

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

TORRANCE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016120826

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on December 15, 2016, naming Torrance Unified School District. The matter was continued for good cause on January 26, 2017.

Administrative Law Judge Elsa H. Jones heard this matter in Torrance, California, on February 14-16, 2017, and February 27, 2017.

Bruce Bothwell, Attorney at Law, represented Student. Mother attended the hearing on all days. Father attended the hearing on all days except on February 27, 2017. Parents are native Korean speakers. Therefore, at Parents' request, a qualified Korean interpreter was present on all hearing days to interpret the proceedings for Parents.

Sharon Watt, Attorney at Law, represented District. Melinda Smith, District's Interim Director-Compliance attended the hearing on February 14. Ian McCullen, a District administrator, attended the hearing on all other days.

Sworn testimony and documentary evidence were received at the hearing. A continuance was granted until March 20, 2017, for the parties to file written closing briefs. The parties timely filed their written closing briefs on March 20, 2017. Thereafter,

on March 28, 2017, the ALJ requested supplemental briefing and District to file an answer to the complaint, based upon the Ninth Circuit Court of Appeals decision in *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 852 F.3d 840. District filed its answer to the complaint, as ordered, and Student timely filed his supplemental brief on April 11, 2017. District timely filed its reply brief on April 18, 2017, at which time the record was closed and the matter was submitted for decision.

ISSUES

1. Did District deny Student a free appropriate public education from December 15, 2014, to September 25, 2015, by the following:

- A. Failing to offer appropriate goals in the areas of: (i) behavior; (ii) social interaction; and (iii) academics;
- B. Materially failing to implement Student's behavior services; and
- C. Failing to offer appropriate behavior support?

2. Did District deny Student a FAPE on September 25, 2015, and thereafter by:

- A. Materially failing to implement the academic services and all accommodations contained in Student's September 2014 individualized education program; and
- B. Materially failing to implement the behavior services contained in Student's October 1, 2013 IEP?¹

¹ With the agreement of the parties, this issue was refined at hearing, and is therefore stated differently than as stated in the prehearing conference order issued on February 9, 2017. Furthermore, the issues have been renumbered for formatting purposes, as compared to the manner in which they were numbered in the PHC Order.

3. Did District deny Student a FAPE at the IEP team meeting on September 25, 2015 by failing to find him eligible for special education and related services?

4. Did the November 30, 2016 IEP deprive Student of a FAPE by reason of the following:

- A. Failing to offer appropriate goals in the areas of: (i) behavior ;(ii) social interaction; and (iii) academics; and
- B. Failing to offer appropriate behavior support?²

SUMMARY OF DECISION

Student is a smart 12-year-old sixth grader eligible for special education as a child with autism. District always placed him in general education classes, and his autism had minimal impact upon his academic functioning. He always received good grades and has been promoted from grade to grade. He participated in class and completed his schoolwork. Student was generally well-behaved at school, and never had any disciplinary issues. Rather, his behavioral issues involved him not respecting his seatmates' space at their classroom desks, and attempting to converse with them when they tried to listen to the teacher or do other class work. He sometimes called out in class, or had difficulty paying attention in class, but was easily redirected. He fidgeted with pens and small objects while in class, sometimes mumbled to himself, and bounced or rocked in his seat.

² The PHC Order contained an additional issue, denoted Issue 2D(2), regarding whether District materially failed to implement Student's behavior services in the November 30, 2016 IEP. Student withdrew this issue at hearing.

Student's autism primarily manifested itself in the area of social skills. He displayed certain immaturities, such as thinking that his comments were funnier than they were, but he had a variety of strengths even in social skills. Student got along with peers, and they did not tease him or bully him. He worked well with them during group classroom assignments. He played games with them at recess and lunch. Student participated in after-school or extracurricular activities. His major weaknesses were that he was awkward during social conversations, as he did not readily initiate interactions or maintain conversations, and he was not very good at explaining his ideas. He knew many children at school, but he had not developed any true friendships among his classmates. He did not socialize with children at his house for example, and he does not communicate with them outside of school. Sometimes he exhibited odd mannerisms.

Until the 2014-2015 school year, District provided academic and behavior goals and services to Student pursuant to his IEP's. Then, District eliminated his behavior services and goals, but offered stay put behavior services. Thereafter, at the triennial September 25, 2015 IEP team meeting, the District members of the IEP team decided that Student was no longer eligible for special education services. Again, District offered stay put services. District reinstated Student's special education as a child with autism at an IEP team meeting in November 30, 2016, and also reinstated some of his services.

This Decision finds that District failed to implement some of Student's behavior services so as to deny him a FAPE as of December 1, 2014, through the beginning of the 2016-2017 school year. Additionally, District denied Student a FAPE by failing to find him eligible for special education services in September 2015, and by not providing sufficient behavior services in the November 30, 2016 IEP.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. At the time of the hearing, Student was a 12-year-old boy who attended sixth grade at Richardson Middle School in District. Student has resided with his parents in District at all relevant times. His primary language is English, but some Korean was spoken at home. Mother earned a Ph.D. in special education from the University of California, Los Angeles in 2013. She holds special education teaching credentials, and she served as a special education teacher in another school district from July 2000 to June 2005, and again from February 2013 to June 2015. She became a program specialist at the other school district, where her duties included analyzing data and monitoring compliance with special education requirements. From approximately June 2016, through the time of the hearing, Mother was an associate professor at a local state university.

2. Student was diagnosed as a child with autism when he was two-and-one-half years old. During the 2007-2008 school year, when Student was three years old and in preschool, Los Angeles Unified School District found him eligible for special education. under the category of autism. When he was seven years old, his parents moved into District, and enrolled Student in second grade in District's Walteria Elementary School for the 2012-2013 school year. He attended Walteria through the 2015-2016 school year, at which time he completed fifth grade. He then attended Richardson Middle School for sixth grade during the 2016-2017 school year.

3. Student's cognition is in the average to superior range. He has been enrolled in general education classes at all relevant times. At no relevant time has he had behavioral or other issues that generated suspensions or any other school discipline.

4. District conducted triennial assessments shortly after Student enrolled in District, and convened a triennial IEP team meeting on October 2, 2012, at which time the team discussed the assessments. The team determined that Student had a primary eligibility of autism, and a secondary eligibility of speech or language impairment. The secondary eligibility was based upon Student's need for speech and language services in the areas of articulation and language due to difficulty with critical thinking and pragmatic judgments, as well as pragmatical structure. In addition, Student had difficulty taking perspective, focusing in the classroom, and controlling his impulsivity. The team developed goals in language, to address critical thinking skills; articulation, to address Student's difficulty producing a particular phoneme; expressive language, to address Student's difficulties with appropriate word order; social skills, to address Student's difficulty with initiating play and conversation with peers; and in prevocational/work completion, to address Student's tendency to easily become distracted. The team offered Student placement in a general education classroom, with the following related services: (1) group language and speech services in two weekly sessions of 30 minutes each; (2) group behavior intervention services by the Autism Spectrum Services Inclusion Support Torrance Team³ in the form of Lunch Club or during recess one time per week for 30 minutes, to address social skills deficits; and (3) specialized academic instruction

³ This is a team of credentialed special education teachers, behavior analysts, and educational assistants who provide services for children with autism spectrum disorders, who are included in general education classrooms. The team is trained in many research-based educational, behavioral, and social approaches and techniques. At all relevant times, Student's Autism Service Team behavioral intervention goals and services generally emphasized social skills development.

consultation services once per month for 30 minutes, by the Learning Center teacher⁴. The IEP included two accommodations. One accommodation involved seating Student near instruction, and the other accommodation involved priming Student for non-preferred tasks. Parents consented to the IEP.

5. District convened Student's annual IEP team meeting on October 1, 2013, when Student was eight years old and in third grade. District offered the same general education placement and services as in the October 2, 2012, IEP. He had made progress on his previous social skills goal to initiate conversation and play, but he did not meet the goal because his behavior was not consistent over time so as to demonstrate mastery. The goal was modified to require him to make relevant comments in a social opportunity with peers, so that Student could improve his conversational skills. This goal was to be measured by observation and by data collection. Student had also not met his previous prevocational/work completion goal to complete non-preferred tasks with only one or two prompts, so another version of that goal was included. He met both of his speech goals.

6. The IEP included three accommodations: (1) to seat Student near instruction; (2) to prime Student for non-preferred tasks; and (3) to use an assignment notebook planner, which was a requirement for third grade and above. Parents were concerned that the class was a combination third/fourth grade class. Maria Ruth, Student's general education teacher, responded that the class was going to teach him independent skills. Mother expressed concerns about Student's writing skills, but with a little support, he could complete writing tasks. He participated in class and generally stayed on task. The team discussed Student's social skills. Student played with his peers

⁴ The Learning Center is a resource room where students go for specialized academic instruction by credentialed special education teachers.

at recess and lunch, and blended in with his peers. Parents requested that daily email communication regarding homework be part of the accommodations. District members of the team believed Student was doing well with the new third grade skill of using a planner. District preferred to monitor Student's planner use during the year to observe how Student's skills in using the planner developed. Parents consented to this IEP.

7. Ms. Ruth, Student's third grade general education teacher, had a general education clear credential. She did not have a special education credential, but has had other special education students in her class. At the time of the hearing she had been employed by District for 15 years. Student's class was a combined third and fourth grade class. Student did well in that class. He was amiable with his classmates, he followed directions, and he earned good grades.

8. Ms. Teresa Turner was Student's Learning Center teacher during third grade, as well as his case manager. Ms. Turner held both general education and special education credentials. She had been a special education teacher at Walteria for seven years, and subsequently, through the time of the hearing, the Learning Center teacher for third, fourth, and fifth grades. She began to provide Learning Center consult services to Student during the 2013-2014 school year, when Student was in third grade. She provided 30 minutes of consultation services every month. She performed those services by going to Student's classroom several times per week, and checking with Ms. Ruth whether he was having any difficulty, and whether he was on task and had his materials out. Two of his greatest needs were his organizational skills and following the third grade routine. Ms. Turner observed much progress on these fronts. Student learned where his papers and books went. He learned to fill out his planner. He learned the third grade routine, such as how to turn in his work.

SEPTEMBER 25, 2014 IEP

9. District convened an annual IEP team meeting on September 25, 2014, when Student was nine years old and entering fourth grade at Walteria. All required members of the IEP team were present, including Parents, a special education teacher in Walteria's Learning Center, Student's general education teacher, an Autism Services Team behavior analyst, and Student's speech and language pathologist. Student's primary eligibility was autism and his secondary eligibility was speech or language impairment. Student exhibited weaknesses in oral language for appropriate communication, social interaction skills, and was preoccupied with objects. He qualified for speech and language services in the areas of articulation and language due to difficulty with critical thinking and pragmatic judgments, as well as pragmatical structure. Student also had difficulty taking perspective, was impulsive, and had difficulty focusing in the classroom. He was friendly, curious, and strong in academics. He had adapted well to the fourth grade routine.

10. The team considered Student's present levels of performance. Student was at grade level in both language arts and mathematics. He wrote at grade level. Student had met the previous year's goals in speech and language. He had good fine motor control, and his gross motor skills were within normal limits. In the area of social emotional/behavior, Student could follow directions, comply with teacher instructions, and stay on-task most of the time. He did not engage in any disruptive behaviors that might impede his learning. The IEP repeated the IEP team members' comments from the October 1, 2013 IEP regarding his progress on his 2012 Autism Services Team goal and the modification of it in the October 1, 2013 IEP. Student had met his previous goal in the October 1, 2013 IEP of making at least four relevant comments in a structured social group setting. During Lunch Club, Student could make appropriate and relevant comments to initiate and respond to peers during a variety of games, and while eating

with peers. He would also engage in games during unstructured social opportunities at lunch recess. He qualified for Autism Services Team services to address social skills deficits.

11. In the vocational area, Student could attend to the teacher and do what the teacher asked. He met his prevocational goal of performing non-preferred tasks when directed. In the adaptive/daily living skills area, Student could independently care for himself. There were no health concerns.

12. The team determined that Student's areas of need were prevocational and speech. Even though, as mentioned below, the Autism Services Team behavior analyst stated that Student did not require a goal for Autism Services Team services, and District members of the IEP team determined at this meeting to discontinue Student's Autism Services Team services, the team listed Autism Services Team services as an area of need.

13. The team adopted a goal it labeled as a prevocational goal to address Student's need to stay on task. The baseline noted that Student would do what the teacher asked, and was doing non-preferred tasks with no more than one teacher prompt. He needed reminders when there was a transition in the classroom routine. The goal involved Student looking to a peer or asking his teacher when presented with a new task or direction he did not understand, in four out of five opportunities as measured by teacher observation. The team adopted an articulation goal and a syntax goal. The baseline for the syntax goal noted that Student had met his previous goal, and could formulate grammatically correct questions during structured activities in the therapy. The new syntax goal provided that Student would use correct syntax when asking question during a short conversation with 90 percent accuracy and minimum cues. The Autism Services Team behavior analyst stated that Student had met his

previous goal and Student would not have a new goal, as she did not see any concerns at this time.

14. The team recommended minimal accommodations, which included preferential seating at teacher discretion, priming for non-preferred tasks, use of an assignment notebook planner, a home/school communication system as needed, and checking for understanding. The team did not offer accommodations for standardized testing.

15. The team offered placement in general education at Walteria, individual speech and language services outside of the classroom (pull-out) once per week for 30 minutes, and special education consultation services once per month for 30 minutes. The District members of the IEP team discontinued Student's Autism Services Team services as of October 1, 2014.

16. During this team meeting, Parents expressed concern about Student's seating location in class. He sat at one table with one other student, while the other students sat in a group. District attempted to justify this seating arrangement, and the general education teacher and principal discussed this issue with Parents. Parents requested that Student be moved to another classroom. Mother also expressed her concerns whether Student was actually meeting his goals. The issue was discussed, and Mother withdrew her request for written evidence that Student had met his academic goal. However, Mother wanted written evidence that Student had met his Autism Services Team goal of conversing with his peers.

17. Parents signed consent to the IEP, with the exception of the behavior intervention services. Parents had not received any notice prior to the IEP team meeting that Student's Autism Services Team services would be discontinued. As a result of Parent's disagreement with the District's decision to terminate these services, District continued to provide Autism Services Team behavior services in the form of Lunch Club,

one time per week for 30 minutes, as stay put. Further, in response to Parents' request due to their concerns about Student's seating arrangement in the classroom, Student was moved to another fourth grade classroom in late September or early October 2014. Miwa Yoshihara became his classroom teacher. Ms. Yoshihara was a general education teacher, who received her clear general education credential in June 2015. She did not hold a special education credential. She had been employed full-time with District since the 2013-2014 school year, and had taught fourth grade the entire time. Part of her credentialing program involved teaching children with autism.

IEP AMENDMENT OF MARCH 31, 2015

18. Shortly after the September 25, 2014 IEP team meeting, Student joined Ms. Yoshihara's class. The desks were arranged in groups of three, and Student had a seat partner at his desk. Sometime after winter break, Student began to talk to his seatmate at inappropriate times during class, placed his materials in the seatmate's area, and touched the seatmate's possessions. Student had two successive seat mates who did not like this behavior, and they asked to be moved to other seats. Ms. Yoshihara had spoken to Student about his conduct, and he understood the problem, but was unable to follow through with her suggestions and strategies to stop the conduct. By email of Friday, March 6, 2015, Ms. Yoshihara notified Mother that Ms. Yoshihara was having difficulty finding a student to sit next to Student, and explained the situation. Starting the following Monday, she wanted to move Student's seat partner and have Student sit alone. He would still have preferred seating, pursuant to his IEP accommodations, and be part of a table group.

19. A succession of emails ensued. Mother responded to Ms. Yoshihara that same day, thanking her for the information. Mother requested a conference with Ms. Yoshihara and the Learning Center teacher. Ms. Yoshihara responded on Saturday, and advised Mother she would start organizing the conference when she returned to school

on Monday. She asked Mother to elaborate on her plan for the outcome goals of the conference. Mother responded on Monday, formally requesting an IEP amendment meeting to add a behavior support plan to Student's IEP.

20. After corresponding with Mother, Ms. Yoshihara consulted with William Dawson about this issue. Mr. Dawson was a behavior analyst on the Autism Services Team. Ms. Dawson holds a bachelor's degree in theology and history. He obtained a master's of science degree in marriage and family therapy from California State University, Dominguez Hills, in 2010, and employed by District since 2006. He started with the District as a paraeducator working with students with special needs, and became an educational assistant about four to six years later. About two years thereafter, he became a behavior analyst. As such, he performs functional behavior analysis, formulates strategies and techniques to assist students with their behaviors, and supervises three to four educational assistants. He has had a variety of trainings to become a behavior analyst, including seminars and on-line classes, but he is not a board certified behavior analyst. He has also taken numerous classes since approximately 2008 regarding autism. These classes have included in-service classes, on-line classes, training through District or the special education local plan area, as well as continuing education for his marriage and family therapy degree.

21. Mr. Dawson was familiar with Student, because Mr. Dawson customarily observed Lunch Bunch once or twice per month, and had seen Student there. After Ms. Yoshihara contacted him about Student's behavior with his seatmates, Mr. Dawson observed Student in Ms. Yoshihara's class once or twice and discussed the matter with Ms. Yoshihara, to assist in developing strategies for dealing with the behavior.

22. On March 31, 2015, District convened an IEP team meeting to discuss Parents' request for a behavior support plan for Student. The IEP team included Parents, Walteria's principal, Mr. Dawson, the general education teacher, and an interpreter.

Ms. Turner, Student's Learning Center teacher, was on a two-to-three month medical leave at this time, so Kendra Lopez served as the Learning Center Teacher at the meeting. She was a special education teacher in the Learning Center at Walteria, and had been Student's Learning Center teacher in second grade, during the 2012-2013 school year. Ms. Lopez did not provide Learning Center consultation services to Student while Ms. Turner was on leave. However, she supervised the substitute teachers who provided those services, and served as Student's case manager.

23. The team discussed Student's propensity to touch his seatmates' items and talk to them at inappropriate times, Student's classroom seating and whether Student was socially isolated due to the change of classroom seating, and Student's feelings about the change in classroom seating. Mother stated that Student had been bullied, and that Student had friends during structured times, but not during unstructured times. Father commented that Student had told him that the other students did not want to talk to him anymore. Ms. Yoshihara stated that was not true in the classroom. Further, Student was not isolated in the classroom by not having a seatmate, as the desks were arranged in groups of three and he had four neighbors in his table cluster. Ms. Yoshihara saw no reduction in other children talking to him. His behavior improved, and, in her opinion, he was fine with the seating change.

24. Mother also requested a functional behavior assessment. The principal explained that a functional behavior assessment was for severe behavioral issues that significantly impacted learning, and that was not the case with Student. She further explained that a functional behavior assessment was for students who did not benefit from their educational program due to behavioral issues, and are a danger to themselves or others. The IEP team further discussed Student's behavior and whether a functional behavior analysis was appropriate. The team ultimately agreed that the Autism Team Services behavior analyst would assess Student on the behaviors that

Parents were concerned about to determine whether Student required a behavior support plan. The assessment would consist of interviews, questionnaires, observation, and data collection. After the data was collected, the team would meet again to determine whether Student required a behavior support plan or whether there were other recommendations to help Student. The team did not change any of Student's goals or services at this meeting.

25. After the meeting, Mr. Dawson did not perform a formal assessment. However, he and the educational assistant he supervised observed and interviewed Student. In particular, Mr. Dawson inquired of Student regarding the issues regarding bullying and friends that Parents had raised at the IEP meeting. Student was not being bullied, and he identified friends to Mr. Dawson. The educational assistant and Mr. Dawson both observed Student playing with other children on the yard. They observed him in class, talked to his teachers, and looked at data.

26. Mr. Dawson or the educational assistant came into the classroom quite often after the IEP meeting, and offered strategies and interventions regarding Student's use of space at his seat. During these observations, Mr. Dawson also observed Student's social interactions. His peers were not bullying him or avoiding him; they merely did not want to talk with him when the teacher was teaching. He determined that Student needed to learn how to use his desk space. He also determined that Student did not need a behavior support plan. His behaviors were not impeding his access to the curriculum or his socializing with his nearby peers.

27. Mr. Dawson also observed Student at Lunch Club. Student was acting appropriately with his peers, laughing and having fun. There was a consistent group of peers Student liked to be with. Mr. Dawson would continue to observe Student and several other children on Mr. Dawson's caseload at Lunch Club about twice per month for 10-15 minutes each time.

IEP AMENDMENT OF APRIL 23, 2015

28. District convened another IEP amendment team meeting on April 23, 2015. The team included Parents, Mr. Dawson, the general education teacher, Ms. Lopez (as Ms. Turner was still on leave), the speech and language pathologist, and a program specialist. An interpreter was present. The team discussed strategies that Mr. Dawson had developed to help Student learn to manage his desk space. Parents decided they did not want a functional behavior analysis at that time. Parents expressed their concerns regarding Student's need for social support and that he needed to interact with his peers. Parents also requested more communication between home and school so that Parents and teacher could work as a team. Parents also wanted the accommodation of flexible seating for statewide testing added to Student's IEP, in view of Student's personal space issues.

29. Mother asked whether, on the special factors page, the box should be checked indicating that Student's behavior impeded his learning or that of others. Based upon her training and experience as a special educator, Mother believed that this may be appropriate, as Student would be receiving behavior services. At the school district where Mother worked, the box would be checked anytime a student was offered behavior services. District checked the box in response to Mother's question, but District members of the team did not believe that Student's behavior affected his learning or that of others. Ms. Yoshihara in particular did not believe that Student's behavior affected his learning or that of others; it just affected the ability of the other students to focus when it occurred.

30. The team agreed that Student's Autism Services Team Lunch Club group services would be reinstated, at one time per week, for 30 minutes per week, as stated in Student's October 1, 2013 IEP. Additionally, the IEP team offered behavior intervention consultation services by an Autism Services Team behavior analyst once per month

for 60 minutes. All other services remained the same as set forth in the September 25, 2014 IEP. All services in the April 23, 2015 IEP stated they were to be effective until the September 25, 2014 IEP.

31. The team developed two additional goals, both drafted by Mr. Dawson, to address peer interactions. One goal, to be met by September 25, 2015, addressed Student's need in a group educational or social setting to maintain appropriate space and refrain from interrupting others by exhibiting appropriate social interaction skills. This goal was based upon Student's behavior that generated this IEP meeting. This goal was to be measured by observation and data collection. The Autism Spectrum Team was responsible for the goal, but Student would assist the teacher in taking data on this goal.

32. The second peer interaction goal required Student, by September 25, 2015, to independently initiate, engage, and maintain conversations with peers that naturally occurred in social environments for his age in structured and unstructured settings. The goal was to be measured by observation and data collection. The baseline for this goal was that Student had not demonstrated his ability to initiate and respond to peers during structured games in naturally occurring settings. For example, Student did not approach peers for social interaction in unstructured settings such as lunch and recess. The goal did not require a specific number of conversational turns, or specify the content of the conversation. Mr. Dawson and other members of the Autism Services Team were to monitor this goal.

33. Parents did not initial the blank area on the IEP consent page that they agreed to this amendment IEP, and, at hearing, Mother did not recall whether Parents consented to this IEP. Mother initially testified that she did not know whether the services in the amendment IEP were put in place, but believed that the goals were put in place. The evidence reflected that District considered the services and goals in this IEP to

be operative. Furthermore, when Mother testified about Student's behavior services in the November 30, 2016 IEP, discussed below, she acknowledged that Student's services up to then were 60 minutes per month of consultation and 30 minutes per week of group services. This is what the April 23, 2015 IEP and no other IEP involved in this case provided. Consequently, the ALJ finds that Parents consented to the services and goals in the April 23, 2015 IEP.

34. Mr. Dawson and the educational assistant were responsible for the goals in the April 23, 2015 IEP, and Mr. Dawson was to provide the 60 minutes per month of behavior consultation services and document the consultation services. The educational assistant was to take data on the goals, and Mr. Dawson was to review it and summarize it weekly. Student would also self-monitor on the goal that addressed his ability to maintain personal space and refrain from interrupting others.

STUDENT'S PERFORMANCE DURING THE 2014-2015 SCHOOL YEAR

35. Ms. Turner continued to be responsible to provide Student's Learning Center consult services during the 2014-2015 school year, except for a short period of time when she was on medical leave. During that period, two other teachers provided the Learning Center consultation services.⁵Ms. Turner was responsible for addressing this goal and monitoring his progress on his prevocational goal of asking for clarification. She confirmed that he met this goal, and was performing it independently, based upon her observations and consultation with teacher.

⁵ At hearing, Ms. Lopez initially testified that these two teachers may not have held special education credentials, but she later acknowledged that this was only an assumption on her part, and she had no knowledge as to whether they had special education credentials.

36. Ms. Turner also assisted with Student's self-advocacy skills. Ms. Turner observed him in the classroom. She would prompt him to raise his hand, and he would do so. He was engaged in classroom activities. He asked for help, used his organizational skills, and kept his materials together. He could collaborate with other students. Both Ms. Turner and Ms. Yoshihara were regularly assigned to yard duty and would see Student on the yard. He did not stand out on the yard, and, in particular, he did not stand out as someone who was alone on the yard for an inordinate amount of time. Ms. Turner would see him on the yard with a few friends.

37. Mr. Dawson testified that he provided the 60 minutes per month of consultation services set forth in the IEP, but there was no service log or any other documentary evidence produced at hearing that documented that he provided those services during the 2014-2015 school year. Similarly, Mr. Dawson testified that the educational assistant provided Student's Lunch Club services, but there was no documentation produced at hearing, such as data sheets, that reflected that District provided 30 minutes per week of Lunch Club services during the 2014-2015 school year.

38. Academically, even though Student joined Ms. Yoshihara's class after the semester started, he caught up quickly, especially in math. Ms. Yoshihara had no more concerns about him academically than another student in her class. Two to three times per week there were group activities in class. His interactions varied, and sometimes he needed a prompt. He did not initiate interactions, but he could sustain interactions with others. Ms. Yoshihara could hear his conversations, and did not recall a time that she had to admonish him that his conversation was inappropriate during classroom activities. Some of his behaviors were unusual, in that he did not initiate conversations, and he misunderstood certain facial expressions. He did not always make eye contact, and sometimes answered in short sentences instead of giving detailed answers. Ms. Yoshihara would prompt Student to initiate conversations, or to explain facial

expressions, and these interventions would help. In Ms. Yoshihara's experience, some typical children exhibited the same behaviors Student did, in that they did not initiate conversations or they answered in short sentences.

39. Except for the behaviors that generated the March and April 2015 IEP's (i.e., Student's difficulty in managing his desk space and attempts to speak with his seatmates at inappropriate times), Student's behavior was generally appropriate for a fourth-grader, and his behaviors and social interactions were generally similar to those of his classmates. Eventually Ms. Yoshihara assigned him a seat partner.

40. Student received excellent grades on his fourth grade report card for the third trimester of the 2014-2015 school year. Report cards graded students on a scale from 1 to 3. A grade of 1 meant limited progress toward standard. A score of 2 meant progressing toward standard. A score of 3 meant that a student consistently met the standard. Student's grades on his report card were all 3's. Skills (referred to as "Skills for Success") were measured by similar grades. Student's grades of 3 in each skill area reflected that he consistently met the standard on the Skills for Success, in that he demonstrated responsibility, independence, perseverance, working with others, active listening, following rules, and attending to precision. He also consistently met the standards in all academic areas.

41. By September 25, 2015, District documented in an Annual Goals and Objectives Progress Report that Student had met all of his IEP goals. His report card and testimony supported that Student had met his annual prevocational goal of asking for clarification. Documents and testimony supported that Student met his behavior goal of maintaining appropriate space and refrained from interrupting others. In this regard, District had maintained data sheets in May 2015, with respect to Student's progress on this goal. There was testimony and conclusory documentation in the form of the Annual Goals and Objectives Progress Report that Student had met his social skills goal to

independently initiate, engage in, and maintain conversations with peers in structured and unstructured settings. However, no data was produced to support that Student had met this goal.

TRIENNIAL ASSESSMENTS

42. District conducted triennial psycho educational, speech and language, and behavior/social skills assessments during September 2015 in preparation for Student's triennial IEP team meeting, to be held in September 2015.

Psycho educational Assessment

43. Christina Dillard, a District school psychologist, conducted the psycho educational assessment, and produced a report dated September 25, 2015. The assessment was conducted in English, Student's primary language, and according to the report, Student's only language.⁶

44. Student's teacher did not report any concerns to Ms. Dillard. Parent was concerned that Student was emotionally sensitive. The report described Student's current placement and services, and his eligibility of autism. Student's strengths were his overall intellectual ability, which was in the superior range of standard scores.

45. Student was in good health, and had no history of excessive absences or tardies. There was no history of behavior referrals or disciplinary actions. His second grade state achievement testing results were Basic in English/Language Arts, and Advanced in Math. Ms. Dillard noted his high grades on his report card for the third trimester of fourth grade.

⁶ Student did not contend that any of the triennial assessments did not conform with technical statutory requirements.

46. Ms. Dillard interviewed Student's general education teacher. Student was at grade level in reading, math, and written language. He was friendly. His work habits were grade-appropriate and he finished his work in a timely manner. His fine and gross motor skills were age-appropriate.

47. Ms. Dillard also interviewed one of Student's parents, but her report did not specify Mother or Father. Student tried hard to please and help others, and was reliable, compliant, and responsible. He showed strength in art, crafts, and blocks. He got along with family members and did not have any problems completing his homework or chores. He was confident about himself as a student. Parent was concerned about Student's poor ability to make inferences, and his limited vocabulary. He was emotionally sensitive, especially to the remarks of others, and could not develop friendships with peers.

48. Ms. Dillard interviewed Student. Student's favorite subject was math and his least favorite was history. He did not enjoy reading and writing, and did not enjoy reading the books in class. Outside of class, he preferred to read *Plants vs. Zombies*. He wanted to become an inventor or an engineer.

49. Ms. Dillard conducted the Behavioral Observation of Students in School, which is designed specifically for direct observation of academic skills. She observed Student on September 14, 2015, for 35 minutes during a social science lesson, and also on September 17, 2015, for 30 minutes during a math lesson. During the observation, data was collected at specific time intervals regarding actively engaged time, passively engaged time, and off-task behaviors. Additionally, at specified intervals, data was taken of peers in the classroom to compare with the targeted student's behaviors. The results showed that in social studies Student was actively engaged slightly more than his peers, who were not actively engaged at all, and was passively engaged the same percentage of time as his peers. He was off-task a total of fewer times than were his peers. During

math, Student was actively engaged less than his peers, passively engaged the same amount of time as his peers, and was off-task slightly more than his peers.

50. In general, during the entire assessment, Student's conversational proficiency seemed typical for his age level. He was cooperative and his activity level seemed typical for his age. He appeared confident, self-assured, and attentive to the tasks throughout the assessment. He responded promptly, but carefully, to test questions, and increased his level of effort for difficult tasks. He made good eye contact with the test examiner.

51. On the Woodcock-Johnson III Normative Update Tests of Cognitive Ability, Student obtained a General Intellectual Ability score of 130, which placed him in the superior range of functioning. Compared to others at his age level, his standard verbal ability scores placed him in the average range; his standard intentional cognitive process scores were in the very superior range, and his cognitive efficiency processing scores were in the superior range. Student's auditory processing and phonemic awareness standard scores were in the very superior range; his visual process score was in the superior range, and his working memory score was in the high average range.

52. Ms. Dillard was unaware of any concerns regarding Student's adaptive behavior in connection with the assessment, and Student's performance on the assessments did not generate concerns in adaptive behavior. She also was unaware of any concerns in Student's processing in connection with this assessment.

53. Ms. Dillard administered the Behavior Assessment System for Children-2 to Parent and Student. The Behavior Assessment System is a rating scale used to assess the behavior and self-perceptions of children and young adults. Parent ratings were in the clinically significant range in the area of Internalizing Problems and on the Behavioral Symptoms Index. Student rated himself in the average range in all areas.

54. Ms. Dillard administered the Conners Rating Scale 3rd Edition, a behavioral measure, to Parent, Student, and Student's teacher. Teacher's ratings of Student fell in the average range; Parent's ratings fell in the very elevated range in the areas of Inattention, Hyperactivity/Impulsivity; Executive Functioning; and Peer Relations. Parent's ratings fell in the elevated range in the area of Learning Problems. Parent rated Student in the average range only in the area of Aggression. Student's self-ratings fell in the elevated range in the area of Family Relations, in the high average range in the area of Aggression, and in the average range in all other areas.

55. Ms. Dillard administered the Gilliam Autism Rating Scale-3 to Student's general education teacher and to Parent. The Gilliam is an instrument used to identify individuals who have severe behavioral problems that may be indicative of autism. Student's teacher's responses corresponded to an unlikely probability of autism spectrum disorder. Mother's responses corresponded to a very likely probability of autism spectrum disorder.

56. Ms. Dillard also administered the Autism Diagnostic Observation Schedule, Second Edition, which is a standardized assessment consisting of standard activities designed to elicit behaviors that are directly relevant to the diagnosis of autism spectrum disorders at different developmental levels and chronological ages. Ms. Dillard's report of Student's scores are inconsistent, in that one sentence of the report stated that Student's overall total score was consistent with a classification of autism spectrum, and another sentence of the report at the end of the same paragraph stated that Student's overall total score was consistent with a classification of non-spectrum. Ms. Dillard did not testify at hearing to explain this discrepancy, and her report did not include Student's scores on this assessment. However, the report's narrative summarizing Student's responses reflected that Student's scores were consistent with a classification of non-spectrum.

57. For example, Student used non-echoed spoken language without any stereotyped use of words. He had appropriate eye contact and exhibited a range of facial expressions. He interacted comfortably with her, and demonstrated social reciprocity and shared enjoyment. He could describe and detail his emotions. He enjoyed playing with his peers at lunch. He showed interest in the examiner's thoughts, feeling, or experiences and demonstrated insight into another's emotions, social situations, or relations. Student played with objects creatively and inventively. Student exhibited no unusual sensory interests, no atypical behaviors, and no preoccupation with topics. Ms. Dillard's findings were atypical of individuals with autism.

58. The assessment included the Woodcock Johnson IV Tests of Achievement to assess Student's academic achievement. He scored in the superior range in Written Expression, in the high average range in Basic Reading Skills, Math Calculation, and Math Problem Solving, and in the average range in Reading Comprehension and Reading Fluency.

59. Ms. Dillard observed Student at lunch. He was active on the playground and played with a group of boys. He appeared to fit in socially with them, as he laughed, smiled, made eye contact with them, briefly spoke to them, and pointed.

60. Ms. Dillard's report summarized his cognitive and academic functioning, and included the legal criteria in California for finding a child eligible for special education and related services under the autism category.

Triennial Speech and Language Assessment

61. Melissa Matherly, a speech and language pathologist, performed a speech and language assessment of Student on September 17 and 18, 2015, and produced a report dated September 25, 2015.⁷The assessment was conducted in English. She

⁷ Ms. Matherly did not testify at hearing.

summarized Student's background information and his previous speech and language assessment results. She performed an oral motor examination, and obtained a language sample, reviewed records, and informally observed Student. Ms. Matherly also administered the following instruments: (1) the Clinical Evaluation of Language Fundamentals—Fifth Edition, including the Pragmatic Profile; and (2) the Test of Pragmatic Language—Second Edition.

62. Ms. Matherly's report concluded that Student exhibited average receptive and expressive language skills. His pragmatic skills were also within the average range of functioning. He was easily understood during a conversation, and answered questions appropriately. There were no voice, fluency, or articulation difficulties.

Behavior and Social Skills Assessment

63. Mr. Dawson conducted the triennial behavior and social skills assessment during the week of September 15, 2015 through September 22, 2015, and produced a written report that he presented at the IEP team meeting on September 25, 2015. The standardized test results were valid and reliable for the purposes of the assessment, and were not primarily due to environmental, or socio-cultural factors, language, or economic disadvantage. He administered the assessment in English.

64. Mr. Dawson summarized Student's family, health, and educational background information. He reviewed Student's IEP's of September 25, 2014, and April 23, 2015; District's psycho educational assessments dated April 25, 2010 and October 2, 2012; and the Autism Service Team's Behavioral and Social Skills Assessment Report dated October 2, 2012.

65. Mr. Dawson used the following assessment procedures: the Social Skills Improvement System, the Autism Social Skills profile, the Behavior Assessment System for Children-2 Student Observation System, interviews of teachers and Mother, and observations of Student.

66. The Social Skills Improvement System is a rating scale designed to assist professionals in screening and classifying students suspected of having significant social skills deficits. Mr. Dawson selected Mother as the rater for the test. Mother rated Student at a standard score of 78 percent for social skills, which was in the below average range. Mother rated Student at a standard score of 119 percent for problem behaviors, which was in the above-average range.

67. Mr. Dawson administered the Autism Social Skills Profile to Mother, Ms. Turner (Student's Learning Center teacher), and Maria Ruth (Student's general education teacher). The Social Skills Profile is a rating measure used as a tool for tracking and monitoring progress in social skills development in the school setting for children with autism. The rater reports how frequently each of 49 skills were observed in the school setting, on a scale of Never Sometimes, Often, or Very Often. Mr. Dawson's report presented the responses of the raters, but the report does not analyze the responses or explain their significance with respect to Student's social skills development in the school setting.

68. Mr. Dawson used the Student Observation System to evaluate Student's classroom behaviors. The system is a 15-minute timed sampling observation, during which 30 three-second observations are made at the end of each 30-second interval. Data is taken regarding the frequency of the behaviors and whether the behavior is disruptive. Mr. Dawson observed Student during a 15-minute interval in the general education math class on September 17, 2015; during a 15-minute interval in the general education classroom on September 18, 2015; and during a 15-minute interval in the general education classroom during Language Arts class on September 21, 2015. The data reflected that Student displayed 70 instances of adaptive behaviors during the entire 45 minutes of observation, only one of which was a peer interaction. He displayed 20 instances of problem behaviors during the entire 45 minutes of observation, all of

which consisted of inattention, and two of which Mr. Dawson characterized as disruptive.

69. The report summarized Mr. Dawson's observations. Student transitioned well to his math class from his regular classroom. He listened to teacher instructions, and worked appropriately on his computer. He conducted himself as did his classmates, and he did not have any difficulty maintaining personal space.

70. During the observation in the regular classroom, Student distracted a peer by talking to him about the similarity of their pens. Student maintained appropriate personal space.

71. During the observation in English Language Arts class, Student picked at the paper on his desk, played with items inside his desk, chewed on his fingers, tapped on his watch, and played with a pencil sharpener. Student maintained appropriate distance from his seatmate.

72. Mr. Dawson interviewed Mother, Ms. Ruth, and Ms. Turner. Mother reported that Student was very responsible for his own assignments and tasks. He did well in a structured setting, but in an unstructured environment Student tended to play by himself or with younger children. His specific behavioral challenges were impulsiveness and invading the personal space of others. A successful strategy was to talk to Student about desirable age-appropriate behaviors, including using examples and role playing, to help Student consider other perspectives. Student had recently developed some self-awareness, and he had some understanding about autism.

73. Ms. Ruth reported that Student was a good reader who retained the information he learned. He was curious and asked questions. He could follow the fifth grade class schedule and transition between classrooms. If he was out of the room during class time, he would inquire about current class assignments and check to see if he had missed any required information. He did not present any behavioral problems,

although he could be better organized. He independently connected with a peer in another classroom to complete a project, and was independently collaborating with this peer.

74. Ms. Turner reported that Student had strong math skills, and loved number puzzles and games. He was good decoder. He tended to get fixated on specific time frames. If he had to report to the cafeteria for duty at a certain time, he would keep mentioning how much time remained until he had to go. This behavior improved when Student was assured that he would be able to leave in time for cafeteria duty. He had made progress in personal organization and social involvement.

75. Mr. Dawson observed Student during unstructured times. During a 40 minute observation of Student during Student's cafeteria duty, Student spoke to other students about their lunch selections. He interacted with peers who were also cafeteria helpers, as well as cafeteria staff. Student was alert, energetic, and smiling. The supervising staff person described Student's work performance as "awesome."

76. During an eight-minute observation at recess, Student played foursquare with his peers. He was vocal and animated. He greeted a peer and they interacted briefly by playfully bumping their elbows together. During a 17-minute observation at recess time, Student put away his computer before leaving for recess and independently asked the teacher to clarify some of her instructions. He retrieved his snack of popcorn, and walked around eating it. He spoke to one peer, joined a group of peers, and offered his popcorn to other peers. He also spoke with a peer while walking back to class.

77. During a five minute observation at recess on another day, Student played on the swings. A peer approached him to ask him about a project. Mr. Dawson asked Student and the peer about the project, and Student and the peer stood side by side, with their respective arms draped around the other's shoulder, and talked about the project.

78. During the 16-minute observation of the end of recess and transition back to the classroom, Student lined up appropriately when the bell rang at the end of recess. He waited in line while maintaining appropriate space from peers. He spoke to several peers while standing in line. As the teacher was approaching, he yelled out, "Teacher is coming!" Student quietly entered the classroom with his peers and took out a worksheet. Student raised his hand to volunteer to read out loud to his group. As his group worked on a project, Student fidgeted with a pencil sharpener while writing his answers.

79. Student's strengths were that he was friendly, inquisitive, and had a positive attitude. Mr. Dawson concluded that Student had no areas of need as of the time of his assessment. Student had met his goals of maintaining appropriate space and refraining from interrupting others. He was observed to independently initiate, engage, and maintain conversations with peers in naturally occurring social environments in structured and unstructured settings. He interacted with adults. He was fidgeting with small objects while at his desk, but he did not display any behaviors that impeded his access to the curriculum.

SEPTEMBER 25, 2015 IEP

80. District convened an IEP team meeting on September 25, 2015, when Student was 10 years old and in fifth grade, to review the triennial assessments. The IEP team included Parents, a District administrator, Mr. Dawson, Ms. Dillard, Ms. Matherly, Ms. Ruth, and Ms. Turner. A Korean interpreter was also present.

81. Ms. Dillard, Ms. Matherly, and Mr. Dawson presented their reports, and the IEP summarized the findings of the reports. The District members of the team ascertained that Student had met all of his goals, and decided that Student did not demonstrate a need for academic, speech and language, or behavior interventions at

the time of the meeting. District members of the team decided to exit Student from special education.

82. Parents expressed concern as to how Student would perform in middle school. Ms. Ruth and Ms. Turner, the Learning Center teacher, both addressed these concerns. Student looked and acted like a typical peer. The school psychologist read the legal eligibility criteria for autism aloud. The District members of the IEP team agreed that Student did not demonstrate significant deficits affecting his verbal and nonverbal communication and social interactions, and his educational performance was not adversely affected.⁸ Student's report card showed that he was currently meeting grade level standards and making academic progress.

83. Ms. Turner testified at hearing. She attended the IEP team meeting and agreed with the recommendation to exit Student from special education. He worked independently, could do his class work, could manage the classroom routine, and was doing well academically and socially. Ms. Ruth, Student's general education teacher in fifth grade, also testified at hearing. She agreed with the decision to exit Student from special education, but she did not believe the team relied on her input on the matter as she had only been his teacher for two weeks at the time of the meeting. Ms. Ruth believed that Student was academically and socially capable.

84. Parents did not agree with the District members of the IEP team. Parents believed that Student met the eligibility criteria for autism. They also did not agree with

⁸ The IEP notes erroneously stated that the District members of the team agreed that Student "does" demonstrate significant deficits affecting his verbal and nonverbal communication and social interaction and his educational performance is not adversely affected at this time. The failure of the notes to include the word "not" after "does" was a typographical error.

the District members of the IEP team as to the discontinuation of Autism Services Team and Learning Center services. Parents consented to discontinue speech and language services.

85. Due to the Parents' disagreement with termination of the services of the Autism Services Team and the special education consultative services, District continued to provide those services on a stay put basis. The academic services were provided pursuant to the September 25, 2014, IEP, which was the last agreed-upon IEP for those services. The Autism Services Team services continued to be provided pursuant to the October 1, 2013, IEP, which was the last agreed-upon IEP for those services, as amended by the April 23, 2015 IEP.

MARCH 28, 2016 AMENDMENT IEP

86. On March 28, 2016, District convened an IEP team meeting to discuss Student's transition to middle school. The team included Parents, Ms. Ruth, Ms. Turner, the school counselor for middle school, the school administrator for middle school, and a Korean interpreter.

87. Parents requested an independent psycho educational evaluation be conducted at District expense, including communication skills and peer relations. Parents agreed to submit their request, and their potential concerns, in writing. The middle school participants explained the special education mode at the middle school level. The team agreed to reconvene with a program specialist to discuss Parents' concerns. Parents also wanted to know the status of the April 2015 IEP. The team noted that Student was receiving services based on his September 2014 IEP on a stay put basis.

88. Student's services were group behavior services one time per week for 30 minutes, with behavior consultation services one time per month for 60 minutes;

individual speech and language services one time per week for 30 minutes; and special education consultation services one time per month for 30 minutes.

EVENTS DURING REMAINDER OF 2015-2016 SCHOOL YEAR

89. Ms. Turner, Student's Learning Center teacher during fifth grade, performed the same consulting services that she had in the previous school year. She observed Student in the classroom, consulted with his teacher, and observed whether he was maintaining his skills. She had no concerns regarding how Student would perform in middle school.

90. On May 17, 2016, Mother sent an email to Ms. Ruth regarding what Mother perceived as a regression in Student's school performance. Mother advised that Student was having difficulty mastering the content, and Student had told Mother that his teacher thought Student was not paying attention. Mother requested Ms. Ruth to ask Ms. Turner to develop some strategies to help Student concentrate. This was the beginning of an email chain between Mother and Ms. Ruth. Ms. Ruth responded the same day, thanking Mother for her support at home. Student was at a table with a good group of students and he worked well with them. She had talked to Student about his attention issues, and he said he was thinking about the You Tube videos he watched. He said he would try to listen better and look at the board. Ms. Ruth was going to have him stay at his current table, but switch seats so that he faced the board and teacher directly. He was also being a bit more social lately and talking during work times, so she would monitor that as well. Ms. Ruth also felt that his concentration might be affected by being out of class several times and going to the nurse because he did not feel well. Ms. Ruth said that she and Student had a good conversation about his attention issues. Student would try to pay attention to the teacher and not think about the videos, and Ms. Ruth would work with him to try to help him stay focused. Ms. Ruth would also share

Mother's concerns with Ms. Turner. Mother responded that she would curtail Student's You Tube watching.

91. On May 19, 2016, Ms. Ruth emailed Mother to advise that Student had been doing better. He had brought a book to school that was distracting him. He doodled in the book and wrote in his own version of the conversations in the book, and shared these creations with another student. Mother responded by thanking Ms. Ruth for letting her know about the book situation. Mother advised that she would talk to Student about appropriate classroom behaviors, and requested that Ms. Ruth let her know if there was anything she could do to improve his behaviors at school. The email chain ended with Mother advising Ms. Ruth that she had talked to Student about the book.

92. Ms. Ruth viewed this event as Student having some issues with re-focusing, but her concern over this event lasted about one day. She did not consider his issue with focusing a major problem, but it was more than a minor issue. He did not have difficulty mastering content in the classroom.

93. Student scored 2499 in English Language Arts on the California Assessment of Student Performance and Progress that were administered during the 2015-2016 school year. This score was in the Standard Nearly Met range, and was three points below the 2502 score needed to reach the Standard Met range. Specifically, he scored below standard on reading, and listening, above standard on writing, and near standard on research/inquiry (how well Student could find and present information about a topic.) Student scored 2621 on the Mathematics portion of the state assessment, which placed him in the Standard Exceeded range. Student's Science score was 435, which placed him in the advanced range on the California Standards test.

94. Student's fifth grade report card had the same three-level grading system as did his fourth grade report card, with 1 being the lowest grade, and 3 being the

highest grade. For the last trimester, Student received grades of 3 (consistently demonstrated the skill) in the following Skills for Success: showing independence, responsibility, and perseverance; showing respect when working with others; building content knowledge through purposeful and active listening; and following classroom, school and District rules. He received a grade of 2 (progressing toward skill) in the remaining skill of attending to precision.

95. In Reading, Student received a grade of 2 in the area of demonstrating understanding of a text by using explicit evidence and drawing inferences from the text. He needed to work on that skill and attend to precision by answering questions using explicit evidence from the text. He received grades of 3 on all other elements of Reading included on the report card: determining the meaning of words and phrases; analyzing a variety of test types and test structures; and reading at grade level with fluency and comprehension.

96. In the area of Speaking and Listening, Student received a grade of 2 in the area of identifying the reasons and evidence a speaker provided to support particular points. He received grades of 3 in all other areas of Speaking and Listening: comprehending, collaboratively discussing, and presenting on various grade level topics and texts; and reporting and speaking clearly to support the content using multimedia components.

97. He received 3's in all areas of Writing. In Mathematics, he received a 2 in all areas. He was making adequate progress in these areas. He received 2's in demonstrating understanding of science and social science concepts. He always participated in art, music and physical education, and received all 3's in these areas.

98. Socially, Student's teachers believed that he did well during fifth grade. He kept up in class and progressed. Student was not disruptive in the classroom. He could ask questions when he did not understand the material. He would participate in class.

He often had something to fidget with and would take pens and other items apart. These behaviors did not distract him; when Ms. Ruth called on him in his class, he was able to answer. She believed these behaviors helped him pay attention, but acknowledged that they possibly could distract other students. He did not stand out negatively at school. He could express social greetings. He participated in Math Club. He played on the yard with friends. By the end of the 2015-2016 school year, he had several friends at school.

99. Ms. Ruth confirmed that she implemented Student's accommodations from the September 25, 2014 IEP. She believed that Student was receiving Lunch Club services, because she would see the Autism Services Team aide around him at recess. However, there was no documentation that Student participated in Lunch Club during the 2015-2016 school year. Ms. Ruth also confirmed that Ms. Turner would come in and check on him in the classroom.

PSYCHOLOGICAL EVALUATION BY HELENA JOHNSON, PH.D.

100. Student entered sixth grade at Richardson Middle School in fall of 2016, when he was 11 years old. He had six classes, with five teachers. Early in the school year, Helena Johnson, Ph.D. performed an independent psychological assessment of Student. Dr. Johnson was a California licensed psychologist. She received her bachelor of arts degree in psychology from the University of San Diego in 1995; a master of arts in pre-clinical psychology from San Diego State University in 2000; a Ph.D. in clinical psychology, with an emphasis in child and family, from the University of Nebraska-Lincoln; and a Certificate in Applied Behavior Analysis for Special Education in 2007 from Pennsylvania State University. She was an instructor of a course in introductory psychology from 1997-2000 at San Diego State University, and a consultant to the special education department of another school district from 2012-2014. She was a psychologist/consultant for the Center for Autism Research and Translation at the

University of California, Irvine from 2014-2015. Dr. Johnson is currently in private practice, and much of her practice now consists of assessing children, primarily for autism. She had testified as an expert witness in Student's counsel's special education hearings on three prior occasions. She is not a speech and language pathologist or a licensed school psychologist, and has no California teaching credentials.

101. Dr. Johnson assessed Student on August 29, 2016, August 31, 2016, and September 2, 2016. Parents retained Dr. Johnson's services because they were dissatisfied with the District's decision to exit Student from special education, and because they believed the District had underserved Student's educational needs in the areas of academic achievement and social-emotional development. Dr. Johnson reviewed the intake and developmental history form that Mother, Father, or both filled out. Dr. Johnson also reviewed and summarized Student's educational records while he was enrolled in District. She noted that the records documented numerous symptoms of autism Student displayed during his education in the District, and which, in her opinion, District did not address.

102. Dr. Johnson administered the Autism Diagnostic Interview-Revised, by interviewing Mother for two and one-half hours, to obtain information about Parents' concerns, Student's history and background, and to obtain detailed descriptions of the behaviors necessary to diagnose autism spectrum disorder. Since Student had been diagnosed with autism as a young child, Dr. Johnson's report focused on his current symptomatology that was consistent with autism. Student demonstrated qualitative abnormalities in the area of reciprocal social interaction in the areas of nonverbal behaviors to regulate social interaction, peer relationships, shared enjoyment, and socio emotional reciprocity. He demonstrated qualitative abnormalities in the area of communication, as in his use of gesture to compensate for spoken language, his use of varied spontaneous make-believe or social imitative play, in initiating or sustaining

conversational interchange, and in that he had stereotyped, repetitive, or idiosyncratic speech. Student also demonstrated restricted, repetitive, and stereotyped patterns of behavior in the areas of preoccupations or circumscribed interests, inflexibility with routines, stereotyped and repetitive motor mannerisms, and preoccupation with parts of objects or nonfunctional elements of material. Dr. Johnson did not report the scores, however her report concluded that cut-off scores on the Autism Diagnostic Interview logarithm were met in each area, and the results were highly consistent with an autism spectrum disorder.

103. Dr. Johnson administered the Behavior Assessment System for Children—3rd Edition to assess Student’s emotional and behavioral development. She administered the questions to Mother⁹, Wendy Turner (Student’s homeroom, science, and math teacher at Richardson)¹⁰, and Leslie Bezich (Student’s English teacher at Richardson). She reported extensively on their responses, which generally had acceptable validity indices. Scores on the Clinical Scales range from clinically significant to very low. Scores on the Adaptive Scale range from very high to clinically significant. In

⁹ The report initially stated that Mother was the respondent on this rating scale, but, at hearing, Dr. Johnson stated that all of the rating forms were given to Mother with the instruction that both Mother and Father were to fill them out. Indeed, throughout the remainder of the report Dr. Johnson referred to Parents’ ratings, and she offered no information in either her lengthy report or her lengthy testimony that she knew whether Mother, Father, or both of them filled out the forms.

¹⁰ Ms. Wendy Turner shares a surname with Teresa Turner, Student’s Learning Center special education consulting teacher when he attended Walteria. To avoid confusion, Wendy Turner will be referred to as Ms. Wendy Turner in this Decision, and Teresa Turner will simply be referred to as Ms. Turner.

other words, high scores on the clinical measures suggest an area of concern, while low scores on the adaptive measures suggest an area of concern.

104. Mother's ratings on the Behavior Assessment System placed Student in the average range on the Externalizing Problems composite. Mother rated Student in the at-risk range on the Internalizing Problems composite. Mother rated Student in the clinically significant range on the Behavioral Symptoms Index composite, and also rated Student in the clinically significant range on the Adaptive Skills composite. Student's overall Executive Functioning Index score was in the elevated range, as were his index scores in Problem Solving, Attentional Control, Behavioral Control, and Emotional Control. Mother's ratings of Student on the Third Edition of the Behavior Assessment System were different from her ratings on the Second Edition, which was administered to her in fall 2015. On the fall 2015 assessment, she rated Student in the clinically significant range on the Internalizing Problems composite, which was a more elevated rating than on Dr. Johnson's assessment, but Mother also rated Student in the average range in Adaptive Skills on the fall 2015 assessment, which was a more benign rating than on Dr. Johnson's assessment.

105. Ms. Wendy Turner's ratings on the Externalizing Problems composite scale placed Student in the average range. Ms. Wendy Turner rated Student one point below the average range on the Internalizing Problems composite and in the average range on both the School Problems composite and on the Behavioral Symptoms Index composite. Student's Adaptive Skills composite score fell in the clinically significant range. Student's Problem Solving Index score fell in the elevated range. Student's Overall Executive Functioning Index score was in the not elevated range. His index scores in Attentional Control, Behavioral Control, and Emotional Control were also in the not elevated range.

106. Ms. Bezich's ratings on the Externalizing Problems composite scale placed Student in the average range. As did Ms. Wendy Turner, Ms. Bezich rated Student one

point below the average range on the Internalizing Problems composite. She rated Student in the average range on the School Problems composite and the Behavioral Symptoms Index. Ms. Bezich's ratings placed Student's index score in the elevated range in Problem Solving. Ms. Bezich's ratings placed Student in the at-risk range on the Adaptive Skills composite. Her ratings placed Student in the not elevated range on the index scores in Executive Functioning, Attentional Control, Behavioral Control Index, and Emotional Control.

107. Dr. Johnson administered the Adaptive Behavior Assessment System III to measure Student's adaptive behavior and related skills. She believed that his scores should be at least average on this measure, in view of Student's average to above-average cognitive skills. She administered the measure to Parents, Ms. Wendy Turner, and Ms. Bezich, and reported on their ratings in detail. Parents' report of Student's adaptive functioning indicated that he was performing well below expectations, particularly in the area of socialization, based on age and cognitive ability. Ms. Wendy Turner rated Student's overall adaptive functioning in the average range, with two areas of below average functioning (school living and leisure). Dr. Johnson questioned the validity of Ms. Wendy Turner's ratings, due to what Dr. Johnson considered a high number of responses that Ms. Wendy Turner reported as guesses. Ms. Bezich rated Student's overall adaptive functioning in the below average range, with all areas of socialization measuring in the low range. Again, Dr. Johnson questioned the validity of Ms. Bezich's ratings, due to what Dr. Johnson considered a high number of responses that Ms. Bezich reported as guesses. As is discussed below, Dr. Johnson's caution with respect to the teachers' responses on this assessment instrument illustrates a generally problematic aspect of Dr. Johnson's overall assessment. The assessment occurred early in the school year, and Student's teachers were not familiar with him.

108. Dr. Johnson administered the Social Responsiveness Scale, Second Edition, to identify social impairment associated with autism spectrum disorders and quantify its severity. Two of the subscales (Social Communication and Interaction and Restricted Interests and Repetitive Behaviors) were compatible with the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, and help to clarify whether Student met the most current diagnostic criteria for autism spectrum disorder. Scores of mild deficits on any given subscale reflect deficits significant enough to warrant attention in treatment programs. Separate forms were completed by Parents, Ms. Wendy Turner, and Ms. Bezich. Dr. Johnson listed examples of each of their responses that contributed to their respective reported scores. The raters scored Student in the areas of Social Communication and Interaction, Social Awareness, Social Cognition, Social Communication, Social Motivation, and Restricted Interests and Repetitive Behaviors.

109. Parents' ratings gave Student a total score in the severe range, and their ratings gave Student scores in the severe range in all areas, except for Social Motivation and Restricted Interests and Repetitive Behaviors, which fell in the moderate range. Ms. Wendy Turner's and Ms. Bezich's reports were generally consistent with each other, and indicated that Student had mild deficits in the area of social communication and interaction. Ms. Wendy Turner reported a mild deficit in Social Communication, and Ms. Bezich reported a mild deficit in Social Cognition. Additionally, Ms. Wendy Turner reported mild deficits in atypical patterns of behavior. Ms. Wendy Turner's ratings gave Student a total score in the mild range, and Ms. Bezich's ratings, which totaled just two points lower than Ms. Wendy Turner's, gave Student a total score in the normal range. Dr. Johnson believed that the ratings reflected a student with more than a mild impairment.

110. Dr. Johnson administered the Behavior Rating Inventory of Executive Functioning—Second Edition, designed to assess executive functioning in school-aged

children in the home and school environments. It also provides an understanding of behavior associated with specific areas of self-regulated problem solving and social functioning. The questionnaire, which was administered to Parents, Ms. Wendy Turner, and Ms. Bezich, measures nine fundamental aspects of executive functioning in three domains: the Behavior Regulation Index; the Emotion Regulation Index, and the Cognitive Regulation Index. The Global Executive Composite is an over-arching summary score that incorporates all of the clinical scales. Parents' ratings indicated questionable consistency in their responses to items. Dr. Johnson reviewed those items with Parents, who decided to alter their responses on a few items. These changes did not turn a non-significant score into a clinically significant score.

111. Dr. Johnson reported examples of the responses of each rater that contributed to the reported scores. Parents reported clinically significant deficiencies in all areas of executive functioning, while Student's teachers did not report those deficiencies within the school setting. However, Dr. Johnson noted that Student's teachers endorsed executive functioning deficiencies in the area of problem-solving on the Behavior Assessment System, which was consistent with Parent's report on the Inventory of Executive Functioning in the area of cognitive regulation. Dr. Johnson stated that research reflected that parents' ratings are commonly lower than school personnel ratings on this measure.

112. Dr. Johnson's analysis on this point is unclear. Both Ms. Wendy Turner and Ms. Bezich rated Student in the non-elevated range on the Overall Executive Functioning Index score on the Behavior Assessment System. Ms. Bezich also scored him in the non-elevated range on the Executive Functioning subscale on the Behavior Assessment System, while Ms. Wendy Turner's score on that subscale placed him but two points into the at-risk range. Indeed, Dr. Johnson's report never mentions the obvious: that Parents consistently found Student to be in the deficient or impaired range

overall on every rating scale Dr. Johnson administered to them. In contrast, Ms. Wendy Turner's and Ms. Bezich's responses were less predictable, and more nuanced and balanced. Dr. Johnson gave several general reasons as to why parents might rate students differently than teachers would, such as that the motivation to perform might be lower at home, or that children may have difficulty at home with independent functioning, or that parents have more opportunities than teachers to see the child in many contexts, but she had no specific explanation as to why Mother, Father, or both consistently gave Student low overall ratings on every rating scale. Dr. Johnson seemed oblivious to this pattern.

113. Dr. Johnson also directly assessed Student on August 31, 2016, and September 2, 2016, for a total of six to seven hours over those two days. She observed Student while he was in her office for the assessments. He immediately presented as a socially awkward child, and his affect tended not to vary. He was generally responsive to her conversation, however, his responses were very limited and he did not elaborate. He had a difficult time explaining anything that was asked of him. He did not think about the listener's perspective. He struggled with expressive vocabulary. He made odd physical movements, regularly pulled at his clothing, and he touched his feet and smelled his fingers. He made odd noises when he was working on a writing task and each time he stood up. He rocked his body. He made silly, immature, or repetitive social overtures. He lagged behind her when walking down the hallway. He snapped his fingers next to his ears or face. He did not respond to her attempts to socialize with him.

114. During the child clinical interview, Student revealed that he was sensitive when somebody yelled at him or when he was embarrassed. He did not appear to understand several aspects of friendship, such that friends visited each other's houses and engaged in activities together outside of school. Student was not sure that peers at school liked him. He generally felt normal, not anxious, nervous, or fearful. Student

admitted that he had difficulty paying attention in class, especially when his teacher was talking at length. He acknowledged that others have told him he did not pay attention. He stated that he did not pay attention in school, and therefore he did not know what to do for homework. He sometimes did not turn his homework in, and tests were difficult. Student had a good relationship with Mother, except for some difficulty when doing homework. Student wished that he was able to study more and that he had more friends.

115. Dr. Johnson administered the Wechsler Intelligence Scale for Children--Fifth Edition to assess Student's cognitive functioning in the domains of Verbal Comprehension, Visual Spatial, Fluid Reasoning, Working Memory, and Processing Speed. Student obtained composite scores in the average range in Verbal Comprehension and Working Memory, composite scores in the superior range in Fluid Reasoning and Processing Speed, and a composite score of very superior in Visual Spatial. These scores combined to generate a full scale IQ score of 118, in the high average range. However, due to significant differences among Student's composite scores, Dr. Johnson believed his full scale IQ score was an inaccurate reflection of his abilities. Therefore, Dr. Johnson's report reviewed each composite score and skill area separately, but the report did not specifically state what impact the review had on Dr. Johnson's opinion of Student's full-scale IQ or his overall cognitive ability.

116. Dr. Johnson administered the Wechsler Individual Achievement Test--Third Edition, to measure Student's academic achievement levels. She described every subtest and set forth Student's scores on the subtests and the subtest components. The composite Score Summary reflected that Student scored in the average range in Oral Language, Total Reading, Basic Reading, and Reading Comprehension and Fluency. He scored in the above average range in Written Expression and Math Fluency, and in the Very Superior Range in Mathematics, for a Total Achievement score in the above

average range. Based on his subtest component scores, she concluded that Student evidenced a substantial strength in overall mathematics abilities. He also demonstrated a significant strength in oral word fluency. Student's below average performance on the sentence repetition subtest component suggested that he had difficulty when required to attend to lengthy, auditorily-presented information.

117. Dr. Johnson also set forth various details regarding Student's errors and deficiencies as to his performance on various subtest areas. Since his composite scores ranged from average to very superior, it was not clear as to why Dr. Johnson focused on Student's weaknesses as opposed to his strengths in these areas. However, this was characteristic of Dr. Johnson's approach. Overall, Dr. Johnson's assessment report emphasized all of the negative aspects of Student, and she discounted or disregarded Student's many strengths. Dr. Johnson's report gave more emphasis to the negative ratings of "Parents," (even though Dr. Johnson was not aware as to which Parent provided the ratings), as opposed to the overall more positive ratings of Student's teachers.

118. Dr. Johnson administered the Autism Diagnostic Observation Scale-- Second Edition Module 3, which is a diagnostic indicator for autism spectrum disorders. In contrast to the detailed score reporting she had engaged in elsewhere in her report, Dr. Johnson provided no scores for any aspect of this instrument in her report. However, she concluded that his scores were consistent with a diagnosis of autism, with his most significant symptoms exhibited in the area of reciprocal social interaction.

119. Dr. Johnson's report narrated her perceptions of Student's language and communication skills, reciprocal social interaction skills, and imagination/play skills. His expressive language was often confusing, and he failed to take the perspective of the listener or express any interest in the listener's comments. He did not sustain reciprocal conversation. Overall, he used phrases and sentences to express his thoughts and ideas

or to respond. He often spoke with a low tone of voice and mumbled. She did not observe stereotyped or idiosyncratic use of language. He exhibited some spontaneous informational gestures, but he did not exhibit any spontaneous use of descriptive gestures.

120. With respect to social interaction skills, Student exhibited unusual eye contact, as he did not consistently coordinate his gaze with other modes of communication. His face was not expressive. He shared enjoyment during only one task. He demonstrated limited understanding of other's emotion and limited insight into typical social situations and relationships. His insight into friendship was notably limited, as he had difficulty identifying any friends and understanding typical friendship behavior for his age group. He did not initiate social overtures as often as expected.

121. With respect to imagination and creativity, Student spontaneously exhibited creativity during the create a story task, but, during make-believe play, he did not demonstrate any creative use of items. His joint interactive play was very limited. He used some creativity in verbal expression.

122. Finally, Dr. Johnson evaluated whether Student had stereotyped behaviors and restricted interests. She noted unusual sensory interests, in that he regularly put his hand in his shirt against his skin and under his arms. He constantly felt the table in front of him and reached behind him to feel the couch. He constantly put his hands in between the couch cushions and would move them up and down to feel the sensation. He repetitively shook his hand near his face, which Mother had also reported in the clinical interview. Dr. Johnson did not observe self-injurious behavior and restricted interests or other repetitive or compulsive behaviors. He often fidgeted and moved throughout the evaluation. He often did not listen to her instructions or ideas the first time, such that she had to repeat them. She did not observe negative, disruptive, aggressive, or anxious behaviors.

123. Dr. Johnson administered the Test of Problem Solving--3rd Edition, Elementary to Student. This is a measure of inferential reasoning and critical thinking abilities. It was administered to assess Student's ability to use language to perform a variety of tasks in response to questions related to pictures depicting social situations. She reported Student's scores on six tasks, which ranged from below average in Determining Causes, to slightly below average in Prediction, to Average in Problem Solving, Negative Questions, Sequencing, and Making Inferences. She concluded that, overall, Student's expressive language often lacked specificity. He tended to respond to items by providing multiple responses, rather than thinking carefully about the question and what would be the most appropriate response. He also occasionally made grammatical errors or errors in word choice while expressing himself orally.

124. Dr. Johnson observed Student at Richardson on October 6, 2016, for one hour and 17 minutes. She observed him during the last five minutes of his homeroom prior to lunch, as he went to his locker to retrieve his lunch, during lunch, and on the yard after Student ate his lunch. She then observed him in Science class. In general, she concluded that Student's awkwardness set him apart from the other students. At various points during the observation, he fidgeted, chewed and fiddled with his sweatshirt, pulled at his pants, put his finger in his mouth, snapped his fingers, played with odd objects (such as a pinecone and objects he found on the ground), fiddled with his scissors, watch, and pen, bounced in his seat, and mumbled to himself. In class he did not consistently attend or stay on task. She attributed his lower grades at the end of the 2015-2016 school year to his lapses in attention. She believed his repetitive behaviors impaired his abilities to socialize and attend.

125. He ate lunch without initiating any social interaction with anyone at his table, and they did not initiate interaction with him. He made overtures to other peers, but, for the most part, they did not seem interested in what he said. He wandered

around the perimeter of the school yard, with his sweatshirt hanging down behind his back and dragging on the ground. He played two games of handball on the yard, but did not converse much with the other players, and he sat by the court before joining the game and after his turn ended. In class, he generally followed teacher directions, volunteered answers to questions, and started his work independently, but he was inattentive at times. He kept appropriate boundaries between himself and his peers during class.

126. Dr. Johnson summarized her evaluation and concluded that Student's presentation of social interaction deficiencies coupled with the presence of communication deficiencies, and stereotypical behaviors (e.g., repetitive behaviors, preoccupation with parts and objects) were consistent with autism. She determined that Student met the Diagnostic and Statistical Manual, Fifth Edition criteria for autism. In her opinion, he also met the educational eligibility criteria of autism due to his deficiencies in verbal communication, nonverbal communication, and socialization, with associated repetitive and stereotypic behaviors that adversely affected his educational performance.¹¹ She characterized his social impairment as moderate to severe, and it impacted his education because cooperative group work was so important.

¹¹ Dr. Johnson's report also reflected her opinion that Student presented with a language disorder and was eligible for special education and related services. Student's complaint sought compensatory remedies with respect to speech and language. However, Student did not present speech and language services as an issue at hearing, as Dr. Johnson is not a speech and language pathologist. There was no evidence that Dr. Johnson was qualified to diagnose any specific disorder in speech and language, as opposed to discerning communication difficulties related to Student's diagnosis of autism spectrum disorder. At hearing, Student did not dispute the quality of the speech and language services District had provided, or raise issues directed specifically at his

127. Dr. Johnson concluded her report with four pages of recommendations so that Student could acquire, maintain, and generalize skills. She believed that District had not provided Student intensive and effective interventions for the previous three years. Her most pertinent recommendations with respect to the issues in this case were direct behavior intervention, behavior analysis and a behavior support plan, social skills training, and a variety of suggestions for IEP goals.

128. More specifically, Dr. Johnson recommended that Student be provided a full time one-to-one aide trained in applied behavior analysis, to instruct him in, and facilitate, social interaction, social communication, and behavioral goals during class and all unstructured social time. She recommended that all of Student's providers receive on-going training and supervision to observe and practice skills for working with children with autism and that Student receive monthly supervision for his applied behavior analysis program. She also recommended that Student receive a functional behavioral assessment performed by a board certified behavior analyst, or professional with the equivalent training, to assess Student's attending and on-task behavior, and to identify appropriate social and behavior skills. Dr. Johnson recommended that a behavior support plan be developed based on the assessment, supported by systematic

speech and language goals, or present a speech and language pathologist to testify regarding Student's speech and language needs. Student did not refer to speech and language services in his opening statement or closing brief. As is mentioned below, District offered a speech and language assessment at the November 30, 2016 IEP meeting. There was no evidence as to the status of that assessment. Therefore, this Decision does not address Student's speech and language eligibility, needs, or services. Nothing in this Decision forecloses Student from pursuing these issues through another due process complaint, pursuant to Education Code section 56509.

data collection and regular data analysis. Additionally, Dr. Johnson recommended Student receive group social skills intervention using evidence-based methodology to develop all of his social skills, especially social insight, social awareness, and socio-emotional reciprocity. She believed Student needed to be motivated to generalize his skills. She recommended that Student enroll in the 16-week Program for the Education and Enrichment of Social Skills at the University of California, Los Angeles, which was a specially designed program to teach a number of social skills to middle school and high school students.

129. Dr. Johnson recommended that goals be created in the following areas, without including prompts, and requiring generalization across people and settings:(1) Behavior;(2) Social Interaction/Social Communication; (3) Language; and (4) Academic. The behavior goals should address attending/concentration, flexibility in problem solving, adaptability, and decrease in repetitive behaviors. The social goals should be directed to friendships and sustained social engagements, include social skills, and promote self-awareness as to undesirable social behaviors. The language goal should address social/language and expressive language, such as responding with detail and elaboration to questions using grade-level vocabulary and grammar. The academic goal should target Student's ability to demonstrate grade-level critical thinking skills and ability to answer questions using appropriate explanations and application of concepts.

130. Dr. Johnson testified at hearing and criticized District's services and goals through the time of her assessment. With respect to services, she did not believe that a 60- minute per month consult was sufficient to take and analyze data. She thought Lunch Club was insufficient, as it involved much game playing and did not focus on other types of conversations and social skills. She criticized the data taken by Mr. Dawson and the educational assistant because it was not meaningful as to the behavior that it was targeting and as to whether Student could generalize his skills.

131. Dr. Johnson was concerned that Student's behavior with respect to use of space at his desk could contribute to him having a bad reputation among his peers, but she admitted that she had not heard that he had any such poor reputation. Indeed, that behavior was short-lived. She was skeptical that he had met his goal in the April 23, 2015 IEP to independently initiate, engage in, and maintain conversations with peers in structured and unstructured settings, because one of his greatest deficits was in conversation, and he did not approach peers for social interactions in unstructured settings such as lunch or recess. She also did not think the goal for help when he did not understand something was met, and he should have had a goal that targeted staying on task and attending.

132. Mother agreed with Dr. Johnson's school observations. Mother observed Student at Richardson in school and at lunch on a few occasions during the fall semester of the 2016-2017 school year, as she was a parent volunteer at the school. He sat with other children at lunch in the cafeteria, but did not speak to the other children. He did not always interact with the other children on the yard, but at one point she encouraged him to ask other children to play ball. He did so, and they accepted his invitation and played. He would ask children to play when she encouraged him to. Mother was concerned that he did not socialize with his classmates without prompting at school. He also did not socialize with them outside of school. When he told her funny stories, she could not understand the context and he did not explain them very well. She did not think his ability to converse was age-appropriate.

133. Krystal Alcala, Richardson's assistant principal, accompanied Dr. Johnson during her school observation of Student. Ms. Alcala holds a bachelor's degree in communication, a master's degree in special education, and a master's degree in educational administration. She holds a mild/moderate special education credential and a preliminary administrative credential. She obtained her additional autism authorization

approximately three or four years ago. She was employed by District as a special education teacher for 10 years, during which time she taught approximately 40 to 50 students with autism. She also worked with students who received applied behavior analysis support, and, as such, collaborated with outside agencies, behaviorists, and clinicians. She had behavior training, including training in applied behavior analysis techniques with respect to students with a variety of behavior issues, including non-compliance, self-stimulatory behaviors, self-injurious behaviors, and elopement. She was the interim assistant principal at Richardson last year, and this year was formally named Richardson's assistant principal.

134. Ms. Alcalá disagreed with Dr. Johnson's interpretation of her observations of Student, partly because she considered his conduct to be within the range of typical for a Student his age, and also because she observed things that Dr. Johnson did not. He fidgeted with objects, but he did not appear different from his peers. He walked alone to his locker when transitioning to lunch, but it was not uncommon for children to go to their lockers alone. She saw him interact with two peers at his locker at lunchtime. She did not believe it was uncommon for children to eat lunch without conversing. After lunch, he walked to his locker alone, but again, this was not uncommon. She believed Student was walking around the yard after lunch to see what the other students were doing. He picked up a wood chip, which is a common thing for the children to do, as the yard was filled with them. Another child had a woodchip or something in his hand, too, and Student and the other child engaged for short period of time and then they went their separate ways. She thought Student enjoyed watching the handball game before and after he participated in it.

135. In science class after lunch he was fidgeting, but he still paid attention, and he was able to follow the overhead projection. He could answer the teacher's questions. In her opinion, Student's interactions were normal, and he did not stand out. He

mumbled to himself, but still performed the task of gluing information into his notebook. He was not the only child who called out in class.

136. Ms. Alcala had observed Student at other times in his classes. The last time she observed him, he was in math class. Student complied with teacher directions, and would ask when he needed clarification. He fidgeted with objects a lot, but paid attention. She did not believe his behaviors prevented him from accessing his education, or affected the ability of the other children to access their education.

137. Ms. Alcala supervised the yard daily, so she saw him on the yard as well. He played handball, or played ball or tag on the field. She observed him in the cafeteria, playing games on his iPad with his peers. Sometimes they watched him use the device, but sometimes he and his peers used the device together. His conversations did not appear to her to be out of the ordinary.

138. She disagreed with Dr. Johnson's report that Student did not explain his thinking. Sometimes Student's responses were minimal, but the answer did not require any further information.

139. Ms. Alcala also disagreed with Dr. Johnson's recommendation for a one-to-one aide. She did not think he needed that level of support to access his education, or for social interaction. Ms. Alcala had seen him interact with a peer in the cafeteria while playing with his device and sustain the interaction throughout the 40 minute lunch period. He listened and followed along in class, even when he was fidgeting with an object. She also disagreed with Dr. Johnson's recommendation for a functional behavior analysis, because he was accessing the curriculum and his behavior was not impeding his learning or that of others. In her opinion, he also did not need a behavior support plan. He had good grades, he was able to function in the classroom and access the curriculum, his behavior was not impeding his learning or that of others, and there were no reports or referrals for discipline.

140. Student's teachers also disagreed with Dr. Johnson's perceptions of Student's academic skills, social skills and behaviors. Madeleine Black was Student's Learning Center teacher at Richardson during the 2016-2017 school year. Ms. Black received her bachelor of arts degree in psychology from the University of Maryland in 2008. She was a behavioral therapist for a nonpublic agency from October 2009 through January 2011, where she worked at home and in school with children with autism. She received her special education mild/moderate credential from the extension program at the University of California, Los Angeles. As part of that program, she worked as an intern in a special day class at The Help Group. She completed that internship at the end of the 2015-2016 academic year, and then started working at Richardson at the beginning of the 2016 school year as a special education teacher in the Learning Center. She began working with Student in September 2016, providing his specialized academic instruction consultation services for 60 minutes per month.

141. Ms. Black observed Student with his peers, and sometimes he would walk with peers in the hallway. It was normal for students to walk alone or with peers in the hallway. He did not stand out in any way. He had no inappropriate interactions, although sometimes he gave "goofy" responses, which were a means of attention-seeking from peers. His "goofiness" seemed to be part of his personality, and it did not affect his education. Peers did not react negatively to him.

142. Student fidgeted with objects and his fingers, but Ms. Black did not believe that Student's fidgeting affected his access to his education, or negatively impacted other students. She believed that the fidgeting may be a reflection of his need for stimulation, and, to the extent it filled that need, it helped him focus. Student was readily re-directed. He socialized with peers, if sometimes at an immature level. However, he initiated interactions, and made eye contact. She considered the gazing off that Dr. Johnson observed to be age-appropriate conduct that Student's peers engaged

in as well. She had not observed Student at lunch or at recess, but she had never seen him bullied. He was not shunned by his peers.

143. Ms. Wendy Turner, Student's homeroom, science, and math teacher during the 2016-2017 school year, also described Student's social skills. She received her bachelor's degree in economics from the University of California, Irvine, and her master's degree in education from National University. She received her multiple subject teacher credential in 2002 or 2003. She has been a teacher for 16 years, and employed by District that entire period. She taught seventh grade for two years when she first began teaching, but since then she has taught sixth grade. At the time of the hearing, Ms. Wendy Turner was in her seventh year as a sixth grade teacher at Richardson.

144. Ms. Wendy Turner observed that in science, Student could find a partner, work in a group, and cooperate with others. No behaviors of Student in science or math interfered with his learning or that of others. He did not persevere on things. He was fun, excited to learn, motivated, told jokes, and a pleasure to have in class. He often helped other students with their work. Student liked his mini iPad, and he often had people around him, all looking at the screen. Sometimes he was alone, but other students were also sometimes alone.

145. Ms. Wendy Turner observed that Student initiated conversations with peers and was able to sustain interactions. His interactions were appropriate. He had no trouble with eye contact with his peers; sometimes students have trouble with eye contact with teachers. Student liked math. He gave short answers, but he could give more explanation when needed. Sometimes he annoyed other students on purpose, by fidgeting, touching things, tapping on table. He bounced in his chair, but peers did not mention or tease him about his body movements. His movements in his chair were not disruptive or distracting to the other students. Sometimes he mumbled to himself,

shouted out an answer, made an off-topic comment, or made silly facial expressions. She never saw him shake his hand in front of his face.

146. Ms. Wendy Turner acknowledged that she provided rating scales for Dr. Johnson's assessment. Some of her responses were also true for other students in class, or were common among sixth graders generally, but she acknowledged that it would be unusual for a sixth grader to exhibit all of the behaviors Student had on the rating scales. She would change some of her answers if she were completing the rating scales now, because he was more comfortable in class now, and she knew him better. For example, some of the times on which she had answered "often" would now be "sometimes," and some of the behaviors did not occur at all. Some of the behaviors occurred, but she did not necessarily view them as negative.

147. Student's teachers also disagreed with Dr. Johnson's recommendations that Student required a one-to-one aide. Ms. Black did not believe that a one-to-one aide was necessary, and thought it would be harmful to him socially. Other students would react negatively to the aide, and would be less likely to engage with Student. She has worked as a one-to-one aide in the past, and she did not believe a one-to-one aide would not be noticed by the other students. Ms. Wendy Turner also disagreed with the recommendation for a one-to-one aide. She did not believe that it was necessary for academics or for social reasons. Ms. Wendy Turner thought the presence of such an aide would make Student uncomfortable. She also did not believe that he needed an aide for behavior reasons. He could be redirected, follow instructions, and perform academically.

148. Ms. Teresa Turner, the special education Learning Center teacher who was assigned to provide student's specialized academic instruction consultation services during fourth and fifth grades also did not believe that Student needed a one-to-one aide to access his education or to further his social skills. She remarked that he had both

academic skills and social skills, and had operated very well at the elementary school level. She believed it would be detrimental to Student to have a one-to-one aide.

149. Dr. Johnson and, to a certain extent, Parents, perceived Student differently than did Student's teachers and other school personnel. Overall, Student's teachers and other school personnel were more credible than Dr. Johnson insofar as their perceptions of Student and of his educational needs, for a variety of reasons.

150. First, Dr. Johnson never interviewed any of Student's teachers, Mr. Dawson, or anyone else from District as part of her assessment. She spent hours absorbing Mother's perspective, through both the intake process and her interview. Student's teachers might have offered her a different perspective of Student. Second, her assessment was done at the very beginning of Student's sixth grade year, when he was transitioning to the unfamiliar, and more socially and academically complex environment of middle school. This adjustment, which can be difficult for typical children, let alone a child with autism, could have impacted both Student's behaviors that Dr. Johnson observed on campus, as well as his responses and her observations during her direct assessment of him. Third, the fact that the assessment occurred so early in his sixth grade year meant that Ms. Wendy Turner and Ms. Bezich, his new sixth grade teachers, were not very familiar with him. This impacted their ratings as mentioned in her report, as they had not known him long enough to be able to offer a rating as to certain items. Additionally, as Ms. Wendy Turner testified, her responses to the assessment would not be the same as of the time of the hearing as they were at the beginning of the school year when she filled out Dr. Johnson's rating scales.

151. Fourth, some of Dr. Johnson's opinions were beyond her expertise, or experience. For example, her conclusion in her report that Student qualified for special education under the category of speech and language impairment was not supported by any of the technical and detailed criteria that such an eligibility requires pursuant to

California Code of Regulations, title 5, section 3030, subdivision (b)(11). She testified that, even though she was not a speech and language pathologist, as a psychologist who assesses for autism she is also qualified and experienced in assessing communication deficiencies. That communication deficiencies are a hallmark of autism spectrum disorder does not, in and of itself, confer upon her the expertise to label a child as eligible for special education on the basis of speech and language impairment.

152. Similarly, she believed that her recommendation of a full-time one-to-one aide would benefit Student, when all of the teachers who commented on it recommended against it, on the grounds that it was not only unnecessary, but also because it would actually be socially detrimental to Student. Dr. Johnson also opined that his various social deficiencies could lead to his peers shunning him, but there was no evidence that such was the case. She believed that Student's somewhat lower grades at the end of fifth grade were due to his deficiencies in his abilities to support his ideas with evidence and make inferences (which the report card itself said with respect to Student's grades in reading and speaking/listening), as well as his lack of focus. However, she offered no additional basis for her conclusions. A student's grades can vary for a variety of reasons. Student's teachers noted that his occasional lack of focus did not seem to affect his ability to absorb the material. Student's teachers also were satisfied with his academic performance and progress, and were not concerned about his slight drop in grades at the end of fifth grade.

153. Fifth, despite the numerous instruments Dr. Johnson used to assess Student, she made no attempt to differentiate which of Student's behaviors were due to his autism, and which were simply behaviors of an 11-year old boy. Rather, she attributed all of his awkwardness, his social unawareness, his eccentric personal habits, his occasional lack of focus, and his taciturn nature, to his autism. Typical 11-year old boys also often have social deficits. Student is a smart, high-functioning, pre-teen boy

who has autism, and who also has the confidence to raise his hand and contribute in class, who has a sense of self-esteem, who enjoys the company of his peers and who plays games with them, who works cooperatively with them in groups in the classroom; and who has sufficient executive functioning that he is prepared for class and can behave in school in a non-disruptive way.

154. Sixth, Dr. Johnson's analysis of Student's undesirable social behaviors was also incomplete even to the extent they were related to his autism. For example, she considered his fidgeting, his body movements while seated, and his pulling on his clothes, simply as manifestations of his lack of social finesse as a result of his autism. However, they might also be manifestations of sensory issues, which also could be caused by his autism. She mentioned that Student might have sensory issues once or twice in her report; however, she did not suggest any sensory-based solutions for these issues.

155. Seventh, Dr. Johnson did not demonstrate an understanding of the District's obligations to provide a FAPE. Her recommendations that Student receive intensive services had the objective to extinguish as many of his social and academic inadequacies as possible. That is not District's obligation. District is required to provide Student a placement and services that are reasonably calculated to permit him to make meaningful educational progress in light of his circumstances.

156. Dr. Johnson's report and testimony were credible as to Student's eligibility for special education under the category of autism. However, due to these factors, and others also mentioned above, Dr. Johnson's recommendations as to the services and goals that Student required are not particularly persuasive.

NOVEMBER 30, 2016 IEP

157. District convened an IEP team meeting on November 30, 2016. The purposes of the meeting were to develop Student's annual IEP and to review Dr.

Johnson's assessment report. The IEP team included Parents, Student's attorney, two administrators, Dr. Johnson, Dr. David Feldman (the school psychologist), Mr. Dawson, Ms. Black, Ms. Wendy Turner¹² and District's attorney. An interpreter was present. The meeting lasted several hours.

158. Student's strengths were that he was very sweet, intelligent, and a hard-worker who was motivated to do well. He worked well independently, liked art, and was a great student in math class. Student was performing very well in all of his classes, earning A's and B's. Student did not need any extra help, and his teachers had no academic concerns. Student participated in group work in class. Parents had concerns regarding Student's pragmatic language and socialization. At home, Student needed help and clarification with homework. Parents were not sure whether Student understood questions asked of him.

159. Dr. Johnson presented her report. Based on her report, the team decided that Student was again eligible for special education and related services under the category of autism, and that Student should be assessed in speech and language. Parents agreed to the speech and language assessment. District members of the IEP team had differences with Dr. Johnson's observations, but they did not criticize or question the report, because they felt that they were there to listen. Parents had questions about Lunch Club, which Mr. Dawson addressed. Parents reported that Student was uncomfortable in the Lunch Club because there were too many other kids, and Student did not know their names.

160. The team reviewed present levels of performance, including his recent scores on the California standardized assessments. Student was performing very well in

¹² Ms. Wendy Turner was only there for part of the meeting. Parents excused her from attending the entire meeting.

all his classes, and had received A's in Science, Physical Education, and Math. He had earned B's in English Language Arts, Social Studies, and Beginning Instrumental Music. Student worked well, did not need extra help, and his teachers had no academic concerns. His gross and fine motor skills and adaptive daily living skills were age appropriate. Student independently completed his assignments and turned in his homework. His emotional functioning and behavior were age-appropriate, but Student required prompting for some socialization. The team decided that Student's areas of need were social interactions and communicating information. The District members of the team decided to offer Student the opportunity to participate in a social skills group which would be smaller than the Lunch Club, and would be led by Mr. Dawson and Dr. Feldman. Parents believed this social skills group would be similar to the Lunch Club, which was unsuccessful.

161. The team reviewed previous goals and determined that Student continued to meet them. However, two of the previous Autism Services goals regarding conversing with peers required Student to perform these goals independently, but the present levels of performance in the November 30, 2016 IEP mentioned that he required prompting for some socialization. Therefore, these goals were not met as of the time of the IEP. At hearing, the only data presented regarding Student's progress on his behavior or social goals was two pages of data taken in October 2016 during Lunch Club, and one page of observation notes dated October 5, 2016, taken by the educational assistant during Student's physical education class.

162. The team discussed and developed new annual goals. The academic goal addressed communicating information, and was predicated on the baseline that Student exhibited deficits in communicating information, answering questions using appropriate explanations, and application of concepts. This goal was based on Dr. Johnson's assessment, but Ms. Black, who wrote the goal, believed that Student was, nonetheless,

performing well academically. The goal provided that Student would engage effectively (by expressing on-topic ideas that peers understood and by responding to peer ideas) in a range of collaborative discussions with diverse partners on sixth grade topics, texts, and issues, in four out of five trials with 80 percent accuracy. Progress on the goal would be measured by curriculum-based assessments, works samples, oral response, or teacher records.

163. The behavior goal addressed social intentions, and was predicated on the baseline that Student demonstrated limited social interactions with peers, showing interest in others, and having reciprocal conversations with peers. Student's peer interactions during lunch involved playing games; he did not engage peers socially during lunch. The goal provided that Student would demonstrate social skills by appropriately entering and exiting social interactions, expand his friendship network by at least one additional peer, and show interest in others, pay attention, listen to other's ideas, give compliments, etc., with a minimum of 20 conversational exchanges with two or more peers for a minimum of 15 minutes in 80 percent of unstructured social/play opportunities, with up to two prompts, as measured by observation and data collection.

164. District members of the IEP team offered placement in general education classes at Richardson, with the following services: (1) Specialized academic instruction consultation services one time per month for 30 minutes; (2) Consulting behavior services one time per month for 60 minutes; and (3) Group behavior services in a social skills group for two times per month for 30 minutes each time. This was a reduction in the group behavior services from the April 23, 2015 IEP, which offered the Lunch Club for 30 minutes per week

165. The team agreed on classroom accommodations of preferential seating; instructions repeated or rephrased; checking for understanding; and cues, prompts, and reminders to pay attention. Student would take the standardized state assessments

without accommodations. On the Special Factors page of the IEP, the team checked the box stating that Student's behavior did not impede his learning or that of others.

166. Parents consented to the implementation of the IEP goals and the 60 minutes per month of behavior consultation. Parents did not agree to the reduction of group behavior intervention services, and did not agree that the IEP offered Student a FAPE.

167. At hearing, Dr. Johnson criticized the new goal in the November 30, 2016 IEP regarding Student's conversational skills, because it did not target the application of concepts, or his writing, which, in her opinion, was determined to be deficient. She also criticized the new social goal because it required prompting instead of performing independently, and she questioned the definitions of spontaneous conversations and friendships. She also did not believe he could meet the goal with the level of services he had, as he did not engage with peers at lunch or recess. Dr. Johnson did not express any criticisms about the goals at the IEP meeting.

168. Dr. Johnson also criticized the accommodations in the November 30, 2016 IEP, as she did not believe that a general education teacher with a classroom full of students could implement them. Again, Dr. Johnson did not express any criticism about the accommodations at the IEP meeting.

STUDENT'S SERVICES AND PROGRESS IN SIXTH GRADE

169. Student earned good grades during the first two trimesters of sixth grade, which he had completed as of the time of the hearing. He earned an A in Science for the first trimester, a B in the second trimester, and he had an A as of the time of the hearing. In Math, he earned an A in the first and second trimester, and he had earned a B as of the time of the hearing. Ms. Wendy Turner, his math and science teacher, implemented his November 30, 2016 IEP accommodations in class. They were not difficult to implement, as they were things she would do with most students on a daily basis. Ms.

Ruth, Student's fifth grade general education teacher, who was not at the November 30, 2016 IEP team meeting, also believed that the accommodations in the November 2016 IEP would not be difficult to implement. Like Ms. Wendy Turner, they were something that she did as a matter of course. Their comments served as another example that Dr. Johnson was overextending her expertise and experience when she opined that general education classroom teachers could not implement the accommodations in Student's November 30, 2016 IEP

170. Ms. Alcala agreed that Student was eligible for special education as a child with autism, and with the goals and services offered at the November 2016 IEP team meeting. She has seen him in classes five or six times since that meeting. Within the past month or two she has seen him in the cafeteria and he was not eating alone. The last time she saw him was two weeks before she testified. Based on her observations, she believed that his social interactions improved, and that he made progress on his goal.

171. Ms. Black provided Student's specialized academic instruction consultation services pursuant to the November 30, 2016 IEP. She believed he needed the services she provided, and that he had sufficient support with the services, goals, and accommodations in the November 30, 2016 IEP. She observed him in class and collaborated with his teachers on a monthly basis. She kept a log of her consultation services from October 2016 to the time of hearing. She saw him in the hallway, and spoke to him there occasionally. During consultations, she would check on his work. When she first began to provide services to Student, she continued to implement his prevocational goal to request clarification from teacher or peers, because even though the goal had previously been met, it was part of the stay put services. As of November 30, 2016, Student had met the goal. Ms. Black implemented that goal until a new academic goal was developed in the November 30, 2016 IEP. The new goal was developed based upon Dr. Johnson's recommendations, and was more expansive and

focused on more complex conversations and discussions than the previous goal. Student was progressing very well on his new communicating information goal, based on his grades and teacher reports. He was more social, engaged in more interactions with peers, stayed on topic, responded with grade-level material, and able to perform all of his work. She based this on his grades, on teacher reports, and on her observations.

172. Dr. Feldman was one of the attendees at the November 30, 2016 IEP team meeting. Dr. Feldman holds a bachelor's degree in psychology from San Diego State University, and a master's degree in clinical community psychology from California State University, Dominguez Hills. He received his Ph.D. from Cambridge Graduate School in 1991. He is a state licensed marriage and family therapist, and received his clear pupil personnel services credential in 1999. He has been employed by District since 1995. He was a District school counselor until 2000, and from 2000 to present he has been a District school psychologist. He also has a private practice as a marriage and family therapist. In his work with the District, he had experience counseling and consulting children on the autism spectrum, and has also had previous experience providing counseling and assessments services on a contract basis to students on the autism spectrum.

173. The IEP meeting was Dr. Feldman's first contact with Student's educational program. He believed Student had academic strengths and some social skills, but based upon Parents' report and Dr. Johnson's report, he thought an IEP would be functional and could support Student in some areas. Dr. Feldman participated in implementing all of the behavior/social skills goals in the November 30, 2016 IEP.

174. On January 20, 2017, Student commenced participating in the social group that was offered in the November 30, 2016 IEP. This was the first meeting of the group. Dr. Feldman was the leader and facilitator of the group, and he and Mr. Dawson would

model social skills for the group.¹³The group used a variety of curricula and social skills training methodology, as well as Dr. Feldman's clinical expertise. Student's IEP provided that he would participate in the group every other week, but Dr. Feldman believed that meeting once per week would be more beneficial, so the group met every week. Both Dr. Feldman and Mr. Dawson believed that Student enjoyed participating in the group, and he participated well in the group. They also believed that his socialization skills increased as a result of his involvement in the group. Student had longer conversations and stayed on topic. They both described an incident when Student had not shown up for group, and they searched for him on campus. He was socializing with another peer, and enjoying himself, and he requested to miss group so he could stay with his peer. Since Mr. Dawson and Dr. Feldman believed that Student's socialization with peers was a point of the group, they advised him to call his Mother and ask if he could miss group, and they also told him that he could not just skip group. Rather, he had to ask their permission to be excused from group. Dr. Feldman also described other instances when he saw Student engaged with peers while playing a game on his iPad. Still, Student had some weaknesses in social skills. He would talk about a particular subject excessively, and he had over-expressive physical gestures and facial expressions.

¹³ A variety of factors caused the relative delay in starting the group. Parents did not sign consent to the November 30, 2016 IEP until December 15, 2016. District then had to form the group and obtain consents from other parents, and winter break intervened as well.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA¹⁴

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement the IDEA and its regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.¹⁵, 5 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 higher education; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

¹⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference in the analysis of each issue decided below.

¹⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to [a child with special needs]." *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, the *Rowley* court decided that the FAPE requirement of the IDEA was met when a child received access to an education that was reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200,203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The Supreme Court recently decided the case of *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ___ [137 S. Ct. 988] (*Endrew F.*) and clarified the *Rowley* standard. *Endrew F.* provides that an IEP must be reasonably calculated to enable “progress appropriate in light of the child’s circumstances.” (137 S.Ct. at 999.) The Court recognized that this required crafting an IEP that required a prospective judgment, and that judicial review of an IEP must recognize that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Ibid.*) Additionally, and of particular significance for this case, the Court stated, “for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, ‘be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’ ” (*Id.* at 999 [citing *Rowley, supra*, 458 U.S. at 203-204.])

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for due process hearing “shall be filed which two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.” (Ed. Code, § 56505, subd. (1); 20 U.S.C. § 1415 (f)(3)(B); *M.M v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 859, interpreting California’s statute of limitations statute.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528; 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA

administrative hearing decision is preponderance of the evidence[.]) In this case, Student, as the petitioning party, has the burden of persuasion as to all issues.

ISSUE 1A(I-III).APPROPRIATE BEHAVIOR, SOCIAL INTERACTION, AND ACADEMIC GOALS FROM DECEMBER 15, 2014 TO SEPTEMBER25, 2015

6. Student contends that he was deprived of a FAPE during the period from December 15, 2014, to September 25, 2015, because the September 25, 2014 IEP that was in effect during that time period included no social or behavioral goals, any academic goal targeting certain alleged deficiencies, or any goal to address Student's weakness in conversational skills.

7. District contends that Student's claims regarding the offer of appropriate goals are barred by the statute of limitations. District contends that Student filed his complaint on December 15, 2016, and that a party may not challenge the contents of an IEP, such as the September 25, 2014 IEP, that was created outside of the statute of limitations period. Further, District contends that Student did not allege nor offer any proof that there was any applicable exception to the statute of limitations.¹⁶

Law Pertaining to the "Snapshot Rule" and the Statute of Limitations

8. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149,

¹⁶ One of the reasons for the Order requiring supplemental briefing was that District had not documented its statute of limitations defense in an answer or in its PHC statement, or raised it at hearing. In the interests of clarifying the record, District accurately pointed out in its supplemental closing brief that District's counsel raised the issue of the statute of limitations orally during the recorded PHC.

citing *Fuhrmann v. East Hanover Bd. of Ed.*, *supra*, 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

9. As was stated above in Legal Conclusion 5, California law and the IDEA provide that, except for specified exceptions, a complaint for due process hearing shall be filed within two years from the date the petitioner knew or had reason to know of the facts underlying the basis for the due process hearing request. Recently, the Ninth Circuit in the case of *Avila v. Spokane School Dist.* 81 (9th Cir. 2017) 852 F.3d 986, interpreted the 2004 addition of a statute of limitations in the IDEA, and affirmed that the statute of limitations is governed by the "discovery rule." Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F. 3d 233, 248.) (*Abington*). In particular, the common law exception to the statute of limitations that applies when a violation is continuing is not applicable in IDEA cases. Thus, a party may not challenge the appropriateness of an IEP created outside of the statute of limitations period even though the IEP's provisions were in effect within the limitations period. (*K.P., etc., v. Salinas Union High School Dist.* (N.D. Cal. April 8, 2016, Case No. 5:08-cv-03076-HRL) 2016 WL 1394377, which interpreted the California statute of limitations, Ed. Code, § 56505, subd. I.) (*K.P.*)

Analysis

10. The issue as presented by Student's complaint and PHC statement raises issues regarding the "snapshot rule," but it does not involve the statute of limitations. At the PHC, in his opening statement, and throughout these proceedings, Student has contended that the period at issue for this claim was the period from December 15, 2014 to September 25, 2015. At hearing, the evidence reflected that this claim was based upon the fact that the September 25, 2014 IEP failed to develop and offer appropriate goals in behavior, social interaction, and academics. However, the September 25, 2014 IEP itself was not at issue with respect to this claim, and therefore the statute of limitations and tolling issues discussed in *K.P.* are not implicated.

11. However, to consider the issue so as to require an evaluation of the content of the September 25, 2014 IEP, only during the time period from December 15, 2014 to September 25, 2015, would violate the provisions of the "snapshot rule." The "snapshot rule" provides that the contents of an IEP are to be evaluated only as of the time it was developed, and not in hindsight. Therefore, as framed by Student, Issues 1A (i)-(iii) arguably do not state a legal claim.¹⁷ However, it is possible to consider these issues in another way, so that they state a legal claim. If the issues are viewed as a challenge to the manner in which District responded to Student's progress or lack thereof in the goal areas mentioned in these issues during the period from December 15, 2014 to September 25, 2015, then the issues state a claim, and better conform to the allegations in Student's complaint.

¹⁷ Nothing in this Decision prohibits Student from filing another complaint to assert claims as to the content of the September 25, 2014 IEP. (Ed. Code, § 56509.) Additionally, nothing in this Decision is to be construed so as to determine the issue as to whether such a complaint would be barred by the statute of limitations.

12. Student's goals as of December 15, 2014, did not include behavior and social skills goals. In March 2015, Ms. Yoshihara reported to Mother Student's classroom behaviors of not respecting other students' personal space and objects. Student had begun to manifest these behaviors shortly after winter break. Upon learning of these behaviors, Mother requested an IEP team meeting. Two IEP team meetings ensued, one on March 31, 2015, and one on April 23, 2015. As a result, at the April 23, 2015 IEP team meeting, the team reinstated Student's Autism Services Team Lunch Club group services, at one time per week, for 30 minutes per week. The team also added behavior intervention services by an Autism Services Team behavior analyst once per month for 60 minutes. The team also added two behavior/social goals. One of the goals addressed Student's needs in a group educational or social setting to maintain appropriate space and refrain from interrupting others by exhibiting appropriate social interaction skills. The second goal required Student to independently initiate, engage, and maintain conversations with peers that naturally occurred in social environments for his age in structured and unstructured settings. These services and goals were to be provided until the next annual IEP of September 25, 2015.

13. District addressed the particular classroom behaviors noted by Ms. Yoshihara by convening the IEP team meetings in March and April, and adding the appropriate goal regarding Student's maintaining his space and refraining from interrupting others. By adding the second goal regarding conversations, District also addressed Parents' concerns, which they specifically raised at the April 23, 2015 meeting, that Student needed to improve his peer interactions. Accordingly, District did not deprive Student of a FAPE on these grounds during the period from December 15, 2014 to September 25, 2015.

14. District did not offer Student any additional academic goals during the period from December 15, 2014 to September 25, 2015, which covered the bulk of his

fourth grade year and the beginning of his fifth grade year. However, there was no evidence that, during this period, Student developed any academic challenges that required attention. Student's grades were all 3's at the end of the 2014-2015 school year. His teachers had no concerns about his academic abilities from December 15, 2014 to September 25, 2015. Therefore, District did not deprive Student of a FAPE during this period by not convening an IEP team meeting to add academic goals.

ISSUE 1B: MATERIALLY FAILING TO IMPLEMENT STUDENT'S BEHAVIOR SERVICES FROM DECEMBER 15, 2014 TO SEPTEMBER 25, 2015

15. Student contends that District failed to implement the "stay put" behavior services from the October 1, 2013 IEP, which was the last agreed upon IEP which offered behavior services.

16. District contends that the evidence showed that the behavior services were provided, and, in particular, that documentary evidence reflected that behavior services were being provided as of the March 31, 2015 IEP team meeting, and that Student met the goals in the April 23, 2015 IEP.

Law Regarding Implementation of IEP

17. After the IEP is written, the district is obligated to provide the student with the special education and related services as listed in the IEP. (34 C.F.R. § 300.323 (c)). Minor failures by a school district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821.) (*Van Duyn*.) Rather, only a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Ibid.*) This standard does not require that the child suffer demonstrable educational harm for there to be a finding of a material failure. (*Ibid.*)

However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. (*Ibid.*)

18. In the recent case of *M.C., etc., v. Antelope Valley Union High School Dist.*, *supra*, 852 F.3d 840, the court stated, citing *Rowley*, that, in enacting the IDEA, Congress was as concerned with parental participation in the enforcement of the IEP as it was in its formation. (852 F.3d at 849.) Parents must be able to use the IEP to monitor and enforce the services that their child is to receive. (*Ibid.*)

Analysis

19. The evidence demonstrated that District failed to materially implement Student's behavior services during the period from December 15, 2014 to September 25, 2015. In considering this issue, it is important to note that the analysis actually encompasses two shorter time periods: the period from December 15, 2014 through April 23, 2015, and the time period from April 23, 2015 to September 25, 2015, because Student's behavior services changed during that time period. The September 25, 2014 IEP discontinued Student's behavior services. Parents consented to the IEP, with the exception of the discontinuation of Student's behavior services. Therefore, to maintain the status quo, District instituted the behavior services in the last agreed-upon IEP of October 1, 2013, and these services were in to be in effect on December 15, 2014, the beginning of the time period at issue here. These services consisted of Lunch Club for 30 minutes per week, and included a single goal by which Student was to make relevant comments during a social opportunity with peers. This goal was to be measured by observation and data collection. At the April 23, 2015 IEP team meeting, the team added 60 minutes of behavioral consultation and the goal of maintaining space and not interrupting others.

20. With respect to Lunch Club, Mr. Dawson's testimony was the only specific evidence that District provided the behavior services with respect to Lunch Club at any

time during the time period from December 15, 2014 to September 25, 2015. Mr. Dawson was the supervisor of the educational assistant who conducted Lunch Club, and his testimony as to Student's participation in Lunch Club was based upon his once or twice monthly observations of Lunch Club, his recollections of his communications with the educational assistant, and his review of records. There was no specific evidence, documentary or otherwise, that anybody except Mr. Dawson saw Student at Lunch Club during this time period. Ms. Ruth testified that she believed Student was receiving Lunch Club services because she would see the Autism Services Team assistant around him at recess. However, she did not specify a time frame for this observation, and this vague recollection of seeing Student with the educational assistant at recess does not support that he was consistently receiving the behavioral services regarding Lunch Club as set forth in his IEP.

21. The only records produced at hearing with respect to District's providing of Student's other behavioral services during the period from December 15, 2014, to September 25, 2015, were records concerning Student's new behavior goal of maintaining personal space and not interrupting others, which covered the time period May 2015,¹⁸ and an Annual Goals and Objectives Progress Report, dated September 18, 2015. The goal progress report contained no data, but reported that Student had met the behavior goal and social skills goal contained in the April 23, 2015 IEP. One of the lessons of *M.C. v. Antelope Valley Union High School Dist., supra*,⁸⁵² F.3d 840, is that parents are to be able to monitor the implementation of the IEP. One of the key ways for parents to do so with respect to behavior services is by being able to check documentation, such as service logs, documentation of observations, and collected data.

¹⁸ The goal regarding these behaviors was developed at the April 23, 2015 IEP meeting.

22. The weight of the evidence demonstrated that the only behavior services District systematically provided to Student was to work with him on his behavior goal, set forth in the April 23, 2015 IEP, to maintain his personal space and refrain from interrupting others. In addition to testimony that Mr. Dawson and his educational assistant worked with Student on this goal, there was documentary evidence that data was collected regarding this goal. This data supported the goal progress report of September 18, 2015, that Student had met this goal. Additionally there were no further complaints from any teacher about Student's behavior in this regard, and Ms. Yoshihara eventually provided him a seatmate. All witnesses who testified about Student's ability to maintain personal space affirmed that he could do so, and there was no evidence that he interrupted his classmates so as to disturb or disrupt them. However, District's efforts in implementing this goal are not sufficient to avoid a conclusion that District materially failed to provide Student's behavior services during the period from December 15, 2014 through September 25, 2015, because there was more than a minor discrepancy between the services Student received and the services that District was to provide pursuant to the October 1, 2013 and April 23, 2015 IEP's. District thereby failed to provide Student a FAPE on this ground.

ISSUE 1C. FAILING TO OFFER APPROPRIATE BEHAVIOR SUPPORT FROM DECEMBER 15, 2014 TO SEPTEMBER 25, 2015

23. Student contends that District offered no behavior services during the period from December 15, 2014 to September 25, 2015. District contends that the claim is barred by the statute of limitations because the claim concerns the content of the September 25, 2014 IEP.

24. Legal Conclusions 1-5 and 8-14 are incorporated herein by this reference.

25. This issue presents the same concerns as did Issues 1A (i)-(iii), above, regarding whether it states a legal claim. As with Issues 1A (i)-(iii), the time period of the

claim, as framed by Student and as maintained by Student throughout this matter, does not implicate the statute of limitations, because the time period stated in the issue is within two years before the filing of Student's complaint. Further, as discussed above, this issue cannot state a claim if it is challenging the content of the September 25, 2014 IEP, because that would violate the "snapshot" rule. However, it is possible to consider these issues in another way, so that they state a legal claim. If the issues are viewed as a challenge to the manner in which District responded to Student's progress or lack thereof with respect to behaviors during the period from December 15, 2014 to September 25, 2015, then this issue states a claim.

26. For the reasons discussed above with respect to Issues 1A (i)-(iii), District did not deny Student a FAPE on this ground. In March 2015, Ms. Yoshihara reported to Mother new worrisome behaviors that Student had manifested since after winter break, regarding his use of desk space, touching his seatmates' possessions, and talking to them at inappropriate times during class. Mother requested an IEP team meeting to discuss these behaviors. District then convened two IEP team meetings, one in March 2015 and one in April 2015, and the team addressed these behaviors. The IEP team added behavior services to Student's IEP, in the form of 30 minutes per week of Autism Services Team Lunch Club, as well as 60 minutes per month of behavior consultation by an Autism Services Team behavior analyst, along with additional goals, as discussed above. As a result of these services, the new behaviors that Student had manifested were extinguished by September 2015. Under these circumstances, District appropriately responded to concerns about Student's newly-manifested behaviors, and did not deprive Student of a FAPE.

ISSUE 2A. MATERIALLY FAILING TO IMPLEMENT THE ACADEMIC SERVICES AND ACCOMMODATIONS IN THE SEPTEMBER 25, 2014 IEP FROM SEPTEMBER 25, 2015

27. Student contends that there was no documentation that Student received consultation from the special education Learning Center teacher from September 25, 2015, onward, that for two or three months some of the services were provided by uncredentialed staff members and that the accommodations were such that they could not have been addressed in a general education classroom. District contends that the evidence demonstrated that District provided the services pursuant to the IEP.

28. Legal Conclusions 1-5 and 17-18 are incorporated by this reference.

Analysis

29. In analyzing this issue, it is important to bear in mind the relevant time period and IEP's. The September 25, 2014 IEP provided that Student would receive 30 minutes per month of specialized academic instruction consultation services from a Learning Center teacher. At the next annual IEP, on September 25, 2015, District found that Student was no longer eligible for special education services, and exited Student from special education. Parents consented to District discontinuing speech and language services, but did not consent to District exiting Student from special education and discontinuing Student's Learning Center services (as well as the status quo behavior services from the October 1, 2013 IEP and the April 23, 2015 IEP.) Therefore, to maintain the status quo, District would continue to implement the 30 minutes per month Learning Center consultation services that were consented to in the September 25, 2014 IEP. District would also continue to implement the accommodations in that IEP, which were: priming for non-preferred tasks, use of an assignment notebook planner, a home-school communication system as needed, and checking for understanding.

30. Ms. Turner, Student's Learning Center teacher during the 2015-2016 school year, did not maintain any service logs regarding her consultations. She testified

that she provided the 30 minute consultations to Student every month.¹⁹Ms. Ruth, student's general education teacher in the subjects of English/Language Arts and social studies, confirmed Ms. Turner would come into her classroom to observe Student during this time period. Ms. Ruth also testified, without contradiction, that she implemented Student's accommodations from the September 25, 2014 IEP.

31. Ms. Black was Student's Learning Center teacher during the 2016-2017 school year. Ms. Black, who also testified at hearing, kept a service log reflecting the consultation services she provided Student, which revealed that she provided services to Student every month, starting on October 21, 2016. She implemented the only academic/prevocational goal in Student's September 25, 2014 IEP, on a stay put basis. The goal provided that Student was to look to a peer or ask his teacher when presented with a new task of direction he did not understand, and, by the November 30, 2016 IEP he had met this goal. Her testimony and her log were uncontradicted. Ms. Wendy Turner, his math and science teacher during the 2016-2017 school year, implemented his stay put accommodations from the September 25, 2015 IEP in class.

32. During the 2015-2016 school year, Student's academic performance was, in general, average to above average. For the last trimester of that school year, Student's report card reflected that he received the highest mark, a 3, in every area of Reading, except that he received a 2 in the area of demonstrating understanding of a text by using explicit evidence and drawing inferences. He received grades of 3 in all of the Skills for Success except that he received a 2 in the skill of attending to precision. He

¹⁹ Ms. Turner's medical leave occurred during the 2014-2015 school year. Therefore, Student's contention that Student was served by an uncredentialed teacher during Ms. Turner's absence is not relevant to this issue, and, in any event, the weight of the evidence did not support this contention.

received grades of 3 in all areas of Speaking and Listening, except that he received a grade of 2 in the area of identifying the reasons and evidence a speaker provided to support particular points. He received grades of 3 in all areas of Writing. He received grades of 2 in all areas of Math, and the report card noted he was making adequate progress in these areas. On the state standardized tests, his English Language Arts score was three points below the score needed to meet the Standard Met range. He performed in the Standard Exceeded range in Mathematics, and in the Advanced range on Science.

33. During the first trimester of the 2016-2017 school year, he had earned A's in Science, Physical Education, and Math. He had earned B's in English Language Arts, Social Studies, and Music. His November 30, 2016 IEP reflected that he had continued to meet his prevocational goal of staying on task by looking to a peer or a teacher to assist him when he was presented with a new task or direction he did not understand. There was no evidence contradicting Student's ability to perform this goal.

34. District should have maintained service logs with respect to the consulting services Ms. Turner provided. However, Ms. Turner's testimony that she provided the services contained in the September 2014 IEP during the 2015-2016 school year was supported by Ms. Ruth's testimony. Ms. Black kept service logs showing that she implemented Student's Learning Center services from the September 2014 IEP through the time of the November 30, 2016, IEP, and she testified in conformity with her service logs. Her testimony was also uncontradicted.

35. Based upon *Van Duyn, supra*, only a material failure to implement an IEP is actionable, and a student's progress can be a measure as to whether there has been a material failure to provide services. Student continued to meet his prevocational goal and perform at a high academic level during the 2015-2016 school year, which reflects that there was no material failure to provide services or accommodations during that

time pursuant to the September 2014 IEP. Ms. Black provided both credible uncontradicted testimony and credible uncontradicted documentary evidence that she provided services pursuant to that IEP during the first half of the 2016-2017 school year. Her services consisted of observing Student in the classroom and consulting and collaborating with Student's teachers. Ms. Ruth and Ms. Wendy Turner, two of his general education teachers during the school years at issue, credibly testified that they provided his accommodations. Consequently, Student was not deprived of a FAPE on this ground.

ISSUE 2B. MATERIALLY FAILING TO IMPLEMENT THE BEHAVIOR SERVICES IN THE OCTOBER 1, 2013 IEP, FROM SEPTEMBER 2015

36. Student contends that there was no documentation that Student received Lunch Club services or consultation from September 25, 2015, until October 5, 2016, on which date an Autism Services Team data sheet was generated which was prepared by an educational assistant. Thereafter, there are two Autism Services Team "goal sheets" dated October 2016. At the November 30, 2016 IEP meeting, District reported that the two peer interaction goals of the April 23, 2015 IEP meeting were met. However, there was no documentation supporting that claim between September 25, 2015 and October 5, 2016, despite the fact that both goals were to be measured, at least in part, by data collection. District contends that the evidence showed that behavior services were provided to Student from the September 25, 2015 IEP meeting and thereafter.

37. Legal Conclusions 1-5 and 17-18 are incorporated by this reference.

Analysis

38. Again, it is important to note that District found Student not eligible for special education at the September 25, 2015 IEP team meeting, and terminated his behavior services at that time. Since Parents did not agree with the IEP team regarding

those actions, District has provided Student “stay put” behavior services from both the October 1, 2013 IEP and the April 23, 2015 IEP, which are described above.

39. The analysis and conclusion on this issue are similar to those for Issue 1B, above. The primary evidence that any behavioral services were provided to Student during most of this time period is the testimony of Mr. Dawson, who supervised the assistant who led Lunch Club, and who was responsible for providing 60 minutes of behavior consultation per month. However, again, there was no testimony that anybody except Mr. Dawson saw Student at Lunch Club, which, during this time period, was the most direct behavior intervention Student received. There was no specific evidence as to what Student did at Lunch Club or how it improved his social skills.

40. There was no documentation of Mr. Dawson’s services during this time period. There was one page of “Consultation Data” dated October 5, 2016, prepared by the Autism Services Team educational assistant regarding a 15-minute observation of Student in his physical education class. The only documentation prior to the November 30, 2016 IEP team meeting that Student attended Lunch Club are two goal sheets dated October 2016, which were prepared by the Autism Services Team educational assistant. These two pages charted Student’s performance on his goals during Lunch Club. The November 30, 2016 IEP reflected that Student continued to meet his social goal from the October 1, 2013 IEP and the behavior and social goals from the April 23, 2015 IEP, all of which required that they be measured by data and observation. However, except for the documentation described in this paragraph, there was no data collected during the period from September 25, 2015 to December 15, 2016 (the date Student filed his complaint) as to the single social goal regarding making conversational comments in the October 1, 2013 IEP, or as to the social skills goal in the April 23, 2015 IEP to

independently initiate, engage, and maintain conversations with peers that naturally occur in social environments in structured and unstructured settings.²⁰

41. Yet, Student continued to have a few behavioral and social issues during this period. He had some difficulty conversing with peers. For example, he did not usually initiate conversations or initiate play on the yard, and he was not always able to effectively and clearly express his idea or story or joke. In May 2016, Ms. Ruth reported to Mother that Student was having some difficulty concentrating in class, and he was talking to other students during work times. He sometimes spoke about a particular subject excessively. He did not socialize with his classmates outside of school.

42. The evidence demonstrated that District materially failed to provide all of Student's social skills and behavior services from September 25, 2015 through November 30; 2016. This is not to say that Mr. Dawson's testimony regarding the behavior services he and the educational assistant provided was not credible. However, his testimony alone was not sufficient. This is particularly so because the goals to which the Autism Services Team efforts were directed were to be measured by observations and data, and data requires documentation. District should have maintained data, as

²⁰ There was also no data collected during this time period with respect to the maintaining space behavior goal in the April 23, 2015 IEP, however, data had previously been collected with respect to the goal. The evidence demonstrated the goal was met and the behavior targeted by the goal was essentially extinguished by September 2015 and there was no evidence that the behavior manifested itself thereafter. The goal only remained on Student's IEP after the September 25, 2014 IEP because it was stay put. Under these circumstances, the failure to take data on the goal after September 2015 does not reflect that there was a failure of implementation of the goal. Therefore, this goal has not been included as part of the analysis of this issue.

well as logs of the Lunch Club services and Mr. Dawson's consultations. Based upon *Van Duyn, supra*, the dearth of documentary evidence that the services were provided, combined with the lack of evidence as to Student's behavioral growth by reason of Lunch Club, shows that there was more than a minor discrepancy between the services District documented it provided and the services required by the Student's IEP's of October 1, 2013 and April 23, 2015. District thereby deprived Student of a FAPE on this ground.

ISSUE 3. FAILING TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES

43. Student contends that the District's determination at the September 25, 2015 IEP meeting that Student was no longer eligible for special education because he had met his social skills and behavior goals deprived Student of a FAPE. Student contends that the District's determination was not supported by any data, that District did not offer any evidence to support its conclusion that Student no longer met the eligibility criteria for autism, and that Dr. Johnson's assessment and testimony demonstrated that Student met the eligibility criteria.

44. District contends that the decision that Student no longer met the eligibility criteria for special education did not deprive Student of a FAPE, because he received appropriate stay put services based upon the September 25, 2014 IEP, the October 1, 2013 IEP, and the April 23, 2015 IEP.

Law Pertaining to Eligibility

45. The ALJ has authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified Sch. Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487 at 492-493.) If District failed to identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the

Student, District has denied a FAPE. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001)158 F.Supp.2d 1190 at 1196-1197.)

46. Under both California law and the IDEA, a child with autism who cannot access the general education curriculum with accommodations due to his disability may be eligible for special education and related services. (20 U.S.C. § 1401(3)(A); Ed. Code, §56026, subd. (a), (b).) The general education curriculum encompasses not only academic needs, but also includes social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. Cal. Special Ed. Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467.)

47. Both California law and the IDEA define autism as a developmental disability, generally evident before age three, that significantly affects verbal and nonverbal communication and social interaction, that adversely affects a child's educational performance. Other associated characteristics of autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual sensory sensitivities. (Cal. Code Regs. tit. 5§ 3030, subd. (b)(1);34 C.F.R. § 300.8(c).)California law provides that a student with autism is a student who exhibits autistic-like behaviors, including, but not limited to, any, some, or all of the following: (1) an inability to use oral language for appropriate communication; (2) a history of extreme withdrawal or of relating to people inappropriately, and continued impairment in social interaction from infancy through early childhood; (3) an obsession to maintain sameness; (4) extreme preoccupation with objects, inappropriate use of objects, or both;(5) extreme resistance to controls; (6) display of peculiar motoric mannerisms and motility patterns; (7) self-stimulating, ritualistic behavior. (Ed. Code, § 56846.2.)

Analysis

48. Student has met his burden of demonstrating that District's finding that Student no longer met the criteria for special education as a child with autism deprived Student of a FAPE. First, the evidence demonstrated that District members of the IEP team erred in determining at the September 25, 2015 IEP meeting that Student no longer met the eligibility criteria for autism. Dr. Feldman, Ms. Alcala, and Ms. Black admitted that Student needed and benefitted from the services offered in his November 30, 2016 IEP, and there was no evidence that any aspect of Student's autism condition or its impact on his education, which includes his social skills, changed between the September 25, 2015 IEP and the November 30, 2016 IEP. In this regard, Ms. Dillard's assessment report dated September 25, 2015, which provided part of the basis for District's determination that Student was no longer eligible for special education, was unclear. One sentence of the report stated that Student's results on the Autism Diagnostic Schedule were consistent with a classification of autism spectrum, and another sentence stated that Student's results were not consistent with such a classification. Second, Dr. Johnson's assessment, despite its flaws, demonstrated that Student was a child with autism, who, due to his autism, had academic and social behavior needs that adversely affected his educational performance. Student required special education and related services to address those needs so that he could access the curriculum.

49. District's contention that it provided a FAPE since it continued to provide all academic and behavior services from the previous IEP's, and Student progressed, is not persuasive. This contention assumes that the services District provided were actually provided, and that they were sufficient.

50. The two services at issue here are the academic services, represented by Ms. Turner's and Ms. Black's consultative special education services, and the behavior

services, consisting of the Lunch Club and behavior supervision services pursuant to the October 1, 2013 IEP and the April 23, 2015 IEP, both of which were provided under the auspices of the Autism Services Team.²¹As was discussed above, District implemented the September 25, 2014 IEP with respect to the consultative special education services. Moreover, the evidence reflected that those services were sufficient to provide Student a FAPE. Student performed at a high level in most academic areas in the general education environment, as measured by his grades and his standardized test scores, and he continually made progress, even when he advanced toward the more challenging academic environment of middle school. Dr. Johnson believed that the facts that his standardized state test scores in English Language Arts was lower in some areas than his report grades, and that his standardized state test scores in Math were higher than his grades, were attributable to academic difficulties. She also considered his grades of 2 on his report card in Math and in one area of English Language Arts as indicative of academic difficulties. However, there was no evidence that the discrepancies between his report card grades and his state test scores were significant. By the accounts of all of

²¹ Student's issues at hearing and his closing brief did not address the quantity or quality of Student's speech and language services, and Student did not present evidence from a speech and language pathologist as to those matters. As was noted above, Student consented to the September 25, 2015 IEP to the extent that it terminated Student's speech and language services. The November 30, 2016 IEP, which reinstated Student's autism eligibility, did not offer speech and language therapy, but rather offered Student a speech and language evaluation. No evidence was presented as to the status or results of that evaluation. Therefore, whether Student was deprived of a FAPE because of the termination of his speech and language services in the September 25, 2015 IEP will not be discussed in this Decision.

his teachers who testified, Student was always able to access and make progress in his academics, and they had no concerns. The academic services in Student's September 25, 2014 IEP were reasonably calculated to enable him to make appropriate progress in the general education curriculum in light of Student's circumstances, and thereby offered him a FAPE.

51. The result is different, however, with respect to Student's behavior services. As was described above, District failed to materially implement Student's behavior services during the 2014-2015 and 2015-2016 academic years, which deprived him of a FAPE. Consequently, District's contention that Student received a FAPE because he received behavior services even though District decided that Student was no longer eligible for special education is not meritorious.

52. Additionally, as a result of District's decision that Student no longer was eligible for special education, no IEP team considered Student's present levels of performance, and his needs, and offered updated goals and services to address his needs. For example, Student continued to need assistance and support to improve his abilities to initiate conversations, to play with his classmates, and to maintain social interactions. He did not progress in the social skills area until after he was once again found eligible for special education at the November 30, 2016 IEP team meeting. The failure of District to offer updated support and assistance from September 25, 2015 until the November 30, 2016 IEP deprived Student of a FAPE.

ISSUE 4A. APPROPRIATE BEHAVIOR, SOCIAL INTERACTION, AND ACADEMIC GOALS IN THE NOVEMBER 30, 2016 IEP

53. Student contends that the goals in the November 30, 2016 IEP addressing social interaction and communicating information did not address Student's behavior deficits in attention and concentration, flexibility and problem solving, adaptability, and repetitive behaviors. Student contends that the academic goal to address Student's

engaging effectively by expressing on topic ideas during peer conversations on grade level topics, texts, and issues did not fully address the needs Dr. Johnson found. Dr. Johnson believed Student's needs also included to demonstrate grade-level critical thinking skills, using appropriate explanation and application of concepts, both orally and in writing, across all academic subjects.

54. With respect to the academic goal, District contends that Dr. Johnson's assessment showed that Student's cognitive ability ranged from average to superior. In general, his academic achievement was consistent with his ability, Student's teachers had no concerns about his academic functioning, and he required no academic goal. District further contends that Student exhibited minimal maladaptive behaviors, and that his fidgeting and bouncing in his seat did not impede his learning or cause other Students to have negative reactions toward him. Rather, Student's teachers felt that Student's fidgeting helped him focus. Student required assistance with classroom discussions and social interactions, and the subject goals addressed those needs.

Law pertaining to goals

55. An IEP shall include a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 USC §1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2).) A particular goal may be appropriate even if it does not have a one-to-one correspondence with a specific need, as long as the goals as a whole address all of a child's needs and enable progress that is appropriate in light of his circumstances. (*L.O., etc. v. New York City Dept. of Educ.* (2d Cir. 2016) 822 F.3d 95, 118-119.) No information need be included in an IEP beyond what is statutorily required. (20 U.S.C. § 20 U.S.C. §1414 (d)(1)(A)(ii)(I).)

Analysis

56. Student's November 30, 2016 IEP contained an academic goal that addressed communicating information. It provided that Student would engage effectively (by expressing on-topic ideas so that peers understood and by responding to peer ideas) in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on sixth grade topics, texts, and issues. This goal is an appropriate goal. Student criticizes the goal because it does not specifically include a few items, such as references to concepts, and it does not apply to written expression, as recommended by Dr. Johnson. These criticisms are unmeritorious. First, the evidence demonstrated that Student was performing at grade level in the classroom, and none of his teachers, including Ms. Black, his special education consultation teacher, had any concerns about his academic performance. To the extent that the goal addressed discussion on grade level academic topics, texts, and issues, it required discussion about concepts, and it tied directly to Student's social skills deficit in communicating and explaining his ideas to his peers. Dr. Johnson's recommendation that Student have a goal to address written expression was not necessary, as written expression was one of the academic areas in which Student was most capable according to her assessment, and was not an area of need.

57. Furthermore, Dr. Johnson is not an educator, and her testimony and report demonstrated very little awareness of the requirements of a FAPE. Rather, her report and testimony were directed at maximizing Student's education as a child with autism. This is not District's responsibility, as was reiterated in the recent *Andrew F. case, supra*. This academic goal is appropriate.

58. Student's academic goal included a social component, in that it targeted peer conversations. Student's behavior goal also addressed social interaction, and provided that Student would demonstrate social skills by appropriately entering and

exiting social interactions (greetings, farewells, eye contact, body orientation, etc.), and expand his friendship network by at least one additional peer (showing interest in others, paying attention, listening to others' ideas, giving compliments, etc.), with a minimum of 20 conversational exchanges.

59. Student's criticisms of this behavior goal are unmeritorious. Dr. Johnson's report recommended that Student's social goals should be directed to friendships and sustained social engagements, including social skills, and promote self-awareness as to undesirable social behaviors. This goal, especially when combined with the academic communication goal, covers these areas. The goal might not cover these areas as precisely or intensively as Dr. Johnson recommended, but the evidence demonstrated that Student's social skills were not as weak, at least at school, as Dr. Johnson and Mother perceived them to be. Rather, the evidence demonstrated that Student had some reluctance to initiate social contacts, and he did not habitually converse with other people when he was eating lunch, but he did not sit alone at lunch, he had some friends at school, he participated in class and in group projects, he participated in extra-curricular activities, and he played games with and conversed with other students. This goal was appropriate to address Student's needs.

60. The November 30, 2016 IEP did not contain a goal directed at Student's various behaviors, such as fidgeting and fiddling with small objects, moving his body in his chair, mumbling to himself, and occasional lack of focus. The IEP also did not contain any goals regarding flexibility, problem solving, and adaptability. The evidence demonstrated that to the extent that these were maladaptive behaviors, they presented minimal issues, and did not affect those around him or his own ability to access his education. When he lost focus, he was readily redirected. His teachers believed that his fidgeting helped him to attend. Additionally, there was no evidence that any challenges Student had with flexibility, problem solving, or adaptability affected his academic

performance in any manner, or were socially detrimental. Under the circumstances, these behaviors and characteristics were not at such a level that there was an educational need to address them, or that he required a goal in these areas so as to obtain a meaningful benefit from his education. District did not deprive Student of a FAPE on this ground.

ISSUE 4B. APPROPRIATE BEHAVIOR SUPPORT IN THE NOVEMBER 30, 2016 IEP.

61. Student contends that the behavior support offered in the November 30, 2016 was insufficient. The behavior consulting services under the auspices of the Autism Services Team remained the same at one time per month for 60 minutes, but the group behavior services were reduced by one-half. Instead of Lunch Club for 30 minutes per week, the IEP team substituted the new social skills group at a frequency of twice per month for 30 minutes each time. Student contends that his social skills are delayed, that he did not make progress in the Lunch Club program, and that he needs more intensive services than the new social skills group provides.

62. District contends that, because Parents did not consent to the group services of twice per month for 30 minutes, status quo group services have been provided for 30 minutes per week. District further contends that Student's current services are sufficient. He initiates and seeks social interactions, which he is capable of sustaining. His weaknesses were addressed by the IEP goals and the social skills group. His behaviors did not distract the other students and he was easily redirected.

Behavior

63. The IDEA and California law require that an IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address behavior when a student's behaviors impedes his learning or that of others. (34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Under the IDEA, the Department of

Education recommends that school districts be proactive and perform a functional behavioral assessment when a child engages in behaviors which interfere with learning. Following the functional behavioral assessment, a school district develops a behavior support plan or a behavioral intervention plan. (Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46721(August 14, 2006).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028.)

Analysis

64. District is correct that, as of the time of the November 30, 2016 IEP, Student did not have maladaptive behaviors that impeded his learning or that of others. He did not engage in disruptive or anti-social behaviors, and there was no evidence that Student has ever been subject to any disciplinary action due to his behaviors. In class, Student fidgeted, bounced in his seat, and mumbled to himself, but there was no evidence that this conduct affected his learning or that of others. Rather, the evidence reflected that Student's fidgeting assisted him in focusing. His attention issues were minor, and he was easily redirected when he was distracted. None of his teachers had any concerns about his academic performance. The weight of the evidence demonstrated that Student performed well in the general education environment, and did not require behavior services because of any maladaptive behaviors. For reasons discussed above, Dr. Johnson's opinion that Student's behaviors required intensive behavior therapy was not persuasive. For example, her analysis and opinions were not balanced as between Parents' view of Student and his teachers' view of Student. She did not take into account that her assessment was performed as Student was entering middle school, and was also entering a new school. Dr. Johnson made no attempt to discern which of Student's behaviors were due to his disability versus being naturally

part of the normal make-up of an 11-year-old boy. She demonstrated little understanding of District's obligations to provide a FAPE.

65. With respect to social skills, however, District's contention that the services it offered Student in the November 30, 2016 IEP were sufficient to provide a FAPE is not meritorious. First, District partly relies on the fact that Student attended the new social skills group every week for 30 minutes, just as he had Lunch Club, due to "stay put." Thus, even though the IEP itself cut Student's social skills services in half, by only offering the social skills group for 60 minutes per month, District contends that Student received a FAPE because he was benefitting from the additional time at the social skills group. That may be so. However, District is required to provide a formal, written offer of a FAPE. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The formal written offer of a FAPE in this IEP only offered services for 60 minutes per month. District cites no authority that it can rely on its compliance with the principles of stay put to cure an inappropriate formal offer of services. The offer of services must be formally documented in the IEP, so that, if Student moves to another school district, or if Student's IEP team members change, Student's educational program is not jeopardized.

66. Second, the District offered no justification for decreasing Student's social skills services by half at the November 30, 2016 IEP. The evidence did not reflect that Student's social skills at school were as poor as Dr. Johnson perceived and reported them to be, but the evidence also did not reflect that the bare minimum of social skills training that 60 minutes per month would provide was reasonably calculated to enable Student to make progress in the general education curriculum in light of his circumstances. District did not provide a cogent explanation for this service level. Rather, the evidence reflected that Student had some social skills, but he also had some deficiencies in social skills, such as a reluctance to engage peers socially during lunch, some inability to maintain conversations with others, and deficiencies in the ability to

demonstrate interest in the ideas and feelings of others. The evidence also demonstrated that Student's social skills were improving by his attendance at the social skills group for 30 minutes per week. Indeed, Dr. Feldman admitted at hearing that the social skills group should meet for 30 minutes each week, and he was contemplating requesting an IEP team meeting to formally increase the service for Student. Under these circumstances, the November 30, 2016 IEP did not offer a FAPE in the area of social skills.

REMEDIES

1. 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 analysis, 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.*)

2. Student prevailed on Issues 1B, 2B, 3, and 4B. In his closing brief, Student requests as remedy that District fund a full-time one-to-one behavioral aide and 24 hours per month of supervision, all to be provided by a nonpublic agency through the end of the 2017-2018 school year. Student also requests that District fund Student's enrollment in the 16-week UCLA social skills program.

3. As was discussed above, there was no documentary evidence that District implemented Student's 30 minutes per week Lunch Club services between September 25, 2014, and March 2015, and District did not establish that it systematically and regularly provided Student's Lunch Club services thereafter. Except as described above, District also did not establish that it systematically and regularly implemented Student's behavior/social goals from September 25, 2014 and thereafter. As a result, District deprived Student of a FAPE. Additionally, by not offering sufficient behavior services in the November 30, 2016 IEP, District deprived Student of a FAPE. However, at all relevant times Student remained a well-behaved student who was accessing the general education curriculum, and earning good grades in a full-time general education environment. He displayed some social awkwardness, and some less-than ideal self-stimulatory behaviors, but he independently participated in class, independently participated in extracurricular activities, independently participated in group class work, played physical games and internet games with peers, and independently conversed with peers. Student did not demonstrate that he required Dr. Johnson's four pages of recommendations, including the restrictive environment of a full-time one to one aide trained in applied behavior analysis and supervised by a certified behavior analyst, a functional behavior assessment, an intensive social skills program, and a plethora of additional IEP goals, so as to progress in the general education curriculum and receive a FAPE. Furthermore, by the time of hearing, Student's social skills were improving as a result of the social skills program offered in his November 30, 2016, IEP. Therefore, an increase of his behavior and social skills services by formally increasing his participation in his current social skills group to 30 minutes per week, and adding an hour a week of social skills training provided by a nonpublic agency through the 2017-2018 school year, are deemed to be sufficient to compensate for the FAPE deprivations described in this Decision.

ORDER

1. District will provide one hour per week of social skills services from a nonpublic agency, to commence within 15 days of the date of this Decision, to proceed through the end of the 2016-2017 regular school year, and then to proceed from the beginning through the end of the 2017-2018 regular school year. This service shall not be stay put.

2. District will increase the social skills service offered in Student's November 30, 2016 IEP to one hour per week, effective upon the date of this Decision until Student's next annual IEP team meeting. This service shall be stay put.

3. All other relief sought by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on issues 1B, 2B, 3, and 4B. District prevailed on issues 1A, 1C, 2A, and 4A.

RIGHT TO APPEAL

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

DATED: May 9, 2017

_____/s/_____

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings