

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2016110067

v.

SAN MARINO UNIFIED SCHOOL DISTRICT.

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 20, 2016, naming San Marino Unified School District. OAH continued the matter for good cause on November 29, 2016.

Administrative Law Judge Marian H. Tully, Office of Administrative Hearings, State of California, heard this matter on March 7, 8, 9, and 13, 2017, in San Marino, California. Attorneys Mark Wood small and Max Goldman appeared on behalf of Student. Parents attended the hearing.

Attorneys Karen E. Gilyard and Meagan Kinsey represented District. District's Director of Special Education, Abigail Cabrera, attended the hearing.

The ALJ granted the parties' request to continue the matter to April 17, 2017 to allow written closing arguments. The parties filed their briefs, the record closed and the matter submitted on April 17, 2017.

## ISSUES<sup>1</sup>

1. Did District violate the procedural requirements of the Individuals with Disabilities Education Act by (a) failing to conduct updated psycho educational and academic assessments; (b) failing to assess Student in the areas of (i) behavior; (ii) recreational therapy and (iii) assistive technology; (c) predetermining placement and services; (d) failing to consider the findings of Parents' private experts; and (e) failing to provide required prior written notice?

2. Did the January 28, 2015 amendment to Student's April 21, 2014 annual individualized education program deny Student a free appropriate public education by failing to offer (a) a one-to-one learning environment; (b) full-time one-to-one aide support; (c) assistive technology; (d) social skills/recreational therapy; (e) educational therapy/tutoring support; (f) appropriate occupational therapy, adapted physical education and counseling; (g) an educational program based upon research based intervention; and (h) appropriate services during the extended school year?

3. Did the April 16, 2015 annual IEP, as amended, deny Student a FAPE by failing to offer (a) a one-to-one learning environment; (b) full-time one-to-one aide support; (c) assistive technology; (d) social skills/recreational therapy; (e) educational

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<sup>1</sup> The ALJ and the parties agreed upon Student's issues during a prehearing conference on February 24, 2017. Student filed a written request to dismiss two issues on March 6, 2017. The ALJ and the parties clarified the issues on the first day of the hearing. The issues stated are rephrased and reorganized to reflect the dismissal and for clarification. The ALJ has authority to redefine a party's issues so long as the ALJ does not change the substance of the issues. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

therapy/tutoring support; (f) appropriate occupational therapy, adapted physical education and counseling; (g) an educational program based upon research based intervention;(h) appropriate services during the extended school year; and (i) by failing to properly implement the services in an amendment dated February 24, 2016?

4. Did the March 15, 2016 annual IEP, as amended, deny Student a FAPE by failing to offer (a) a one-to-one learning environment; (b) full-time one-to-one aide support; (c) assistive technology; (d) social skills/recreational therapy; (e) educational therapy/tutoring support; (f) appropriate occupational therapy, adapted physical education and counseling; (g) an educational program based upon research based intervention; and (h) appropriate services during the extended school year?

## SUMMARY OF DECISION

An IEP team determined Student was eligible for special education in his triennial IEP on April 21, 2014 based upon an uncontested triennial assessment. His primary eligibility was autism. His secondary eligibility was intellectual disability. At that time, Student had social, academic, recreational, motor function, communication needs and behaviors consistent with autism. His IEP addressed his needs and behaviors with research based interventions appropriate for autism.

### SUMMARY OF ISSUE 1

By February 2015, District was aware Student's behaviors were escalating and District's behavior strategies were not working. By September 3, 2015, Student's behaviors were extreme and included aggression toward others. In November 2015, Student underwent three brain surgeries. District failed to conduct a functional behavior assessment at any time after February 2015.

The April 16, 2015 IEP changed Student's secondary eligibility to other health impairment due to disabilities caused by intractable complex partial epilepsy and focal

cortical dysplasia of the right temporal lobe. Had District conducted a functional behavior assessment between February and November 2015, District would have learned that overstimulation triggered seizures and problem behaviors and that the function of Student's problem behaviors was not necessarily the same as those identified and addressed in the April 16, 2015 IEP. There was a strong likelihood that the IEP team would have better considered an alternative researched based methodology to address his behaviors in the April 21, 2015 IEP and corresponding behavior intervention plan.

Brain surgeries in November 2015 affected Student's memory, cognition, language, comprehension, motor functioning and physiological function, emotional regulation and behavior. The surgeries, and resulting traumatic brain injury, constituted a significant change in Student's disabling condition that warranted updated psycho educational and academic assessments and assessments in the areas of functional behavior, social skills/recreational needs and assistive technology. Behavior, social skills, and assistive technology were known areas of disability. Behavior, social skills, and assistive technology were affected by the change in Student's medical condition following the surgeries. District was required to assess in all areas of suspected disability following the surgeries.

District's failure to conduct a functional behavior assessment at any time after February 2015 and to complete updated psycho educational and academic assessments and assess in the areas of behavior, social skills/recreational therapy and assistive technology after November 2015 resulted in the loss of educational opportunity and deprived Student of educational benefit. Student met his burden of proof as to Issue 1(a) and (b). The evidence did not support Student's claims in Issue 1(c) that District predetermined Student's placement in the March 15, 2016 IEP; (d) District failed to

consider the findings of Parents' private experts; and (e) District failed to provide required prior written notice.

#### SUMMARY OF ISSUES 2, 3 AND 4

The annual April 21, 2014 IEP was amended on January 28, 2015. The January 28, 2015 amendment is the only part of Student's program for the 2014-2015 school year that falls within the statute of limitations. The amendment deleted an accomplished goal and added a behavior goal. Parents consented to the amendment. The amendment was appropriate at the time it was offered and Parents consented to it. Challenges to placement and related services provided in the April 21, 2014 IEP are beyond the statute of limitations. The evidence did not support Student's claim in Issue 2.

As the result of District's failure to conduct a functional behavior assessment, the April 16, 2015 IEP, as amended, was not reasonably calculated to enable Student to make appropriate progress in light of the impact his escalating behaviors had on his ability to access his curriculum, or to address post-surgery deficits in memory, cognition, language, comprehension, motor functioning and physiological function, emotional regulation and behavior. As to Issue 3, a preponderance of the evidence supported Student's claim that the April 16, 2015, and amendments, denied Student a FAPE. In addition, Student proved District failed to provide aid or counseling support during the extended school year and materially failed to implement specialized academic instruction services contained in an amendment dated February 24, 2016.

The March 15, 2016, as amended, was not reasonably calculated to enable Student to make appropriate progress in light of the significant change in Student's disabling condition resulting from the surgeries and traumatic brain injury in November 2015. District had no current accurate information about Student's present levels of performance at the time it offered the March 15, 2016 IEP and its amendments. As the result of District's failure to assess Student in all areas of suspected disability, the March

15, 2016 annual IEP, as amended, was not reasonably calculated to enable Student to make appropriate progress in light of his circumstances following the surgeries in November 2015. Student met his burden of proof in Issue 4.

## FACTUAL FINDINGS

1. Student was 13 years old and in seventh grade at the time of hearing. He lived with Parents within District boundaries at all relevant times. Student's primary eligibility for special education was autistic like behaviors. Student had a secondary eligibility of other health impairment. Student's disabilities, in addition to autism, included intractable complex partial epilepsy,<sup>2</sup> focal cortical dysplasia of the right temporal lobe, and intellectual developmental disorder.

### APRIL 2014 TRIENNIAL ASSESSMENT AND ANNUAL IEP

2. District conducted Student's triennial assessment in April 2014. The assessors included school psychologist Rachel Gaynon, specialized academic instructor Sheila Ross, District's speech and language pathologist, occupational therapist, adaptive physical educator and school nurse. The areas assessed included psycho educational, academic, behavior, occupational therapy, social/emotional, communication, leisure/recreation, self-care, school/home living self-direction, and health.

3. The IEP team convened on April 21, 2014, for Student's annual IEP and to review the results of the triennial assessment. Parents and Student's educational therapist Dawnee Pitzer attended.

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<sup>2</sup> "Intractable" seizures are seizures that cannot be managed by medication. This condition poses the risk of sudden unexpected death due to epilepsy.

4. The IEP team met to continue the IEP review on June 3, 2014. Parents and Dr. Suzanne Goh attended. The team discussed Student's program and goals. The team agreed to use de-escalating strategies in the classroom, such as calm, quiet, waiting techniques (meaning a minimum use of language). The team also agreed to provide incentives for appropriate behavior and to update Student's health plan in response to Parents' report that Student was less likely to have a seizure when he was not in a scented classroom. Group counseling included playing recreational games to learn how to take turns and manage frustration.

5. The April 21, 2014 IEP included 925 minutes per school week of group specialized academic instruction; 105 minutes per week of individual and group language and speech therapy; 240 minutes per month of group occupational therapy; 240 minutes per month of adapted physical education, 30 minutes per week of group counseling and 180 minutes per school day of intensive individual support in a group setting while participating in general education. Extended school year included 951 minutes per week of specialized academic instruction; 30 minutes per week of speech and language therapy; 30 minutes per week of adapted physical education; and 30 minutes per week of occupational therapy. Student was to participate in a general education setting for 50 percent of his time. Assistive technology, specifically a computer/iPad was provided.

#### 2014-2015 SCHOOL YEAR

6. Student attended fifth grade at Valentine Elementary School during the 2014-2015 school year. The 2014-2015 school year began on August 18, 2014. The IEP team met at Mother's request on September 5, 2014. Mother was concerned that Student had difficulty with comprehension during classroom lectures in large group settings and she was concerned about his behavior. District responded to Mother's

concerns by modifying Student's schedule and agreeing to provide one-to-one aide support during the time Student spent in general education.

7. Student's IEP team met again on September 18, 2014. The team discussed Student's program and Student's behavior problems. Mother asked District what was causing Student's behaviors. District school psychologist, Ms. Gaynon, informed Mother that the reason for Student's behaviors was attention seeking. The team agreed to meet again in eight weeks. There was no evidence the IEP team met again before January 2015.

#### JANUARY 2015 AMENDMENT

8. In January 2015, Mother asked District to convene an IEP team meeting to discuss Student's behaviors. Student's behavior was escalating from spitting, swearing, yelling, touching other people's hair, throwing items, and talking about private parts to exposing himself, grabbing others' private parts, and threatening to kill those around him.

9. District convened an IEP team meeting on January 28, 2015. Mother explained her concern that Student's behaviors were increasing in frequency and escalating in severity. Student's teacher would remove him from the classroom in response to his behaviors. District did not conduct a functional behavior assessment.

10. The IEP team, including Parents, amended the April 21, 2014 IEP to include a social emotional/behavioral goal to Student's IEP. The baseline for the goal was when that Student became upset, frustrated, or angry he engaged in improper language and negative attention seeking behavior. The goal was, when Student became upset, frustrated, or angry, he would use a self-regulating/coping strategy to avoid engaging in an unexpected behavior with one reminder on four out of five opportunities as measured by observations and documentation. The strategies included movement breaks, deep breathing, and providing quiet space. Student's general education teacher,



the special education instructor, instructional assistants and related service providers were responsible for Student's progress.

11. In February 2015, Parents consulted Dr. Constance Lillas. Parents informed Dr. Lillas about Student's educational plan, and asked her what they should do to address his behaviors. Parents were distressed and confused. The family was in chaos. Parents questioned whether Student should continue to be educated in a District school or if Student should remain at home. Parents and Dr. Lillas also discussed residential treatment.

12. Dr. Lillas became a licensed marriage, family and child therapist in 1986. She became a certified psychoanalyst in 1991 and obtained a PhD in psychoanalysis in 1992. Dr. Lillas was a licensed registered nurse specializing in maternal-child and obstetrics beginning in 1976. Her numerous professional activities, teaching, presentations, and publications throughout her career demonstrated a thorough understanding of infant and children's mental health. She published numerous articles and books addressing the meaning of behavior in children. She published a textbook about the affect the nervous system has on behavior. Dr. Lillas had a private practice and consultation service.

13. Dr. Lillas began to work with Student in February 2015. Student's principle behaviors at that time were swearing, spitting, reaching into personal space, touching hair, kicking, crashing things off the table, aggression, yelling, sexualized talking, screaming violent threats, exposing himself, and threatening people. Dr. Lillas had conversations with District staff at school about Student's touching, exposing himself, grabbing others, and rubbing against teachers. Dr. Lillas attributed this behavior to a constant toxic level of stress-based arousal. Student was never in a calm state. Student's response to stress was too frequent, lasted too long and Student was too slow to recover. Dr. Lillas referred to this as a "red" zone.

14. District and Student's witnesses used colors to describe Student's emotional state. Known as Zones of Regulation, "red" referred to a state of emotional dysregulation and behaviors that prevented Student from learning. "Green" indicated Student was calm, comfortable and ready for learning. "Yellow" indicated Student was approaching the red zone and required intervention to return to the green zone. In Dr. Lillas' opinion, Student's dysregulation and egregious behaviors were a response to a constant state of arousal that put Student in a "red" zone. Student needed an approach that would allow Student to be calm and comfortable and to regulate his emotions so he could maintain a green zone.

15. District employed a behavior management methodology based on applied behavior analysis. In Dr. Lillas' opinion, applied behavior analysis did not work for Student and actually increased his unacceptable behaviors. Dr. Lillas employed a methodology referred to as "floor time" or "relationship development intervention." These methods were based on the individual child's developmental differences by developing relationships and play-based interventions. In her opinion, Student needed floor time/relationship development intervention because Student did not respond to applied behavior analysis. District's psychologist was familiar with both methodologies and acknowledged that each was research based.

16. At hearing, Dr. Lillas described an incident that illustrated the difference between applied behavior analysis and floor time. Student was working at home with an academic aide. Father came home from work. Student wanted to hug his Father. Following the Premack Principle<sup>3</sup> method in applied behavior analysis, Student was

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<sup>3</sup> Applied behavior analysis employs a method called the Premack Principle; the principle focuses on the desired outcome that will occur when a child completes a task. It is a first/then strategy. For example, if the child completes two worksheets then the

required to complete his task before he could hug his Father, and the aide restrained Student to prevent the hug. Student's response was anger and frustration from which Student took a very long time to recover. Using applied behavior analysis with Student created emotional dysregulation and prevented learning. With floor time relational/play-based methodology, Student would hug his Father first, return to his task and remain in a "green" zone so he could continue learning.

17. Shortly after that incident, Dr. Lillas began to work with the family to build a team for home instruction and services that used common language, a shared approach, and understood the floor time approach to Student's behavior.

18. Dr. Lillas referred Parents to neuropsychologist Dr. Deborah Budding in March 2015. Dr. Budding was a highly qualified neuropsychologist. Dr. Budding conducted a neuropsychological evaluation on March 16, 23 and 24, 2015 and produced a written report. Dr. Budding obtained a history from Parents and Student. She reviewed records including a psychoeducational assessment performed by District in April 2014, and an IEP dated April 21, 2014. Dr. Budding administered a battery of standardized tests. She observed Student during testing and in his classroom. She obtained rating scales from Parents and Student's special education teacher. She also obtained information from Student's private speech therapist and the school-based speech and language pathologist.

19. Dr. Budding concluded Student had wide-ranging deficits in cognitive function, motor control, overall adaptive skills, executive functioning and emotional regulation. Ongoing seizure activity contributed to Student's difficulties in attention, processing information, adaptive skills and emotional dysregulation. Student's ongoing

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child may go to lunch. District's Behavior Intervention Plan included the use of the Premack Principle as much as possible.

seizures also made it difficult to assess Student's true cognitive ability, attention, memory and various other skills. In her opinion, Student's abilities could be not determined accurately until his medical status stabilized.

20. Dr. Budding concluded that specialized academic instruction in a classroom was a possible setting, provided Student's IEP included consistent one-to-one supervision in academics and for behavior. She recommended a classroom with a small number of students; intensive additional one-to-one educational therapy intervention outside of school for one to two hours per day plus time for case management; with access, in Student's areas of interest, to appropriate contact with more typical peers. In her opinion, a more restrictive setting might be required if the special education classroom placement was over stimulating even with one-to-one assistance. Student's IEP and treatment teams should then consider outpatient-based treatment and education or residential placement.

#### APRIL 16, 2015 BEHAVIOR INTERVENTION PLAN

21. District psychologist Ms. Gaynon prepared a behavior intervention plan dated April 16, 2015. Ms. Gaynon characterized Student's behaviors as "negative attention seeking" which functioned to obtain attention from adults and peers and to avoid non-preferred, challenging or uninteresting tasks. The behavior intervention plan defined negative attention seeking behaviors as the failure to follow teacher directions within 30 seconds of a directive and talking to others during instruction. District further characterized the intensity of Student's behaviors as ranging from mild to moderate. The plan adopted a color code system similar to the Zones of Regulation to help teach Student to self-monitor his behavior. The plan proposed environmental changes, structure and supports to remove Student's need to use negative attention seeking behaviors. These included breaking down assignments, providing motivating incentives, consistent visual reminders of expected behaviors and peer support. Additional

strategies included providing Student with more choices to increase his sense of control; a visual daily schedule that included when there were breaks between classes, task modifications and priming, and a sensory diet. The plan specified that the Premack Principle was to be used as much as possible.

#### APRIL 16, 2015 ANNUAL IEP

22. The IEP team opened and continued Student's annual IEP team meeting on April 16, 2015, to maintain compliance. District's FAPE offer was dated April 16, 2015. Ms. Gaynon's behavior intervention plan was included in the IEP. The IEP team met on May 11, 2015 and June 16, 2015 to discuss progress, proposed goals, services and placement for the 2015-2016 school year.

23. The IEP team discussed progress on Student's goals at the May 11, 2015 meeting. Student did not meet his goals in math, attention, articulation, defining words, and social skills. Student met his goal in vocabulary, and listening comprehension. Student met one of two reading comprehension goals. Student made progress on his occupational therapy goal for bilateral coordination while typing. The challenge to meeting that goal was Student's difficulty with memory.

24. Dr. Budding participated in the IEP team on May 11, 2015. She discussed her findings and shared her report. She explained that Student's seizure disorders had not yet been fully explored and was an important piece of information as to Student's capabilities. Student had structural brain differences that contributed to his behaviors. She informed the team that Student's complex partial seizures and cortical dysplasia arose in the right temporal lobe of Student's brain. The right temporal lobe affects attention, cognition and emotional dysregulation. In Dr. Budding's opinion, the specialized academic environment appeared to be the least restrictive appropriate setting provided Student had full time one-to-one support as part of his IEP. This level of support was necessary for behavior and to maintain attention to task and memory

issues associated with epilepsy. She recommended intensive one-to-one educational therapy intervention outside of school for one to two hours per day. If placement in a specialized academic instruction environment was too over stimulating even with one-to-one assistance, placement in a more restrictive setting might be required.

25. Mother informed the team that Student had between two and four seizures per week, typically first thing in the morning. She informed the team that Student's seizures occurred in his temporal lobe and that the temporal lobe is very involved in memory, attention and emotional response. Mother was concerned about Student's move to a busy middle school because he was not making academic progress and his behaviors were not managed.

26. The team discussed proposed goals. Parents requested a goal for self-regulation to use consistently between both school and home. Parents also asked District to assign a consistent aide, provide better communication between home and school, and a more coordinated effort between home and school. Parents informed District Student needed priming, scaffolding, and repetition at home and at school.

27. The IEP team determined Student eligible for special education with a primary disability of autism. The team changed Student's secondary eligibility from intellectual disability to other health impairment due to Student's diagnosis of complex seizures. The team found that Student's seizures affected his temporal lobe functioning, concluded the diagnosis was not temporary and was associated with impairments in the area of memory, attention and behavior.

28. District offered 220 minutes per school day of group specialized academic instruction; 80 minutes per school week of group language and speech therapy; 50 minutes per school week of group occupational therapy; 90 minutes per school week of group adapted physical education; 30 minutes per school week of group counseling and guidance's; 410 minutes per school day of intensive individual services; 240 minutes per

school month of individual behavior intervention services provided by District; 240 minutes per school month of individual behavior intervention services provided by a nonpublic agency to be used by December 15, 2015.

29. District offered extended school year services including 195 minutes per school week of group specialized academic instruction; 30 minutes per school week of individual language and speech services; 30 minutes per school week of group occupational therapy; and 30 minutes per school week of group adapted physical education. The IEP offer reduced the supports and services from what was included in the April 21, 2014 IEP. The April 16, 2015 offer and the behavior intervention plan, prepared before Dr. Budding's report and her explanations during the IEP meeting on May 11, 2015, were not revised following the May 11, 2015 meeting in light of the impact Student's epilepsy and focal cortical dysplasia had on his behaviors. The start date for extended school year was June 15, 2015. The end date was July 10, 2015. The IEP did not include counseling or behavior intervention services during the extended school year.

30. The IEP team met again on June 16, 2015 to discuss proposed goals, service recommendations, and accommodations/modifications. Parents requested an assistive technology assessment and additional hours of private educational therapy. The team discussed the requests. District informed Parents it did not feel the assistive technology was necessary. District reiterated the FAPE offer made on May 11, 2015.

31. Parents signed consent to implement the 2015 IEP on August 17, 2015, but disagreed the IEP offered Student a FAPE. Parents informed District that Student required additional instruction outside of school to support his academic program and that they would provide outside educational intervention and seek reimbursement from District.

## 2015-2016 SCHOOL YEAR

32. The 2015-2016 school year began on August 17, 2015. Student received specialized academic instruction in Penny Roberts' sixth grade classroom at Huntington Middle School. Ms. Roberts was a highly qualified and experienced special education teacher. As part of the group counseling and guidance sessions offered in the 2015 IEP, Ms. Gaynon provided instruction on turn-taking and frustration-management through playing recreational games at recess in her office.

33. Between August 18, 2015 and September 3, 2015, Student's behaviors included daily instances of spitting, touching his private parts, shouting, inappropriate language, verbal aggression, running, and making loud noises. On August 25, 2015, District documented a seizure lasting 10 seconds, six instances of verbal aggression and eight instances where Student was touching his private parts. On September 2, 2015, District documented 16 instances of verbal aggression, 23 instances touching private parts, 14 instances of spitting, and Student pulled his teacher's hair twice.

34. The IEP team met on September 3, 2015 to add new training procedures and to update the health plan in Student's IEP. Between September 3, 2015, and September 30, 2015, Student's behaviors continued to include daily instances of spitting, touching his private parts, shouting, inappropriate language, verbal aggression, running, making loud noises, and pulling hair. In addition, there were new behaviors including touching staffs' hair, exposing his private parts, rubbing his private parts against a female teacher, touching and talking about his penis, lifting his shirt up, climbing on a desk, swatting at a student and parent who said " hi," and throwing things.

35. School psychologist Jacqueline Diskint prepared a Behavior Intervention Services Update in September 2015. Ms. Diskint met Student in the fall of 2015. Her first meeting lasted approximately 20 minutes. Student engaged in negative attention seeking behaviors such as cursing. She could easily redirect him. Student liked people



and was motivated by them. Ms. Diskint interviewed Student and walked with him and his friends on the school playground. He had friends invite him to come out at lunchtime. She worked with Student in the general education classroom, cafeteria, hallway and special education class. She worked in collaboration with Student's in-home providers.

36. Ms. Diskint was a qualified and experienced school psychologist and a Board Certified Behavior Analyst. Ms. Diskint reviewed data, reviewed an in-home behavior plan prepared by private behavior specialist Paula Santos, observed Student, and considered input from Parents, Ms. Santos, private behaviorist Alyssa Jammal, Dr. Lillas, Ms. Roberts, District occupational therapist Vanessa Caulfield, District school psychologist Don Duranso, and District speech/language pathologist Denise Wadsworth.

37. Ms. Diskint updated Student's behavior intervention plan. She considered Student's current levels of performance on his behavior goals, and addressed the environmental and functional factors for the behavior. She proposed new goals; recommended changes to Student's educational environment; recommended new replacement behaviors for problem behaviors; described appropriate reinforcement strategies; and explained reactive strategies for egregious behaviors. Instead of employing the Premack Principle as much as possible, the updated behavior intervention plan, provided that staff "may" use the Premack Principle to promote compliance when other choices were limited.

38. Ms. Diskint's updated behavior intervention plan adopted some of the methods and Zones of Regulation used in Student's home program by the private and non-public agency providers that worked in the home. Ms. Roberts and District staff completed a Home-School Communication Log for each class period in each day Student attended school. The Home-School Communication Log included sections for

Parent and School comments. Periods of "green zone" and problematic behaviors were noted in the log and sent home for Parents' review and comment.

39. District convened an IEP team meeting to review Student's transition to Huntington Middle School on September 30, 2015. Ms. Roberts, a general education teacher, speech/language pathologist, occupational therapist, adapted physical education specialist, and the school psychologist reported Student's progress. Ms. Diskint presented her updated behavior intervention plan. The IEP team, including Parents agreed to implement the updated behavior intervention plan.

40. From September 30, 2015, through November 6, 2015, some of the most egregious behaviors began to abate. The number of class periods in which Student's behavior impeded his learning or the learning of other students decreased. The number of periods per day that Student was in the "green zone" increased.

41. Parents took Student to New York University in November 2015. Student underwent three separate brain surgeries in November 2015. Portions of his brain, including the hippocampus, were removed in an attempt to eliminate brain tissue believed to be responsible for Student's seizures. Student spent a total of 16 days in the intensive care unit during and following his surgeries. Student experienced traumatic brain injury as the result of the surgery. Post-surgery medical instructions required Student to be in a calm structured environment while his brain healed to avoid the risk of seizures.

42. Student did not experience a seizure and his pre-surgery behaviors significantly declined when he returned home after the surgeries. Student experienced a seizure when he attended a family gathering on December 24, 2015. The gathering triggered a seizure. Mother and Dr. Lillas attributed the seizure to overstimulation resulting from the family gathering. Parent returned Student to Huntington Middle School on January 5, 2016.

## JANUARY 6, 2016 IEP TEAM MEETING

43. District convened an IEP meeting on January 6, 2016, at Mother's request. Mother expressed her concern that Student's level of comprehension was so low he had difficulty following a conversation or watching a movie. Ms. Roberts asked Mother for doctor's orders given Student's recent brain surgeries. District members of the team requested medical information as to any restrictions for Student as well as the beginning and end dates of any restrictions on activities. The April 21, 2015 IEP was not amended.

44. Student's behavior on January 6, 2016, in the five periods before lunch included verbal aggression, talking about private parts, touching other people's hair, making loud noises, and standing on top of a chair jumping up and down. Student left school at lunchtime. Student attended partial days at Huntington Middle School on January 7, 8, 12 and 13, 2016. Student's daily behaviors included verbal aggression, talking about private parts, touching adults' hair, spitting, touching his private parts. On one day, he ran from a classroom.

45. Parents removed Student from Huntington Middle School and provided private, self-funded instruction and services in their home beginning in January 2016. Mother was concerned Student's post-surgery dysregulation at school posed a risk of recurring, potentially fatal, seizures and his behaviors presented a risk of injury to himself and others. Parents provided one-to-one educational services in the home. Parents assembled a team of professionals. Parents' educational program included instructional services from educational specialist Debra Hori, behavioral consultation from Dr. Lillas, speech therapy, adapted physical education, aid support, occupational therapy, tutoring, and educational therapy. Parents also provided assistive technology and other equipment including an electronic tablet, exercise balls, weighted blanket and an electronic wristband to monitor Student's arousal levels to prevent seizures and to

determine periods when Student could safely access his educational program. Dr. Lillas devised the wristband to track physical markers in order to match stress levels with behaviors and predict seizures.

46. On January 14, 2016, District received a form entitled Modified Physical Education or Daily Activity Restrictions. Student's neurologist signed the form. The form contained restrictions on specific types of physical activity such as walking, kicking, climbing, etc. The box "as tolerated" was checked with regard to sports. The restrictions on Student's physical activities were from January 14, 2016, through April 14, 2016.

47. On January 14 and January 19, 2016 the NYU Comprehensive Epilepsy Center wrote letters concerning Student's surgeries. The letters requested home hospital instruction in a one-to-one setting with up to four hours daily as tolerated and recommended educational therapy. The letters stated the reason for the request. The letters did not include a projected calendar date for Student's return to school. Parents provided these letters to District.

#### JANUARY 21, 2016 IEP TEAM MEETING

48. District convened an IEP team meeting on January 21, 2016 to discuss the neurologist's restrictions and Student's educational needs in the home setting. Mother and Dr. Lillas informed the team that it was very important to keep Student in a "green zone" to support the healing process. It was very difficult for Student to remain in a "green zone" in chaotic environments that were loud and noisy. Student could access his instruction and services in the home environment because it was calm and quiet and all service providers consistently used the same techniques and strategies to help Student remain in a "green zone." Student was attentive when receiving one-to-one instruction from Lindamood Bell and there were no instances of provocative behaviors in that environment. Mother and Dr. Lillas were concerned that seeing Student's old behaviors appear immediately upon his return to school, post-surgery on January 6, showed that

his brain was vulnerable and susceptible to rebuilding old patterns of behavior. Mother was concerned, should that occur, that Student would require residential treatment. The team discussed a physical-sensory-motor and educational therapeutic support system recommended by Dr. Lillas. The team reviewed a Working Schedule developed by Dr. Lillas based upon that system. Parents and Dr. Lillas explained that Student's doctors recommended not sending Student back to school so soon, and if he was sent back to school to do so very slowly.

49. Mother and Dr. Lillas asked District to provide the following instruction and services in the home: three hours of services per week from Center for Connections; one hour per week of speech/language provided by Amy Johnson (with certain conditions); two hours per week provided by a District teacher (and make-up hours to be determined); four hours per week of adapted physical education; 90 minutes per week of sensory motor occupational therapy; and five hours per week with Lindamood Bell increasing as tolerated up to 10 hours.

50. District agreed to provide home/hospital instruction from a District teacher, three hours of therapy per school week from Center for Connections and 60 minutes of occupational therapy per school week from a District occupational therapist, and two hours per week of instructional assistance in the home by a District aide but did not amend the FAPE offer in the April 16, 2015 IEP. District informed Parents that it would address Parents other requests by prior written notice.

51. Debra B. Hori was the team leader for his home-based education program. Ms. Hori was self-employed under contract with the Center for Connection. Ms. Hori held a Multiple Subject Teachers Credential, and M.A. in Special Education, a Clear Level II Education Specialist Instruction Credential and 20 years experience teaching individuals with autistic spectrum disorders and other learning disabilities. Student made

academic progress during that time. Ms. Hori believed Student required a one-to-one learning environment and could not make academic progress in a group environment.

#### FEBRUARY 24, 2016 IEP TEAM MEETING

52. The IEP team met on February 24, 2016, to discuss the services Parents requested on January 21, 2016. District offered home-based services while Student recovered from surgery. District and Parents agreed that District would reimburse Parents for one hour per school week of private speech language therapy until Center for Connections hired a speech/language pathologist. District offered to provide three hours per school week of educational therapy from Center for Connections, five hours per school week of instruction from a District teacher, and 60 minutes per school week of individual occupational therapy services in the home setting from a District occupational therapist. The February 24, 2016 amendment also included an hour in which the home instructor would shadow Student's private educational therapist and an hour with his behavior interventionist. There would be a one-week overlap with private providers and a District aide. Parents consented.

53. District reimbursed Parents three hours per week for 23 school weeks of educational therapy services, between February 24, 2016 and October 19, 2016. District admitted it owed Parents \$435.00 in reimbursement for private speech and language therapy.

54. District provided 60 minutes per school week of in-home individual occupational therapy between March 3, 2016 through June 2016 and between August through October 2016. District did not consistently provide five hours per school week of home instruction from a District special education teacher. This was due partly to District's failure to send appropriately qualified instructors and partly due to Student's schedule. Student made some academic progress between March 3, 2016 and June 2016 and between August and October 2016.

55. On March 3, 2016 the NYU Comprehensive Epilepsy Center wrote a letter describing Student's seizures, the treatment, and what to do in the event of a seizure lasting longer than three to five minutes.

#### MARCH 15, 2016 ANNUAL IEP TEAM MEETING

56. The IEP team met for Student's annual review on March 15, 2016. Parents and Dr. Lillas attended. They informed District of Student's updated medical condition. Student was doing well in his home instruction. Student's behavior continued to improve. Their most important concern was to keep Student calm and seizure-free. Mother informed District that she did not know when Student would be released to return to school and that he was scheduled for a follow-up with his doctor in New York in the coming week.

57. Student was out of school from November 2015, through the date of the IEP except for the six days he attended in January. He did not meet any of his goals from the April 16, 2015 IEP. The IEP team could not establish Student's present levels of performance. Student's communication skills and his gross and fine motor development were uncertain. District did not have current baseline data in any area. District's speech pathologist had difficulty developing an appropriate pragmatics goal due to unknown baselines following surgery. District's occupational therapist only partially understood Student's post-surgery level of function and expected there were physiological changes following surgical intervention. District's special education teacher was concerned that District did not have current information following surgery that would help inform his IEP. District proposed a new goal to work at grade level in science and history. There was no baseline data to support that goal.

58. District offered a home-based program and a school-based program. The offer did not include a plan to transition Student from the home-based program to the

school-based program. District intended to develop baselines and goals for the school-based program at an IEP team meeting to occur 30 days after he returned to school.

59. District offered: three hours per week of educational therapy, five hours per week of specialized academic instruction provided by District, 60 minutes per week of speech and language therapy provided by Center for Connections, and 50 minutes per week of in-home occupational therapy provided by District. In the event Student returned to school, District offered: 220 minutes of daily specialized academic instruction, 410 minutes of daily intensive individual services, 30 minutes of occupational therapy weekly, 200 minutes of occupational therapy per year from an independent consultant, 90 minutes of group adapted physical education weekly, 80 minutes of group language and speech services weekly and 30 minutes weekly of counseling and guidance. The IEP included a behavior intervention plan identical to the Plan prepared on September 30, 2015. The start date for the school-based program was March 15, 2016. The end date for the school based program was March 15, 2017. The IEP did not include a post-surgery health plan and did not address transition from the home-based program to the school-based program.

60. At hearing, District witnesses, including a psychologist, a program specialist, and a speech pathologist explained the purpose of offering two different programs in the March 15, 2016 IEP. District intended to offer a program for Student's future return to school that could be amended 30 days after he returned to campus at which time Student could be evaluated and an appropriate IEP developed. According to SELPA school psychologist Jennifer Lozano, administrative designee for the March 15, 2016 IEP team meeting, the IEP offered a home-based program.

#### PRIOR WRITTEN NOTICE

61. On March 21, 2016, District sent a written response to Parents denying the requests that were made at the January 21, 2016 IEP team meeting including, for five



hours per week of instruction from Lindamood Bell, adapted physical education, three hours per week with Center for Connections, one hour per week with a speech therapist Amy Johnson until Center for Connections could provide that service, two hours per week with a District teacher plus makeup hours to be determined by the District director, four hours of adapted physical education, 90 minutes of sensory motor occupational therapy, behavior intervention support hours by a nonpublic agency be shifted to an in-home behaviorist from Center for Connections, three hours of educational therapy weekly provided by Center for Connections and collaboration time for the educational therapist. District informed Parents that the offers of placement and services in the March 2016 IEP were designed to confer educational benefit.

62. On March 31, 2016 Dr. Orrin Devinsky from the NYU Comprehensive Epilepsy Center, wrote a letter describing the effect of the surgeries on Student's cognition, memory and language, consistent with a traumatic brain injury. He requested home-based one-to-one instruction. He addressed concerns about Student's safety and the safety of others due to his behaviors. He recommended behavior services implementing the floor time approach to behavior therapy.

63. Dr. Budding also wrote on March 31, 2016. She described signs of traumatic brain injury following the surgery in relation to the areas of resected brain tissue, areas that impacted cognitive function, memory, language and emotional regulation. Student was easily over-stimulated which could cause seizures and behaviors that put his safety and the safety of others at risk. She recommended a one-to-one learning environment because Student became quickly overwhelmed in group settings. In her view, Student's long term prognosis was unclear and he could ultimately require residential treatment to provide the level of behavior containment necessary to allow him to access his curriculum. Parents sent correspondence from NYU and Dr. Budding to District.

## APRIL 12, 2016 IEP TEAM MEETING

64. The IEP team met on April 12, 2016. The team discussed the program Parents provided at home. District asserted that home instruction was intended for only a few months. There were no changes to the IEP offered on March 15, 2016.

## SPRING-SUMMER 2016

65. Ms. Diskint went to Student's home for an hour in the spring of 2016 to help Student's aid work with Student. Student was dysregulated when she arrived. Student was kicking, cussing and spitting. She visited him again at the end of May 2016. He was not dysregulated; he asked her questions about who she was and why she was there. Student talked a lot and had difficulty staying focused because he wanted to talk and show her things.

66. On April 20, 2016 Dr. Howard L. Weiner, from NYU School of Medicine wrote concerning significant learning and behavioral concerns resulting from Student's seizure disorder. He attributed the seizure on December 24, 2015 to over-stimulating caused by a loud, chaotic environment. He advocated one-to-one home-based instruction for the foreseeable future. He required a calm learning environment to avoid overstimulation that could trigger a seizure and to help post-operative behaviors.

67. Dr. Goh wrote on July 20, 2016, July 26, 2016, and August 1, 2016. Parents sent correspondence from Dr. Goh to District. In Dr. Goh's opinion, Student was successful in reducing his provocative behaviors in a one-to-one home-based program, although she reported that his level of dysregulation continued to be highly volatile and was, at times, beyond pre-surgical levels. Student could not tolerate a group educational placement. Traditional approaches to behavior management and discipline resulted in high levels of stress for Student putting him at risk of seizures. Student required a

developmental play-based one-to-one approach to instruction within a special education framework.

68. Student's next annual/triennial IEP was due April 21, 2017.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, 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>5</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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>5</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. On March 22, 2017, the Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School District* (2017) 580 U.S. \_\_\_, [137 S. Ct. 988], 2017 WL 1066260.) *Endrew F.* explained, under *Rowley*, when a child is fully integrated in a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 2017 WL 1066260 at p. 11.) However, both *Rowley* and *Endrew F.* declined to hold that advancing from grade to grade proved a student was receiving a FAPE. (*Endrew F.* at p. 14, fn. 2; *Rowley*, 458 U.S. at p. 202 [no one test for determining adequacy of educational benefits]; see also *id.* at p. 203, fn. 25.); *Endrew F.* held, as applied to a student that was not fully integrated in a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F.*, at p. 11.) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

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); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has

the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student had the burden of proof in this matter.

#### ISSUE 1 (A): UPDATED PSYCHO EDUCATIONAL AND ACADEMIC ASSESSMENTS

5. Student contends District was required to update psychoeducational and academic assessments following the surgery in November 2015 and argues that District witnesses admitted important information was missing from their understanding of Student's functioning after the surgery. District argues it was not required to assess Student after the November 2015 surgeries because the 2014 triennial assessment thoroughly evaluated Student in all areas of psycho education and academics and Student's academic performance did not change after the surgeries.

#### Applicable Law

6. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

7. The IDEA provides for reevaluations (referred to as reassessments in California law) to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B);

34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district “determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reassessment, or if the child’s parents or teacher requests a reassessment.” (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

8. A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Upon parent request, the local educational agency must conduct a reassessment, even when the school determines that no additional data is needed to determine the student’s educational needs. (20 U.S.C. § 1415 (a)(2)(A)(ii); Ed. Code, § 56381, subds. (a)(1) & (d); 34 C.F.R. § 300.303 (a)(2).) A parent's request for an assessment initiates the assessment process. (Cal. Code Regs., tit. 5, § 3021(a).)

9. When a special education student’s behavior impedes the child's learning or that of others, a district must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Although the IDEA requires a school district to consider the need for a behavior support plan when a student exhibits problem behavior, it does not provide any guidance as to the behavior support plan’s format or contents, and such format or contents may be developed on a case-by-case basis, taking into account the particular student’s behavioral needs. (See 34 C.F.R. § 300.530(a).) The legislature intended that children with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions.(Ed. Code, § 56520, subd. (b)(1).)

10. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 Fed. 3d 1025, 1031-1033.) Procedural violations of the IDEA only constitute a denial of FAPE if the violation: (1) impeded the student'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 *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) A procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) A loss of an educational opportunity is shown if there is a "strong likelihood" that, but for the procedural error, an alternative placement "would have been better considered." (*Doug C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (quoting *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657 (Gould, J., concurring).)

#### Analysis

11. A preponderance of the evidence demonstrated that the November 2015 brain surgeries constituted a substantial change in Student's disabling condition that impacted Student's memory, cognition, language, comprehension, motor functioning and physiological function, emotional regulation and behavior. Student's circumstances following the surgeries and his unsuccessful return to school in January 2016 warranted updated assessments in all areas of suspected disability because his academic and behavioral needs changed as the result of the surgeries and traumatic brain injury. District's argument that there was no change in Student's academic skills after the

surgery is not persuasive in light of the special education teacher's concern that District did not have current information following surgery to help inform his IEP.

12. District's failure to update the 2014 psycho educational and academic assessments after the surgeries resulted in a loss of educational opportunity and deprived Student of educational benefit because District proceeded to offer IEP's that were not based on his current circumstances. The evidence demonstrated a strong likelihood that Student's goals, placement, and related services would have been better considered if District updated the 2014 psycho educational and academic assessments and considered his needs in the areas impacted by the surgery. Memory, cognition, reading comprehension, and language were affected by the surgeries yet District had no current information about Student's abilities in math, reading, writing, language arts or any other academic area. District was required to determine Student's present levels of performance before attempting to develop an appropriate IEP.

**ISSUE 1 (B)(I)(II) AND (III): FUNCTIONAL BEHAVIOR, SOCIAL SKILLS/RECREATIONAL THERAPY AND ASSISTIVE TECHNOLOGY ASSESSMENTS.**

13. Student contends access to his curriculum was significantly impeded by frequent and serious behavioral challenges that required a functional behavior assessment. District contends Student's behaviors were appropriately assessed in the 2014 triennial assessment and it was not necessary to conduct a functional behavior assessment after surgery because Student continued to demonstrate many of the same autistic-like-behaviors after surgery as he had before surgery.

14. Student also contends that District was required to assess him in the area of recreational therapy and assistive technology because Student's social interaction, pragmatic communication and recreational skills were an area of need that required assessment. District asserts that the 2014 triennial assessment comprehensively assessed



Student's social skills and recreational needs and that those needs were addressed in his IEP's.

#### Applicable Law

15. Paragraphs 6 through 10 are incorporated by reference in this section.

#### Analysis

##### FUNCTIONAL BEHAVIOR ASSESSMENT

16. By February 2015, District was on notice that Student's behaviors were increasing in frequency and severity. Mother asked about the cause of Student's behaviors in September 2014 and Ms. Gaynon informed her Student was seeking attention. As Student's behavior increased in frequency and severity Mother requested a functional behavior assessment.

17. District responded to Mother's concerns by developing the April 16, 2015 behavior intervention plan. According to Ms. Gaynon, the function of Student's behavior was to avoid non-preferred, challenging or uninteresting tasks. The plan defined the behaviors to be addressed as the failure to follow directions within 30 seconds of the directive and talking during instruction. The plan used methodology consistent with applied behavior analysis such as the first/then Primack Principle. The April 16, 2015 behavior intervention plan was prepared before the IEP team meeting on May 11, 2015 and before the IEP team changed Student's secondary eligibility from intellectual developmental disorder to other health impairment.

18. Dr. Budding presented her report and explained how Student's behaviors were affected by structural differences in his brain. Overstimulation caused seizures and put Student at risk for potentially fatal seizures. Student responded to overstimulation with aggressive maladaptive behavior that posed a danger to Student and to others.

Student's seizure disorders impacted Student's behaviors differently than autism and thus the April 16, 2015 behavior intervention plan's methodology was not appropriate.

19. Student's circumstances from February 2015 forward warranted a functional behavior assessment which could or would have resulted in a behavior intervention plan using methodology appropriate to Student's needs. As it was, the April 16, 2015 behavior intervention plan included methods, such as the Primack Principle, that triggered the kinds of behaviors that impacted Student's access to his curriculum. By September 3, 2015, Student's behaviors were extreme and included aggression toward others. On September 30, 2015 District developed an updated behavior intervention plan. The updated behavior intervention plan included strategies that were successful in the home consistent with the floor time and relationship development intervention advocated by Parents, doctors and service providers.

20. When District included some floor time methods used in the home in the September 30, 2015 updated behavior intervention plan, Student's behavior improved. District violated the Individuals with Disabilities Education Act by failing to conduct a functional behavior assessment at any time after February 2015. District's failure to conduct a functional behavior assessment resulted in the loss of educational opportunity and deprived Student of educational benefit. A functional behavior assessment would have informed the IEP team of the impact Student's seizure disorders on his behavior and there was a strong likelihood that, but for the procedural error, District would have better considered floor time and relationship development intervention and avoid methods that increased or exacerbated Student's behavior.

#### SOCIAL SKILLS/RECREATIONAL THERAPY AND ASSISTIVE TECHNOLOGY

21. District further violated the IDEA by failing to assess Student in all areas of suspected disability following the November 2015 surgeries because the surgeries constituted a substantial change in his disabling condition that affected memory,

cognition, language, comprehension, motor functioning and physiological changes, emotional regulation and behavior.

22. Post-surgery assessments were needed to inform the IEP team of Student's post-surgery needs. For example, Student's communication skills and his gross and fine motor development were uncertain. Pragmatic language affected Student's communication and social skills, but the speech pathologist did not have baselines upon which to base appropriate goals. The occupational therapist expected there would be physiological changes after the surgery but he only partially understood Student's post-surgery level of function.

23. Student was easily over stimulated in social situations, in groups, and by unfamiliar people. It was important for Student to avoid seizures after surgery, not only for his health but to enable him to stay calm, comfortable and able to learn. A social skills/recreation assessment would have informed goals and support services to address that need.

24. District was aware the wristband was successfully used in the home to help prevent seizures and that it was important to prevent seizures after the surgery. District was aware that seizures triggered behavior and impaired Student's ability to access his educational program. An assistive technology assessment would have informed the IEP team as to whether the wristband was appropriate assistive technology to increase, maintain or improve Student's functional capabilities.

#### ISSUE 1(C) AND (D): PREDETERMINATION AND FAILURE TO CONSIDER PARENT'S EXPERTS.

25. Student contends that District predetermined the school- based program in the March 15, 2016 IEP because there was no information as to what his needs and abilities would be at some undetermined time in the future. Student argues District failed to consider other alternatives such as full time special education placement,

placement in a nonpublic school, or more restrictive home- based or residential treatment programs. District argues that it considered several placements before making its final offer at the March 15, 2016 IEP meeting.

26. Student also contends that District failed to consider Parent's experts. District contends it considered the input of Parents, their educational advocates and medical professionals.

#### Applicable Law

27. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgins Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A school district predetermines the child's program when it does not consider the parents' requests with an open mind, thereby denying their right to participate in the IEP process. (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858.) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP team meeting, and may arrive at an IEP team meeting with a pre-written offer, but may not take a "take it or leave it" position. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10, citing *Ms. S v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).)

28. School officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox County Schools, supra*, 315 F.3d at p. 693, fn. 3.) Although school district personnel may bring a draft of the IEP to the meeting, parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers

with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).) The IDEA does not require a school district to accept parents' choice of program, but it must consider suitable alternatives. (See *Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.)

29. If a parent obtains an evaluation at private expense, the results of the evaluation: (1) must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and (2) may be presented by any party as evidence at a hearing on a due process complaint regarding the child.(34 C.F.R. § 300.502(c); Ed. Code, §§ 56341.1, subd. (b)(1), 56381, subd.(b).)

#### Analysis

30. The evidence did not support Student's contention that District denied him a FAPE by predetermining the placement in the March 15, 2016 IEP. Rather, for the reasons set forth above, the March 15, 2016 IEP denied Student a FAPE because there was no set date for Student's return to school and it was impossible to offer an IEP that was reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances the significant after the surgery.

31. The evidence did not support Student's contention that District failed to consider Parent's experts. Student's home-based team, advocates, private providers, assessors and doctors corresponded with District team members during IEP team meetings, by email and by letters. Medical providers consistently invited District to call them for more information as needed. District considered the reports and presentations of medical providers, private and nonpublic agency members providing home-based services, and the substantial correspondence Parent provided to District. For example, the IEP team fully discussed Dr. Budding's report input at the May 11, 2015 meeting. District was no required to accept her recommendations. District's did not fail to

consider her expert opinion, the failure was that her report and the discussion put District on further notice of the need to determine the function of Student's behaviors.

#### ISSUE 1(E): PRIOR WRITTEN NOTICE.

32. Student contends that District was required to send prior written notice concerning an assistive technology assessment and occupational therapy assessment requested at the June 2015 IEP meeting and that Parents' request for private educational therapy in June 2015 was not addressed until March 21, 2016. District contends it provided prior written notice as required on March 21, 2016 and it was not required to provide prior written notice concerning the assistive technology assessment because the request was discussed in depth during the June 16, 2015 IEP team meeting. If there was a procedural error, District argues, it did not amount to a substantive denial of FAPE because District provided appropriate assistive technology.

#### Applicable Law

33. The law requires that written notice be given to the parents of a child with a disability within a reasonable time before a school district: a) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or b) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.(20 U.S.C. § 1415(b)(3).) That notice must include: 1) a description of the action proposed or refused by the agency; 2) an explanation of why the agency proposes or refuses to take the action; 3) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; 4) a statement that the parents of a child with a disability have protection under the procedural safeguards of IDEA and the means by which a copy of the procedural safeguards can be obtained; 5) sources for parents to contact to obtain assistance in

understanding the provisions of this part; 6) a description of other options that the IEP team considered and the reasons why those options were rejected; and 7) a description of other factors that are relevant to the agency's proposal or refusal.(34 C.F.R. § 300.503.)

### Analysis

34. The prior written notice dated March 21, 2016 complied with the statute. Parents' request for an assistive technology assessment and additional hours of private educational therapy were discussed during an IEP team meeting on June 16, 2015. Student sites no authority for the proposition that prior written notice is required after a request for assessment or for additional services are discussed and declined during an IEP meeting. On August 17, 2015, Parent's sent District a letter consenting to implementation of the April 16, 2015 IEP, as amended, but that the IEP did not provided a FAPE. In the same letter, Parents informed District that they would provide additional instruction outside of the school day and seek reimbursement from District for the services. District was not required to send a prior written notice responding to Parents' statement that they intended to seek reimbursement for private services they planned to obtain.

### ISSUES 2, 3 AND 4: IEP'S

35. Student contends District denied him a FAPE for the 2014-2015, 2015-2016, and 2016-2017 school years by not offering educational placements reasonably calculated to provide educational benefit to Student. Student argued, as to all school years, District failed to offer Student a one-to-one learning environment; full-time one-to-one aide support; assistive technology; social skills/recreational therapy; educational therapy/tutoring support; appropriate occupational therapy and adapted physical education; an educational program based upon research based intervention and appropriate services during the extended school year. District disagrees.

## Applicable Law

36. Each local educational agency must have an IEP in effect for each child with a disability, within its jurisdiction, at the beginning of each school year. (34 C.F.R. § 300.323(a); Ed.Code, § 56344 (c).) In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluations of the child, and the academic, developmental and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).) A school district must make a formal written offer of FAPE in the IEP that clearly identifies the proposed program. (*Union School Dist. v. Smith* (9th Cir. 1993) 15 F.3d 1519, 1526.)

37. When a child with exceptional needs experiences an acute health problem which results in non-attendance at school for more than five consecutive days, the school district shall assure that an IEP team meeting is convened to determine appropriate educational services. (Cal. Code Regs., tit. 5, section 3051.17, subd. (c).) The IEP team must review and revise the child's IEP whenever there is a significant change in the child's medical condition. (Cal. Code Regs., tit. 5, section 3051.4, subd.(c).)

38. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, which will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4)(2006)5 ; Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).) 10. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to



be involved in and progress in the general curriculum” and “meeting each of the child’s other educational needs that result from the child’s disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).)

39. The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd.(c).)

40. When a child’s behavior impedes his learning or that of others, the IEP team must consider strategies, including positive behavioral interventions and supports, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child’s learning denies the child a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

41. The methodology used to implement an IEP is left to the school district’s discretion so long as it meets a student’s needs and is reasonably calculated to provide educational benefit. (*Rowley, supra*, 458 U.S. at p. 208; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992; See *Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149 - 1150 [there are many programs which effectively assist children with autism]; *T.B. v. Warwick School Committee* (1st Cir. 2004) 361 F.3d 80, 86; *Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32 [the focus is on whether the chosen methodology is reasonably calculated to confer educational benefit, not whether there are other more effective methods].) Parents, no matter how well intentioned, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 207-208.)

42. Applied behavior analysis is just one methodology to address the needs of students with autism and IEP team decisions regarding services must be based on the unique needs of each individual child. (Dear Colleague Letter, (OSEP July 6, 2015) 66 IDELR 21.) Several federal courts have disagreed with the argument that intensive applied behavioral analysis is generally the best or the only way to educate an autistic student. (See *Joshua A. v. Rocklin Unified School Dist.* (9th Cir. 2009) 319 Fed. Appx. 692 (unpublished), affirming *Joshua A. v. Rocklin Unified School Dist.* 2008 WL 906243; *Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149-1150.) The Office of Special Education Programs recently noted that applied behavioral analysis is “only one methodology to address the needs of children with autism spectrum disorder.” (Dear Colleague Letter (OSEP, July 6, 2015) 11 LRP 33911 [School districts should ensure that decisions are made “based on the unique needs of each individual child.”].)

43. The IEP team shall “[c]onsider the communication needs of the child,” (20 U.S.C. § 1414(d)(3)(B)(iv); Ed. Code, § 56341.1, subd. (b)(4)) and shall consider whether the child requires assistive technology services and devices. (20 U.S.C. § 1414(d)(3)(B)(v).) An “assistive technology device” is defined as “any item, piece of equipment or product system [other than a surgically implanted device]. . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs.” (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. (34 C.F.R. § 300.105.)

44. The IEP must include support services that are required to allow the student to benefit from special education. (34 C.F.R. § 300.34(a); Ed. Code, § 56363.) Leisure and recreation services, including therapeutic recreation services, recreation programs and leisure education may be included as related support services. (34 C.F.R. § 300.34(b)(11).)

45. Extended school year services must be provided if the child requires the services in order to receive a FAPE. (34 C.F.R. § 300.106(a)(2).) Extended school year services are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP. (34 C.F.R. § 300.106 (b).) Extended year is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd.(c).) A child requires extended school year services if the child's disabilities are likely to continue indefinitely or for a prolonged period, interrupt the child's educational program and cause regression which, when coupled with limited recoupment capacity, render it impossible or unlikely that the child will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.) The services a child receives during the extended school year must be comparable to those he receives during the regular school year. (Cal. Code Regs., tit. 5, § 3043, subd. (g)(2).)

46. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) If an IEP team determines a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education* (5th Cir. 1989)874 F.2d 1036, 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially

designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instruction in hospitals or institutions. (Ed. Code, § 56361.)

47. When recommending placement for home instruction for a child with exceptional needs, the IEP team shall have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the child from attending a less restrictive placement. (Cal. Code Regs., tit. 5, § 3051.4, subd (d).) The report shall include a projected calendar date for the child's return to school. (*Id.*) The IEP team shall meet to reconsider the IEP prior to the projected calendar date for the child's return to school. (*Id.*)

48. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314. For a school district's offer of special education services to a disabled child to constitute a FAPE under the IDEA, the district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with educational benefit in the least restrictive environment. (*Ibid.*)

#### Analysis

ISSUES 2(A) THROUGH (H): JANUARY 28, 2015 AMENDMENT<sup>6</sup>

49. The IEP team met twice in September 2014. At that time, Mother was concerned about Student's comprehension in large group settings for classroom

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<sup>6</sup>The only action taken within the statute of limitations for the 2014-2015 school year is the January 28, 2015 amendment to Student's annual April 21, 2014 IEP.

lectures and about his behavior. District responded by modifying Student's schedule and providing Student one-to-one aid support during general education time. Student's behaviors were consistent with his autism eligibility. By January 2015, the frequency and severity of Student's behaviors had increased to the point at which he was being removed from the classroom. He was becoming a danger to himself and others. It was apparent that the strategies in place to address autistic like behaviors were not working.

50. District convened an IEP meeting on January 28, 2015 to discuss Student's behavior. The team agreed to amend the April 16, 2014 IEP to address Mother's concerns. The IEP team, including Parents, added a social emotional/behavioral goal for Student to use self-regulating/coping strategies when he was upset, frustrated or angry. The strategies included movement breaks, deep breathing, and providing quiet space. The general education teacher, specialized academic instructor, instructional assistants and related service providers were all responsible for the goal. The team deleted a turn-taking goal because that goal had been met. The amendment was appropriate when it was offered and Parents consented to it.

#### ISSUES 3(A) THROUGH (H): APRIL 16, 2015 ANNUAL IEP

51. As set forth above, District failed to conduct a functional behavior assessment at any time after February 2015.

52. The April 16, 2015 IEP changed Student's secondary eligibility to other health impairment due to disabilities caused by intractable complex partial epilepsy and focal cortical dysplasia of the right temporal lobe. Had District conducted a functional behavior assessment between February and November 2015, District would have learned that overstimulation triggered seizures and problem behaviors and that the function of Student's problem behaviors was not necessarily the same as those identified and addressed in the April 16, 2015 IEP. There was a strong likelihood that the IEP team would have better considered an alternative researched based methodology to

address his behaviors in the April 21, 2015 IEP and corresponding behavior intervention plan.

53. Student contends the April 16, 2015 IEP as amended May 11, did not adequately address Student's behavior needs. District contends that the behavior intervention methods employed in Student's program and set out in the April 16, 2015 behavior intervention plan appropriately addressed Student's autistic-like behaviors.

54. The April 16, 2015 IEP was opened and District's offer of FAPE and Ms. Gaynon's behavior intervention plan were dated April 16, 2015 and prepared. The April 16, 2015 IEP was continued to May 11, 2015. Ms. Gaynon presented the behavior intervention plan at an IEP meeting on May 11, 2015.

55. Dr. Budding attended the meeting on May 11, 2015. Dr. Budding shared her report and her recommendations with the team. She explained Student's complex partial seizures and cortical dysplasia arose in the right temporal lobe of Student's brain. The right temporal lobe of the brain affects memory, attention, cognition and emotional dysregulation. Dr. Budding's findings were consistent with Mother's concern about the comprehension difficulties Student had in large group lectures, the increased frequency and severity of his behavior, his failure to meet goals in the areas of math, attention, articulation, defining words, social skills and one of his reading comprehension goals; and moving Student to a busy middle school.

56. Dr. Lillas and Dr. Budding opined that strategies based upon applied behavior analysis used for children with autism increased Student's behaviors, and that Student required a different approach. Dr. Lillas and Dr. Budding recommended a relational, play-based, floor time approach. District witnesses were aware of the floor time approach recommended by Dr. Lillas and Dr. Budding and that floor time was research based. At a minimum, as discussed above, the information District obtained

during and before the May 11, 2015 IEP meeting established the need for a functional behavior assessment.

57. As of the May 11, 2015 meeting, Student's behaviors were escalating in frequency and severity. Applied behavior analysis was not working. District's methodology increased Student's behaviors. While a school district has discretion as to methodology and need not provide a methodology preferred by parents, the methodology chosen by District must be reasonably calculated to provide educational benefit to Student.

58. On May 11, 2015 the team determined Student's secondary eligibility was other health impairment due to intractable partial epilepsy and focal cortical dysplasia. But, the April 16, 2015 IEP as amended May 11, 2015, including the behavior intervention plan, was not revised upon being informed of the effect structural differences in Student's brain had on Student's behavior.

59. Student prevailed on Issues 3(a)-(h). This Decision does not separately address each of subparts (a) through (h) in light of the resolution of Issue 1(a) and (b)(i) in paragraphs 52 through 57 above. Issue 3(i) is discussed in the following section.

#### FEBRUARY 24, 2016 AMENDMENT

60. Student contends District failed to provide five hours of instruction by a special education teacher according to an IEP amendment dated February 24, 2016. District contends the difference between the hours provided and the hours delivered and that difference between instruction by an aide and a special education teacher was not material.

#### Applicable Law

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

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

### Analysis

62. District implemented some, but not all, of the February 14, 2016 amendment to the April 16, 2015 annual IEP. The annual IEP offered specialized academic instruction during the extended school year. The amendment called for five hours weekly of specialized academic instruction provided by a teacher. District did not provide instruction by a qualified teacher, did not consistently provide five hours per school week and did not provide any instruction during the extended school year. Home-based instruction was a material component of the amendment. Student was not required to prove educational harm due to this failure. If District could not or would not implement the amendment, the proper course was for District to convene an IEP meeting. District did not have the option to unilaterally reduce or eliminate the services offered in Student's IEP.

### ISSUE 4: MARCH 15, 2016 ANNUAL IEP

63. As an initial matter, neither party contended that full time placement in general education for Student would have been appropriate. There was no dispute that Student required a home-based program following the November 2015 brain surgeries through the date the complaint was filed. However, District was required to review and revise Student's IEP for a home-based program based upon his post-surgical academic,



developmental and functional needs. District witnesses agreed Student did not meet any goals from April 16, 2015 IEP and District did not have sufficient information to establish baselines in any area. The speech pathologist could not develop an appropriate pragmatics goal due to unknown baselines following surgery. The occupational therapist understood that Student's level of function and physiological changes would result from the surgery. The special education teacher was concerned District did not have sufficient information to inform his IEP. District was required to show a direct relationship between Student's present levels of performance and the goals and educational services in Student's IEP. District was also required to include a statement of measurable annual goals that met each of Student's educational needs resulting from his disability. Student's needs changed after the surgery. Instead, District proposed a combination of unmet goals from the previous year and a new goal that had no baseline.

64. As a result of District's failure to assess Student in all areas of suspected disabilities after the November 2015 surgeries, the March 15, 2016 annual IEP did not include appropriate goals and services to address Student's unique needs caused by his disability. District was required to first appropriately assess Student to identify all of his disability related needs and then tailor services to meet his needs.

65. In summary, the March 15, 2016 annual IEP, as amended, was developed without necessary vital information that could only be obtained by updated psycho educational and academic assessments and, following surgery, assessment in all areas of suspected disability including behavior, social skills/recreation and assistive technology. Therefore, the March 15, 2016 IEP did not offer Student a FAPE because it was not reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. This Decision does not separately address each of subparts (a) through

(h) in light of the above findings in Issue 1, paragraphs 11, 12 and 16-20, and above in paragraphs 52 through 57.

## REMEDIES

1. Student seeks independent educational evaluations; prospective placement at home with related services; reimbursement of Parent's costs; and an order for District to convene an IEP team meeting with all necessary members to develop an appropriate IEP related to Student's unique needs.

2. Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Committee of Burlington, Mass. v. Department of Education*, (1985) 471 U.S. 359, 370; *Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) 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) 129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168.) 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.)

## INDEPENDENT EDUCATIONAL EVALUATIONS

3. Student has established the need for independent educational evaluations in the areas of psycho education, academics, behavior, recreational therapy/social skills, assistive technology and occupational therapy.

4. When a district has failed to conduct a requested reassessment of a student within the statutory timelines, the student may be equitably entitled to an independent evaluation at public expense. (See, e.g., *M.S. v. Lake Elsinore Unified School District* (C.D. Cal. July 24, 2015); 2015 WL 4511947, at pp. 10-11.) This equitable remedy is available independently from a student's statutory right to an independent evaluation

that may arise where a district has conducted a reassessment, but has done so improperly, either because it failed to employ required procedures or testing methods, or because it failed to assess the student at all in a particular area. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b).)

5. An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the district. (34 C.F.R. § 300.502 (a)(1).) A district may impose criteria to ensure that publicly funded independent evaluations are not unreasonably expensive. (Letter to Wilson, 16 IDELR 83 (OSEP October 17, 1989).) Public agencies are not required to bear the costs of independent evaluations where those costs are clearly unreasonable. (Letter to Kirby, 213 IDELR 233 (OSEP 1989).) To avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Id.*) If a district does establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. (*Id.*) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*)

6. Student offered no evidence concerning the cost for the IEE's he requested. There was no evidence concerning whether District had established maximum allowable charges for the evaluations requested, what those charges were or whether the maximums met the legal criteria. Accordingly, District shall fund independent educational assessments for psycho education, academics, behavior including a functional behavior assessment, recreational therapy/social skills, assistive technology and occupational therapy. The cost for the assessors shall be consistent with District policies, if any, concerning independent educational evaluations.

## PLACEMENT

7. Student has established the need for continued instruction within the home setting and related services. Accordingly, District shall provide specialized academic instruction in the home provided by a certificated special education teacher for five hours per school week through the end of the 2017 extended school year. District shall provide individual behavior intervention services provided by Real Connections or a mutually agreed upon non-public agency for each hour of instruction provided in the home through the end of the 2017 extended school year. District shall provide one hour of individual occupational therapy and one hour of individual speech language services per school week provided by District or a mutually agreed upon provider through the end of the 2017 extended school year. District shall provide 90 minutes per week of adapted physical education provided by District or a mutually agreed upon provider through the end of the 2017 extended school year. District shall provide 30 minutes weekly of counseling and guidance provided by District or a mutually agreed upon provider through the end of the 2017 extended school year. At the beginning of each school year, each local educational agency must have an IEP in effect for each child with a disability within its jurisdiction. (34 C.F.R. § 300.323(a); Ed. Code, § 56344(c).) An IEP team meeting must be held at least annually to review the child's progress, whether the annual goals are being achieved, and the appropriateness of placement. (Ed. Code, § 56343, subd. (d).) Student's next annual/triennial IEP would be due on April 21, 2017. In view of the independent educational evaluations ordered above it is appropriate to continue the placement and services contained in this order for each school week through the end of the 2017 extended school year. The placement and services contained in this order shall be Student's "stay put" placement.

## COMPENSATORY EDUCATION

8. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) 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." (*Ibid.*)

9. Some, but not all, of Student's requested services were supported by evidence. As compensatory education for the failure to consistently provide five hours of instruction per school week by a qualified special education teacher for the period between February 24, 2016 and October 19, 2016, District shall reimburse Parents for five hours per school week of educational therapy and two hours per month of case management services through the end of the 2017 extended school year provided by Center for Connection at the Center's usual and customary rate for those services. In addition, for the failure to provide appropriate behavior interventions District shall reimburse Parents for consultation and services paid to Connie Lillas for each school week from April 16, 2015 (the date of the annual IEP) through September 30, 2015 (the date of the updated behavior intervention plan) and January 6, 2016 (the date Student returned to school) through October 19, 2016 (the date the complaint was filed). As compensatory services for the failure to provide counseling and guidance services

during the 2014-2015 and 2015-2016 extended school years, District shall provide four hours of counseling at a mutually agreeable time and place provided by District or a mutually agreed upon provider and used by December 31, 2017.

#### REIMBURSEMENT

10. Parents seek reimbursement for expenses Parents paid for almost year-round instruction and related services for the two-year period covered by the statute of limitations. Parents seek reimbursement for the following paid expenses: neuropsychological services provided by Dr. Budding totaling \$8,040; instructional services provided by Lindamood-Bell Learning Processes totaling \$21,626; educational therapy services and case management provided by Debra Hori/Center for Connection totaling \$15,150; behavioral training, team-leading, and consultation provided by Dr. Lillas totaling \$25,949.83; tutoring/teaching services provided by Anna Walker and Jennifer Zoeller totaling \$860; aide services and related costs provided by Nicole Mozzilo totaling \$8,865; speech/language services provided by Cornerstone Speech and Language/Amy Johnson totaling \$9,395; adapted physical education services provided by Richard Thomas and Neuro-fit Systems totaling \$18,450; aide services provided by Kasey Cox totaling \$5,886; aide services provided by Sabrina Saenz; totaling \$7,208.32; educational therapy and consultation provided by Dawnee Pitzer totaling \$20,017.50; educational remediation/instructional services provided by Dedicated to Learning totaling \$2,309; speech/occupational therapy services provided by Villa Esperanza totaling \$1,700; pediatric neurology services provided by Dr. Goh totaling \$6,708.77; sensory – motor assessment and services provided by David and Margaret Youth and Family Services totaling \$5,820; tutoring services provided by Amanda Manker totaling \$3,732.25; music services provided by Dawn Ivers totaling \$442.50; and an assistive technology assessment provided by Whittier Area Parents' Association for the Developmentally Handicapped totaling \$115.

11. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist.Four v. Carter* (1993) 510 U.S. 7, 14 [, 114 S.Ct. 36, 1126 L.Ed.2d 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

12. Parents are entitled to some equitable reimbursement for educational expenses to provide Student's home-based program. Reimbursement is an equitable remedy. Parents are not guaranteed reimbursement for all costs that they incur to provide the best possible education for their child.

13. Student did not prove that all of the neuropsychological services provided by Dr. Budding were educationally related. Student is entitled to reimbursement for Dr. Budding's neuropsychological evaluation on March 16, 23 and 24, 2015 and attendance at the IEP meeting on May 11, 2015 as invoiced and paid as reflected in the record. Student is entitled to reimbursement of \$1,800 for educational therapy provided by the Center for Connections between January 25, 2016 and February 22, 2016. District

provided a Lindamood Bell comprehension goal in the January 6, 2016 IEP and Lindamood Bell type of instruction in the home setting. Student is not entitled to reimbursement for Lindamood Bell because it was District's prerogative to select the reading methodology and Student did not contest District's reading program. Student is not entitled to reimbursement for costs incurred after the complaint was filed, for costs that are not supported by invoices, for services that duplicate services provided by District, for assessments that were never provided to District or for costs that were not proven to be educationally related. Accordingly, Student is not entitled to reimbursement for sums paid to Anna Walker, Jennifer Zoeller, Nicole Mozzilo, Richard Thomas and Neuro-fit Systems, Kasey Cox, Sabrina Saenz, Dedicated to Learning, Villa Esperanza, David and Margaret Youth and Family Services, Amanda Manker, Dawn Ivers, Whittier Area Parents' Association for the Developmentally Handicapped, and pediatric neurology services provided by Dr. Goh. Student withdrew his claim that District failed to provide appropriate speech and language services. District paid reimbursement for agreed amounts for speech and language services provided by Cornerstone Speech Services except for \$290 on February 10, 2016 and a balance due of \$435 from October 3, 2016. Dawnee Pitzer did not testify and the evidence did not support a claim of \$20,017.50 for educational therapy and consultation from October 19, 2014 to November 2, 2015 while Student was attending a District school.

## ORDER

1. District shall within 45 days of this Order fund independent educational evaluations in psycho education, academics, behavior, social skills/recreational therapy, and assistive technology, and occupational therapy, by a qualified provider of Parents' choosing. The cost of the independent educational evaluations shall not exceed established District policies, if any, that establish the maximum allowable charges for the assessments.



2. District shall hold an IEP meeting not later than 30 calendar days after it receives the last of the assessment reports and recommendations, unless mutually agreed otherwise by District and Parents, to discuss the evaluation and incorporate agreed upon recommended services into Student's IEP.

3. As compensatory education District shall: (i) provide five hours of instruction per school week by a qualified special education teacher until the end of the 2016-2017 school year and extended school year; (ii) provide four hours of counseling at a mutually agreeable time and place provided by District or a mutually agreed upon provider and used by December 31, 2017; (iii) reimburse Parents, within 45 days of this order, for consultation and services paid to Connie Lillas for each school week from April 16, 2015 through September 30, 2015 and from January 6, 2016 through October 19, 2016; (iv) reimburse Parents, within 45 days of submission, for five hours per school week of educational therapy and two hours per month of case management services through the end of the 2017 extended school year provided by Center for Connection at the Center's usual and customary rate for those services.

4. District shall reimburse Parents within 45 days of this Decision, for Dr. Budding's neuropsychological evaluation on March 16, 23 and 24, 2015 and attendance at the IEP meeting on May 11, 2015; \$1,800 for educational therapy paid to Center for Connections; and \$725 paid to Cornerstone Speech Services.

5. All other claims for relief are denied.

## PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section, the following finding is made: Student prevailed on Issue 1(a);1(b)(i); 1(b)(ii) and 1(b)(iii) for the time period following

November 2015; Issue 3; and Issue 4. District prevailed on Issue 1(c) (d) and (e); and Issue 2.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: May 18, 2017

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*/s/*

MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings