

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

DEL MAR UNION SCHOOL DISTRICT.

OAH Case No. 2018020023

DEL MAR UNION SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018070786

DECISION

Parents on Behalf of Student filed a request for due process with the Office of Administrative Hearings in OAH case number 2018020023 on January 30, 2018, naming Del Mar Union School District. OAH granted Student's request to amend his complaint on May 25, 2018.<sup>1</sup> On June 14, 2018, OAH granted Student's motion for continuance. On

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<sup>1</sup> Del Mar filed its response to Student's amended complaint on May 23, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200 (*M.C.*.)

July 17, 2018, Del Mar filed a due process hearing request with OAH in OAH case number 2018070786, naming Student. On July 30, 2018, OAH granted Student's motion to consolidate the two cases, designating Student's case as primary.

Administrative Law Judge Darrell Lepkowsky heard this matter in Del Mar, California, on August 28, 29, and 30, 2018, and on September 4, 5, 6, 12, 13, and 14, 2018.

Attorneys Corrin M. Johnson and Matthew H. Storey represented Student. Mother and Father attended the majority of the hearing. Student did not attend the hearing.

Attorneys Summer D. Dalessandro and Sarah E. Orloff represented Del Mar. Lori Cummins, Del Mar's Director of Student Services, attended the hearing.

At the parties' request, OAH granted a continuance until October 15, 2018, for the parties to file written closing arguments.<sup>2</sup> The parties timely filed their briefs at which time the record was closed and the matter was submitted for decision. The parties subsequently agreed to and OAH granted on November 1, 2018, an additional two-week continuance of the case.

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<sup>2</sup> On October 18, 2018, Del Mar filed a motion to strike table one of Student's closing brief. Student filed an opposition on October 19, 2018. The table is not new evidence. Rather it is a compilation of information already in the record. Del Mar's motion is therefore denied.

## ISSUES<sup>3</sup>

### STUDENT'S ISSUES:

1. Did Del Mar deny Student a free appropriate public education during the 2016-2017 school year, beginning January 1, 2017, by failing to convene individualized education program team meetings, as warranted by Student's lack of progress and escalating behaviors?

2. Did Del Mar deny Student a FAPE during the 2016-2017 school year, by failing to:

- (a) Timely inform Parents of behavioral emergency reports;
- (b) Provide Parents behavioral emergency reports; and
- (c) Convene an IEP team meeting regarding Student's behaviors and Del Mar's use of restraints on Student?

3. Did Del Mar deny Student a FAPE, beginning January 1, 2017, during the 2016-2017 and 2017-2018 school years, by failing to timely and appropriately assess Student in the areas of academics; psychoeducational, cognitive, social-emotional, and behavior?

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<sup>3</sup> At hearing on August 29, 2018, Student limited issues 1 and 3 to the period starting January 1, 2017. Student also withdrew all issues alleging Del Mar denied him appropriate assessments or services in the areas of occupational therapy and speech and language therapy. Student further stipulated that the occupational therapy and speech and language therapy services Del Mar provided him were appropriate during all times relevant to this case. The issues for hearing have therefore been rephrased to conform to Student's withdrawal of issues and stipulation, and for clarity. The ALJ has the authority to redefine a party's issues so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

4. Did Del Mar deny Student a FAPE in the IEPs dated October 21, 2016, June 9, 2017, and May 8, 2018, by failing to provide appropriate (a) placement; (b) services, excluding occupational therapy and speech therapy; (c) supports; and (d) accommodations, to meet his therapeutic and behavior needs?

5. Did Del Mar deny Student a FAPE by failing to place Student at a residential treatment center on June 9, 2017?

6. Did Del Mar deny Student a FAPE by failing to place Student at a residential treatment center on May 15, 2018?

#### DEL MAR'S ISSUE:

7. Did Del Mar's IEP offer of May 8, 2018 IEP, as modified on May 15, 2018, offer Student a FAPE in the least restrictive environment?

#### SUMMARY OF DECISION

Student was a young boy with autism and related speech and language deficits. He had significant behavioral issues based on anxiety, depression, inattention, and hyperactivity. He asserted several procedural and substantive violations against Del Mar, primarily asserting that Del Mar's failure to offer him placement at a residential treatment center denied him a FAPE.

Student failed to demonstrate that he required placement at a residential treatment center at any time relevant to this case to receive a FAPE. Student failed to prove that Del Mar's assessments did not meet legal standards. Student further failed to prove that Del Mar did not timely assess him in the areas of academics, psychoeducational, or cognition. Student also failed to show that his October 21, 2016 IEP did not offer him a FAPE. Finally, Student failed to prove that Del Mar's delay in providing Parents notice of five behavioral emergencies denied him a FAPE.

However, Student proved that Del Mar should have assessed him in spring 2017,

to determine the reason for his increasing behavioral issues. Student also proved that Del Mar denied him a FAPE by failing to provide appropriate services and supports to address his behavioral needs in the June 9, 2017 IEP.

Del Mar met its burden of proving that the May 8, 2018 IEP, as modified on May 15, 2018, constituted a FAPE in the least restrictive environment.

## FACTUAL FINDINGS

### BACKGROUND INFORMATION ABOUT STUDENT

1. Student was 11-years old and in sixth grade at the time of the hearing. Parents resided within Del Mar's boundaries at all times relevant to this case. Student was eligible for special education and related services under the primary eligibility category of other health impaired, and the secondary categories of autism, speech or language impairment, and emotional disturbance. Student resided and attended school at Sandhill Child Development Center, a residential treatment center in New Mexico, where Parents privately placed him.

2. Student was kind, but had emotional and behavioral struggles from an early age. He attended private school for preschool, kindergarten, and first grade. He was inattentive, afraid to join in activities, and faked feeling ill. He sometimes left class and did not return. He hid in the bathroom during tests. At the end of first grade, the private school informed Parents that it could not address Student's emotional and educational needs and that he had to go elsewhere for school.

3. Parents enrolled Student in Del Mar for second grade. Del Mar administered a full initial assessment<sup>4</sup> to Student in the areas of psychoeducational,

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<sup>4</sup> The terms "assessment" and "evaluation" are synonyms. The terms are used interchangeably in this decision.

speech and language, occupational therapy, and in the need for an instructional aide. Based on the results of the assessment, Del Mar determined Student qualified for special education. Student's IEP team developed an IEP for him. The IEP placed Student in a general education classroom with supporting services and an aide. The aide initially supported Student part time but was increased to full time during the school year.

4. Student continued to have the same behavioral problems exhibited at his private school. He left class with and without permission. He required substantial one-on-one attention and redirection. He started having fits of anger if he did not get his way. He sometimes turned over his chair or crawled under the desk. However, Student kept up academically with his general education peers.

5. Student also exhibited significant behavioral issues at home. Parents took Student to see various mental health professionals. During the summer after Student completed second grade, Parents placed Student at an out-of-state social camp for children with challenging behaviors. Student made progress at the camp with his behaviors. Parents did not disclose to Del Mar that Student's behavioral issues at home were significant and did not tell Del Mar that they had placed Student at the camp.

6. For the 2015-2016 school year, Student began third grade in a general education classroom at Del Mar. Although he had a good teacher, he had behavioral challenges from the outset of the school year. He exhibited high levels of anxiety. He eloped from the classroom and had other maladaptive behaviors. Parents consulted with Student's pediatrician and therapist. They treated Student's anxiety by prescribing anti-anxiety medications. The medications did not work. To the contrary, Student's anxiety and maladaptive behaviors increased at home and at school. At home, Student became suicidal and aggressive. These latter behaviors did not manifest at school during this time and Parents did not inform Del Mar of the extent of the problems at home.

7. Student's IEP team met on October 16 and 19, 2015, to address his anxiety

and resulting behaviors. In consultation with Parents and Student's advocate, Del Mar added supports to assist Student in class and shortened Student's school day. The IEP team noted that ignoring Student's behaviors was not an effective intervention. Instead, it was more helpful to engage him and school staff members were directed to do so.

8. Student's IEP team met again on October 28, 2015, to develop his annual IEP. Parents provided a neuropsychological report from a private provider.<sup>5</sup> In pertinent part, the report found that Student demonstrated acute anxiety and depression. Parents informed Del Mar that they were funding private cognitive behavioral therapy for Student.

9. The IEP team agreed that Student's anxiety was the source of his behavioral challenges at school. To address Student's behavior, Del Mar's IEP offered a one-on-one aide throughout the school day; a temporary shortened school day; goals in behavior; consultation with a behavior specialist; a behavior intervention plan; a positive reinforcement system; individual counseling and guidance services 600 minutes a year; individual counseling 30 minutes a week; individual and group specialized academic instruction; and numerous accommodations. Del Mar also offered Student extended school year services, which it continued to do throughout Student's attendance at its schools. However, Parents generally did not have Student attend public school summer programs, choosing instead to send him to programs they funded.

10. Del Mar did not, however, believe that it could provide the counseling and other mental health supports Student required. It therefore, with Parents' consent, referred Student to a social emotional academic support program available in another

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<sup>5</sup> None of Student's private mental health providers, other than those from the residential placements he attended after June 2017, testified at the hearing.

school district. The program accepted Student and he began attending at the beginning of December 2015.

#### STUDENT'S INITIAL PLACEMENT AT NORTH COUNTY ACADEMY

11. Student's behavior challenges did not decrease in the new program. Based on Student's lack of progress, Del Mar offered to place Student at North County Academy, a public school program operated by the North Coastal Consortium for Special Education and the San Diego County Office of Education. Parents agreed to the change in placement.

12. North County Academy operated as a therapeutic day treatment program, with a high staff to student ratio, more intensive counseling, and counseling imbedded in the program. Each classroom had approximately 10 students, with one credentialed special education teacher and three instructional aides. Therapeutic and academic support was offered for the entire school day. A staff therapist was available all day to work with any student in crisis. The program included a positive behavior reinforcement program utilized throughout the school day in and out of the classroom.

13. The North County Academy curriculum was based on common core standards. It utilized research-based programs in its specialized academic instruction components. While a student might receive accommodations such as less test questions, the curriculum was not modified.

14. To support Student's placement at North County Academy, Del Mar modified Student's IEP through an amended IEP dated February 12, 2016. The IEP provided Student with 1,455 minutes a week of specialized academic instruction, which was almost five hours a day, and constituted Student's full academic day at school. The IEP also provided Student with 50 minutes a week of individual counseling; 120 minutes a week of counseling and guidance; 60 minutes a week of speech and language therapy; and 900 minutes a year of occupational therapy. The IEP further provided Parents with



100 minutes a month of parent counseling. Parents never accessed the counseling services. Mother's testimony showed that Parents were reserved and private people and she did not want to discuss issues in the home with Del Mar or North County Academy personnel. This desire to keep private personal and home issues led to Parents failing to inform Del Mar or North County Academy staff the significant behavioral problems Student was having at home, and that Parents began divorce proceedings in late 2016 or early 2017.

15. The IEP also continued the accommodations from Student's previous IEP. These consisted of prompting; chunking of assignments and checks to determine if Student understood assignments; combining verbal instructions with visual supports; limiting potential distractions; visual and verbal cues to Student to use positive coping strategies; the use of the positive reinforcement system; access to an alternate work location if Student was unable to do his schoolwork in the classroom; front loading of assignments and tests (the provision of information about the assignment or test before Student had to do either one); and the use of sensory tools. Parents consented to the February 12, 2016 IEP, and Student began attending North County Academy on February 22, 2016. The North County Academy met all of Student's unique needs at the time he enrolled there.

#### Data Collection at North County Academy

16. North County Academy staff collected data on each student's behavior approximately every 40 minutes inside and outside the classroom. The data measured three areas of behavior: productivity, safety, and respect. Although the goal at North County Academy was for students to have scores of 100 percent in each area, North County Academy staff considered a student to be successful in the North County Academy program if he or she had scores of 70 percent or more.

17. Productivity measured a student's overall participation and work completion, including work completed with prompts and support from adults. Safety measured a student's ability to control physical and verbal aggression, and the student's level of making threats of harm to self or others. Respect measured a student's ability to use kind words, demonstrate expected behaviors and language, and follow directions.

#### Use of Restraints at North County Academy

18. There are several methodologies available to staff at schools and other institutions to address the need to restrain a child under different circumstances. One such method is by the Crisis Prevention Institute, which teaches a methodology known as CPI. It was the methodology employed at North County Academy.

19. Haley Kitchens, Student's fourth grade teacher at North County Academy, and Heather Chamberlain, North County Academy's vice-principal, explained the components of CPI. CPI is designed to prevent and manage crisis behaviors. It focuses on teaching staff to recognize, prevent, manage, and respond to escalating behaviors. Its principles include teaching staff how to use strategies and restraint holds to keep safe the person whose behavior is escalating as well as the people around him or her.

20. The first component of CPI is training staff to use techniques effective in de-escalating the stress or tension in a child who appears agitated. If the child continues to be agitated and cannot de-escalate, the next step is to escort the child to another area, usually to another room, using a hands-on approach in which the child cannot move out of the escort and is guided out of the area. If the child's behavior is such that he or she is a danger to him or herself or to others, the next step is to use a "children's hold." This consists of crossing the child's hands over the chest and securing them. Generally, one adult is involved in implementing a children's hold. If that hold is insufficient, then another adult may be needed to help secure the child in a hold, either in a standing or a sitting position. The hold could be instituted either as part of an

escort hold or independent of an escort, if the child's behavior needed immediate response and it was not safe to escort him or her to another area.

21. CPI instructs that staff should not interact verbally with a child during a hold. A child who is so agitated or aggressive that a hold is necessary is generally in a "fight or flight" mode, and not able to process verbal instructions or other verbal input. Therefore, CPI teaches staff to use visual cues or gestures until the child has de-escalated.

22. Neither CPI escorts nor holds were designed as preventative measures. Rather, they were to be used solely to keep the child safe and to keep others around the child safe. Therefore, the holds were designed to be of short duration, and only until the child was no longer a danger to self or others.

23. CPI does not permit the use of a "prone" hold, where a person is placed face down on the floor and restrained from moving any part of his or her body. Prone holds are dangerous because there is a higher risk of a child suffocating as staff is either above or on top of the child.

24. North County Academy procedures, in accord with state law, required North County Academy to inform a child's parents within a day after any type of restraint was required to be used on the child. North County Academy generally provided the parents with a behavior emergency report, sent an email informing the parents of the incident, or had the child's teacher or another staff member telephone the parents.

## 2016 SPRING SEMESTER AT NORTH COUNTY ACADEMY

25. Student's IEP team met on March 29, 2016, to review his 30-day progress at North County Academy. North County Academy moved Student from a class of younger children to a class of older children; the change was beneficial as Student exhibited less anxiety in class. The school therapist provided a counseling treatment

plan to Parents. The therapist attempted to contact Student's private counselor but the counselor did not return the call. The IEP team agreed to retain the same programming, services, and supports for Student as indicated in his February 12, 2016 IEP.

26. Student had a behavior incident on April 16, 2016, in which he refused to return to class from physical education and became aggressive toward staff. Staff placed him in a seated restraint. It was the only behavioral incident that required staff to use a restraint on Student during the spring 2016 semester. There is no evidence that Student required any escorts to another area of school during this semester.

27. Student had challenges at school during this time. He sometimes hid under his desk or tried to leave the classroom. Another student attacked him off-campus, punching and kicking him, which increased Student's anxiety.

28. At home, Student was difficult to manage. Parents addressed his issues by allowing Student to get his way and by not providing much structure to avoid conflicts with him.

29. By the end of the spring 2016 semester, Student's productivity averaged 52 percent. His average safety score by the end of the semester was 96 percent. His average score in the area of respect was 87 percent. Thus, the only score in which Student was not demonstrating expected progress of at least 70 percent was in productivity, which measured work completion. Student's low productivity score was reflected in his grades. He earned scores of "needs improvement" in all academic areas.

30. Parents were concerned by the lack of progress and wanted to see other placement options. They voiced their concerns to Linda Hagerty, the program specialist for the North County Consortium for Special Education who was assigned to Del Mar. Parents did not discuss any of Student's home issues with Ms. Hagerty.

31. Ms. Hagerty knew Student since he enrolled in Del Mar and was always interested in his progress. Although she believed that North County Academy staff was

addressing Student's issues at school and did not believe Student required another placement, particularly since he was in the process of acclimating to North County Academy, she agreed to review other placement options to address Parents' concerns. She took Parents to view the Aseltine School and the day program at San Diego Center for Children, two non-public schools. Student participated in a two-day probationary visit to the latter school, but it did not go well. Student hid under the desk, did not speak, and did not engage with anyone. The school informed Parents and Ms. Hagerty that it would not offer Student enrollment there. Parents decided to maintain Student at North County Academy.

#### FALL 2016 SEMESTER

October 28, 2016 IEP

32. Student returned to North County Academy for the fall 2016 school semester. Special education teacher Haley Kitchens, who was certified in CPI, taught the class. The class was composed of approximately 10 children in fourth and fifth grades. Ms. Kitchens had three instructional aides to assist her throughout the school day.

33. Student saw a private therapist. However, by fall 2016, the therapist had informed Parents that the therapy was not benefiting Student because Student refused to participate in the cognitive behavioral therapy used by the therapist. The therapist therefore discharged Student as a patient. Parents also took Student to bio-feedback sessions. Student's participation in that therapy had also lessened. Parents told the IEP team that because Student was doing better in school, they would probably discontinue the bio-feedback sessions.

34. Del Mar convened Student's annual IEP team meeting on October 28, 2016. Parents attended with their advocate. Del Mar's IEP team consisted of Ms. Hagerty, who was present as the administrative designee; Ms. Chamberlain; Ms.

Kitchens; marriage and family therapist Lauren Perez; and both a speech and language pathologist and an occupational therapist.

35. Student's previous IEP contained 12 goals. By the October 28, 2016 IEP, Student met or made progress on over half of them. Data taken for September and October 2016 demonstrated that Student's work productivity increased from the previous semester. School staff attributed the increase to holding Student accountable for class expectations and to Student feeling a positive connection to his class. This connection resulted in Student engaging more in class. Student also recognized his successes which reinforced his academic engagement.

36. To address his anxiety, Student learned to use coping skills, such as deep breathing, asking for a break, or talking to staff, when prompted to use them. However, he could not independently access the skills and sometimes refused to use them or yelled at staff when prompted to use the skills. Student did not like following rules, particularly in games. He continued to have difficulty taking the perspective of others or accepting the viewpoints of others. He sometimes threw objects at staff and peers, or would act out by damaging school supplies, hitting, or kicking.

37. The IEP team agreed that Student's behavior impeded his learning and that of others. The team agreed that Student required, among other things, a highly structured environment; small class size; consistent schedule with concrete breaks; teaching of expected behaviors with frequent reinforcement; access to a break area; and teaching of social skills and coping strategies along with the modeling of appropriate emotional responses.

38. Student's previous IEPs included behavior intervention plans. At the October 28, 2016 IEP team meeting, Del Mar created a new plan to address Student's behavioral needs, with input from Parents; Ms. Kitchens; Ms. Hagerty; Ms. Chamberlain; and Ms. Perez.

39. The behaviors addressed by the plan were: 1) Student's work refusal, which included his elopement from assigned areas or hiding under chairs and desks; refusing to follow instructions; and refusal to complete assignments. Data taken over 38 school days showed Student engaged in work refusal an average of 30 percent of the school day; 2) Destruction of school supplies, which Student engaged in between 0 and 5 times a day; and 3) Aggressive behavior, which included attempting to or actually knocking over tables, desks, and chairs, hitting staff and peers, and throwing items at staff and peers. Over the 38-day data collection period, Student engaged in the aggressive conduct 23 times, for an average of less than once a day.

40. The three types of maladaptive behaviors in which Student engaged were more likely to occur when the noise in the classroom was higher than normal; when peers' verbal behavior was escalated; during recess when Student was playing a game with peers; when given a direction by an adult that Student viewed as unfair or that he was unwilling to do; when Student was hungry; if Student believed he had an ailment or injury; and when Student transitioned from a preferred to a non-preferred activity. Student was more likely to engage in the behaviors when given an unfamiliar task; when participating in a group activity; when directions were not specific; and when staff was not able to remind Student to use his coping skills or to walk away from a situation. The IEP team determined that Student engaged in the maladaptive behaviors to avoid tasks and situations, and to garner attention.

41. The behavior plan contained strategies to address Student's behaviors. These consisted of using a visual schedule at the beginning of each day that indicated the time for all school activities; "chunking" or breaking up of tasks; giving Student choices for task completion; providing Student with a break area in class when he asked for one; providing him with an opportunity to "pass" once during group activities; the use of a token economy for Student to earn for appropriate behavior; a daily incentive

time rewarded for meeting thresholds in respect, compliance, and productivity; and the use of positive praise for on-task behavior.

42. The IEP team determined that as replacement behaviors, Student should independently request a break if he started to escalate; ask for help on difficult tasks; use coping strategies such as deep breathing and requesting breaks; and engage in classroom activities to obtain appropriate positive attention.

43. The behavior plan developed strategies for staff to employ if Student's behaviors continued, including staff members prompting Student to switch to a replacement behavior and the use of a visual timer to structure expectations of work versus rewards versus a break. If Student refused to work, staff was instructed to set a timer for one minute and tell Student that the staff member would walk away for a minute and then return. If Student destroyed school supplies, staff would ignore it until Student calmed down. Thereafter, staff would present the work again. When the work was complete, staff would ask Student to clean up the materials he had destroyed.

44. If Student was aggressive, the behavior plan called for staff to direct Student to a time-out area in class for two to three minutes. Once Student had calmed, staff would direct him back to task and to make amends for his conduct. Additionally, the behavior plan directed staff to have a discussion with Student once he had calmed, asking him why he was upset, what he did that was unexpected, and what he could do the next time rather than engage in the maladaptive behavior.

45. The behavior plan also included a behavior goal for Student to use self-calming strategies such as deep-breathing, asking for a break, or reading a book, instead of engaging in the maladaptive behaviors, with no more than one verbal or visual prompt from an adult, with 80 percent proficiency by the time Student's next annual IEP was due, as measured by staff observations and data.

46. The IEP team developed seven goals for Student to work on over the next



12 months, including the self-regulation goal developed for the behavior intervention plan. The IEP team reviewed a variety of placement options for Student: placement in a general education classroom; special day class placement; direct services; and placement options in other school districts. Ultimately, Del Mar offered Student continued placement in the North County Academy program with the following services: 1) 120 minutes per week of group counseling and guidance; 2) 50 minutes per week of individual counseling; 3) 1,455 minutes a week of specialized academic instruction; 4) 100 minutes per month of parent counseling for Parents; 5) 1,800 minutes per year of group speech and language therapy; 6) 900 minutes per year of group occupational therapy; 7) transportation to and from school; and 8) extended school year services, including group and individual counseling and Parent counseling.

47. Del Mar continued to offer Student supplementary aids, accommodations, and supports in the classroom. These consisted of sensory tools; prompting, chunking of assignments, and comprehension checks; pairing verbal instruction with visual cues or schedules; providing Student with breaks; limiting distractions in Student's work area and in the written assignments; provision of visual and verbal cues to use positive coping strategies; the use of a token reward system; and front loading Parents and Student for testing and practice sessions.

48. Parents did not object to the IEP offer or request different or additional goals, placement, services, or supports. Parents fully consented to Del Mar's October 28, 2016 IEP offer.

49. None of Student's witnesses, including his experts, criticized the behavior intervention plan or any other aspects of Del Mar's October 28, 2016 IEP offer. Student presented no convincing evidence that the IEP, including the behavior plan, was inappropriate or failed to address all of Student's unique needs known to Del Mar at the time the IEP was developed.

50. Student had only one behavioral incident during the fall 2016 semester. On December 2, 2016, he eloped from class and became aggressive, throwing rocks at staff. Staff had to place Student in a children's hold until he calmed.

51. Student was successful at North County Academy during the fall 2016 semester. His productivity increased to an average of 74 percent. His safety scores averaged 92 percent. Student's score in the area of respect averaged 83 percent. Although the latter two scores decreased slightly from the previous semester, both were well above the 70 percent mark that North County Academy considered to be indicative of successful progress in its program. Academically, Student had improved his grades from needs improvement to satisfactory in all areas.

#### SPRING 2017 SEMESTER

##### Parents' Contracts with Educational Consultants

52. After the beginning of the spring 2017 semester, Parents expressed concern to Del Mar about what they perceived as Student's lack of progress. At the time, Student was making anticipated progress and Del Mar had no concerns. It agreed, however, to convene an IEP team meeting. Parents agreed to attend a meeting March 1, 2017. They thereafter cancelled the meeting. Del Mar suggested another meeting date; Parents agreed to meet on May 19, 2017. Parents then cancelled the second meeting. They agreed to attend an IEP team meeting on June 9, 2017.

53. In March 2017, Parents contacted Kelly Corey, an educational consultant who specialized in helping parents find alternative educational placements. She was in private practice as an educational consultant since 2009, and assisted parents with placement issues. Ms. Corey had a master's degree in social work and had worked at various administrative positions for non-public schools. However, she had no teaching credentials or teaching experience and was not a psychologist.

54. Mother testified that she contacted Ms. Corey for placement assistance because Student was not making progress academically and was having increased behavioral challenges at school. Mother's testimony was not persuasive on this issue.

55. Student began having significant behavioral challenges beginning mid-February 2017. His behaviors were the type targeted in his behavior intervention plan. Between that date and mid-March 2017, when Parents first contacted Ms. Corey, Student had five instances of aggression toward staff; on one of those occasions, Student was also aggressive toward a peer. On two of the occasions, staff had to restrain Student. Staff had to escort Student to another area in the other three instances.

56. This was a marked increase in Student's behaviors over the prior school semester. However, Parents were not aware of the first four behavioral issues. Although Ms. Kitchens, Student's teacher for the 2016-2017 school, believed that either she or North County Academy Vice Principal Ms. Chamberlain had either called or emailed Parents, there is no evidence that an email was sent and Parents' phone records do not contain phone calls from North County Academy the day of or the day after each incident.

57. Nor is there any record of North County Academy contacting Parents during that time period specifically to discuss Student's behavior. Although Student's behavior was challenging, the North County Academy program was specifically designed to address the behavioral, social, and academic needs of children who demonstrated aggression or had other behavioral issues. While Student's aggression had increased, it was well within the type of behavior demonstrated by other children in the program. Further, notwithstanding the increased aggressive behavior, Student was accessing his education and making meaningful academic progress.

58. Rather than being triggered by increased behavioral or academic issues at school, Parents' decision to reach out to Ms. Corey was prompted by Student's

behaviors at home. Student's behavior toward his little sister had become more aggressive and she was frightened and traumatized by it. Student was increasingly defiant at home. Parents often responded by allowing Student to manipulate or circumvent rules. When they did confront Student about his failure to follow their directives, things would escalate into screaming matches between Student and one or both parents. Trauma to Student's little sister increased; she would cry hysterically and often hide in her room with the door locked. She would beg Parents to make the screaming stop, and for them to stop Student from hurting her. Parents spent a significant time at home after school trying to address Student's defiance and aggression and having to comfort and calm his sister.

59. Parents did not disclose to Del Mar the issues they were confronting with Student at home. Instead, to address the problems at home, Parents wanted to place Student at a residential treatment center. Therefore, Parents contacted Ms. Corey.

60. Ms. Corey observed Student at school and in the home sometime after mid-March 2017. At home, Student argued a lot, raised his voice, was not compliant with his Parents' directives, and had a tantrum. He only complied after Parents negotiated with him.

61. Ms. Corey agreed with Parents that Student's depression and anxiety had worsened. After completing her observations, Ms. Corey discussed possible options for addressing Parents' concerns. They discussed non-public school placements with which she was familiar. Ms. Corey rejected the idea of placing Student at schools in San Diego County and Riverside County because she believed that the students at some of the schools were more psychiatrically impaired than Student, or that the schools could not address his needs.

62. Ms. Corey agreed with Parents that only a residential placement, where Student's anxiety and attention deficits could be addressed, would meet his needs. Ms.

Corey began searching for a school. She focused her search on schools whose students were younger boys, where therapists were on staff that could treat Student's anxiety, and where different recreational programs, such as equine therapy, were also available.

63. Ms. Corey and Parents believed Student needed a residential treatment center placement, and by April 10, 2017, Ms. Corey asked Cherry Gulch, a school in Idaho, to place Student on its waiting list, although it was not a residential treatment center. Rather, it was a therapeutic boarding school. It had credentialed teachers to provide schooling to its students, and therapy programs such as equine therapy and some counseling programs. However, it did not have a wraparound therapeutic program with therapy embedded in its academic and residential settings and nursing staff available 24 hours a day, which would have been part of a residential treatment center program.

64. On April 24, 2017, Parents and Del Mar agreed to hold an IEP team meeting on May 19, 2017, to discuss Student's progress at school. On May 1, 2017, Parents sent an email to Nadine Schick, a program specialist for Del Mar, requesting that Del Mar move up Student's triennial assessment, due approximately October 2017, and conduct it before the end of the present school year. Ms. Schick, on behalf of Del Mar, wrote to Parents on May 19, 2017, denying the request for an early assessment. Del Mar did not believe the early testing was warranted because state-wide testing of students would soon begin and Del Mar believed that additional testing would increase Student's anxiety. The additional testing would also result in Student missing end of school year events with his classmates. Del Mar also believed that given the short time remaining before the end of the school year, it would be difficult to conduct proper in-depth assessments. Del Mar instead proposed providing Parents with an assessment plan on the first day of the following semester. Del Mar also proposed discussing Student's needs at the IEP team meeting scheduled for May 19, 2017.

65. However, Parents were more focused on finding a residential placement for Student. They booked a flight on May 1, 2017, to visit Cherry Gulch on May 25, 2017. On or about May 4, 2017, Parents contracted with educational consultant and Student advocate Allan Roth. Mr. Roth had a master's degree in special education. Prior to his work as a special education consultant, he had been a special education educator and the director of special education for several school districts. As a consultant, he specialized in assisting parents at determining if a child needed interventions at school; attending IEP team meetings with parents; and helping them with the IEP process. Mr. Roth also believed Student needed a residential treatment center placement. He was surprised that Del Mar rejected Parents' request for an early triennial assessment and suggested that Parents fund an independent evaluation. He requested Student's records. He received copies of all of Student's behavioral emergency reports as part of his record request.

#### Student's Behavioral Emergencies

66. Student engaged in 22 behaviors between February 16, 2017, and May 24, 2017, that resulted in him being either escorted away from the area, placed in a restraint, or both. Several incidents occurred on the same day. Although Ms. Kitchens and Ms. Chamberlain testified that they either emailed Parents or telephoned them within a day of each incident, there were five incidents where Parents did not receive emails or telephone calls from Del Mar. Three incidents, on February 16, February 28, and March 13, 2017, involved the use of a restraint on Student. During two incidents, March 7 and May 4, 2017, an escort hold was used.

67. Del Mar created behavior emergency reports for each incident and placed them in Student's file. While it generally used a behavior emergency report form, on April 24, 2017, it used a narrative form to describe the incident. The narrative included Student's name but not his age; the date of the incident; the setting and location of the

incident; the identification of which staff was involved, but not their names; a description of the incident and the intervention used but not whether Student had a behavioral intervention plan. There was no indication of injuries to Student or staff.

68. Student's behavior emergencies generally occurred when he was asked to do non-preferred tasks and/or became frustrated. He engaged in these behaviors: hitting the teacher or other staff members; leaving the classroom without permission or trying to leave school; tearing up or destroying schoolwork; flipping over tables and chairs; and yelling at peers. Ms. Kitchens and/or her classroom aides would first attempt calming strategies with Student. If he did not respond, staff would try to escort Student to a de-escalation area. If Student became aggressive, staff would place him in a child restraint. No restraint used on Student at North County Academy lasted more than 18 minutes. Most lasted less than 10 minutes. Of the 22 incidents resulting in behavior emergency reports, eight required staff to restrain Student. The 14 other incidents resulted in escorts of Student to a safe area. North County Academy staff appropriately responded to each behavior incident.

69. The 22 behavioral incidents were a substantial increase from Student's behavior the prior school semester, in which he had only one behavioral incident that resulted in either him being escorted to another area or requiring a restraint. By April 17, 2017, Student had 12 behavioral incidents where either escorts and/or restraints were required. At hearing, Ms. Chamberlain testified that the increase in Student's behavioral incidents should have led Del Mar to consent to Parents' request for a functional behavioral assessment of Student in spring 2017.

#### Dr. Haytasingh's Assessment

70. In early May 2017, Parents contracted with Dr. Rienzi Haytasingh for an evaluation of Student. Dr. Haytasingh had a doctorate in psychology and was certified by the American Board of School Neuropsychology. He worked as a school psychologist

for several school districts up to 2013, while simultaneously maintaining a private practice. He was an adjunct professor at several universities in San Diego, lecturing in the areas of school psychology, behavior, and neuropsychology. Since 2013, Dr. Haytasingh worked solely in his private practice.

71. Dr. Haytasingh and his staff assessed Student over three days in May 2017. The assessment consisted of a review of Student's records; observations of Student at school by a graduate student working with Dr. Haytasingh and by Dr. Haytasingh during testing of Student; interviews with Mother, Student, and Ms. Kitchens; and the administration of three standardized tests.

72. The graduate student observed Student in his classroom on May 16, 2017. Based on her observation, Dr. Haytasingh reached several conclusions regarding Student's classroom at North County Academy. He concluded that Ms. Kitchens's lessons were mostly appropriate for Student. Student read what he was given. Student could request a break if needed, although he did so infrequently. The North County Academy program required Student to participate by sharing his feelings and reading aloud. Staff protocol was to first loudly ask students to follow directions. If they did not do so the first time, the teacher would ask the student quietly to do so. Dr. Haytasingh concluded that the instructional expectations were reasonable for Student. He also found that instructions were given clearly in the class, although during the observation staff did not always check for Student's understanding of the instructions.

73. During the observation, Student engaged in several maladaptive behaviors, including using bad language, hitting the teacher and staff, and throwing over chairs. At times, more than one adult was needed to address the behaviors. Dr. Haytasingh concluded, based on the observation, that the teacher and aides handled the behaviors correctly when they occurred. Dr. Haytasingh noted that the classroom staff properly addressed Student's inappropriate behaviors and encouraged him when



he made good choices.

74. Dr. Haytasingh received input from Mother and Ms. Kitchens through interviews with them and their completion of the rating scales for the Behavior Assessment Scales for Children, Third Edition. Mother noted concerns for Student in the areas of anxiety; depression; acting out aggressively; failing to learn; refusing to take on academic challenges; being distracted at school; and being bullied at school. Parents did not inform Dr. Haytasingh of the extent of the problems they had with Student at home or how traumatized little sister was by Student's behaviors.

75. Ms. Kitchens's comments about Student were similar to those made by Mother. She also noted Student was extremely anxious; was easily distracted in class; would shut down and refuse to participate; and sometimes became aggressive, particularly if he lost a game or had to do work he wanted to avoid.

76. Dr. Haytasingh administered the Wechsler Intelligence Scale for Children, Fifth Edition. This standardized test measured cognitive ability and problem-solving processes in children. Student's full scale intelligence quotient was in the average range for a child his age. He scored in the average range in all areas other than working memory, which was below average.

77. Dr. Haytasingh also administered the Wechsler Individual Achievement Test, Third Edition, to evaluate Student's academic achievement in reading, math, writing, and oral language. Student scored below average, and below expected levels in all areas tested.

78. Parents reported to Dr. Haytasingh that Student expressed suicidal ideation at home and expressed that he wanted to die. Although Parents voiced concern about this to Dr. Haytasingh and Mother testified to her concern, there is no evidence that Parents believed Student would act on his suicidal thoughts or that he was capable of it. Parents never acted on the statements. They did not take Student to see a

psychiatrist or other therapist in response to the statements. They did not take Student to a psychiatric hospital. They did not call any authority, such as the police, to review and assess the situation and possibly have Student admitted to a psychiatric hospital for observation.

79. Dr. Haytasingh's first draft of his assessment report did not include a placement recommendation. After speaking with Parents about his assessment, he added to the report a recommendation for residential treatment center placement for Student. He felt that Student's aggressive behaviors at home and at school, Student's anxiety, and difficulty completing assignments and interacting with peers warranted the placement.

80. Dr. Haytasingh recommended that the residential treatment center be capable of providing Student several supports, including: 1) Behavior interventions; 2) Staff trained in de-escalation measures; 3) Cognitive behavioral therapy; 4) Exposure therapy, where Student would learn to identify his triggers; 5) Experiential therapy, where Student would learn through the process of doing; 6) Instruction on goal setting, deep breathing, positive self-talk, and visualization; 7) Technological and digital support as Student had interest in both; 8) Co-operative play groups; 9) Social skills groups; 10) Participation in an anger management group; and 11) Instruction delivered by a special education teacher.

81. Dr. Haytasingh's report did not explain why he believed Student required the residential placement in light of his findings and conclusions that the North County Academy teacher and aides were successfully getting Student to participate in class, were appropriately responding to his behaviors, and provided appropriate instruction and programming. During his testimony, Dr. Haytasingh stated that he rarely recommended residential placements, but believed that Student's anxiety and aggression at home and at school warranted such a placement. However, he did not

clearly address the discrepancy between his conclusions regarding his observations of North County Academy and his recommendation for residential placement. The failure to coherently explain this discrepancy undermined the persuasiveness of Dr.

Haytasingh's conclusion that Student required a residential placement to access his education and make meaningful educational progress.

82. Parents paid Dr. Haytasingh \$3,500 for his assessment.

#### Events Prior to the June 9, 2017 IEP Team Meeting

83. On May 17, 2017, Parents cancelled the IEP team meeting scheduled for May 19, 2017. Instead, they visited Cherry Gulch on or about May 25, 2017, and decided to enroll Student there. Parents liked the school, its program, Student's access to horses and other outdoor activities, and liked that Cherry Gulch was closer to California than other schools they considered. It is clear from the evidence, including Mother's testimony, Parents decided to enroll Student at Cherry Gulch prior to meeting with Del Mar to discuss their concerns about Student.

84. On May 15, 2017, Student made a statement at school that he wanted to die. Student was immediately directed to North County Academy therapist Ms. Perez, who conducted a risk assessment of Student to determine the seriousness of the suicidal ideation. Ms. Perez established that Student was not a danger to himself or others, and thus no further intervention was necessary. She called Mother to tell her what had occurred and mailed a safety plan to her that included crisis relief information and resources.

85. Student made a second, similar statement on May 17, 2017, to Ms. Perez. Ms. Perez did a risk assessment during which Student told her he was just mad. Student used his coping skills to deescalate and return to class.

86. Student made another comment evincing suicidal ideation on May 24, 2017. Ms. Perez conducted a risk assessment. She had concerns about Student's

emotional state at the time, and had two staff members take him to a quiet room for observation, where Student quickly deescalated. Student told staff he made the statement because he was frustrated, and said he did not intend to commit suicide. Ms. Perez determined that Student was not a danger to himself or others, and notified Parents that day of the statement. She also sent them a safety plan. Ms. Perez followed up with Student the following day. She determined that Student continued to be safe.

87. Neither Ms. Perez nor other North County Academy staff believed that Student's comments of self-harm warranted contacting the county Psychiatric Emergency Response team to intervene and assess Student.

88. Parents did not take any action after learning of the self-harm statements. They did not take Student to see any of his past or present therapist or medical providers. They did not consider having him evaluated for observation, hospitalization, or therapy to address possible mental health needs underlying the statements. They did not contact the county psychiatric emergency team, and they did not contact any crisis intervention hotline. Nor did they respond to Ms. Perez's communications about the issue.

89. In anticipation of the originally scheduled May 19, 2017 IEP team meeting, Del Mar notified Parents that a board certified behavioral analyst would attend the meeting to help address Student's escalating behaviors. Del Mar also requested Parents to send it a list of their concerns so that Del Mar would be prepared to address them at the meeting. Parents did not respond to the request. After Parents cancelled the May 19, 2017 IEP team meeting, they agreed to attend a meeting on June 9, 2017. They did not provide Del Mar with their concerns prior to the re-scheduled meeting. They did not inform Del Mar that they were working with two educational consultants or inform Del Mar that they had obtained an independent evaluation by Dr. Haytasingh, or that Dr. Haytasingh recommended a residential placement. Parents did not inform Del Mar that

they had invited Dr. Haytasingh to the June 9, 2017 IEP team meeting. Parents did not inform Del Mar that they had already decided to send Student to a residential treatment center, that they had visited Cherry Gulch, or that they intended to enroll Student there.

#### June 9, 2017 Amendment IEP Team Meeting

90. Student's IEP team convened on June 9, 2017, to review his progress at North County Academy. Parents attended accompanied by Mr. Roth, Dr. Haytasingh, and Dr. Haytasingh's graduate assistant. Ms. Schick was the administrative designee at the meeting. The other Del Mar IEP team members present were Ms. Chamberlain; Ms. Kitchens; Ms. Perez; an occupational therapist; a speech and language pathologist; and a board certified behavioral analyst.

91. The IEP team informally reviewed Student's progress on his goals and his present levels of performance. Student made progress in several areas. He made partial progress on his articulation goal. He made more progress on his social skills/pragmatic language goals because they were addressed primarily in the classroom setting. Student also made progress on his visual motor goal.

92. Dr. Haytasingh expressed concern that Student did not independently work on assigned tasks and that Student appeared to lack self-regulation techniques. Ms. Kitchens and Ms. Schick agreed that Student was only starting to learn to cope. Ms. Perez noted that Student had increased his willingness to participate in her therapy sessions, although his participation was still inconsistent.

93. Del Mar staff provided several documents to Parents at this meeting. They provided a chart detailing Student's behavior incidents. The chart specified when Student was under escort and when and what type of restraint had to be used. Del Mar also provided current data collection on Student's productivity, safety, and respect. Student's productivity slightly decreased from the prior semester, from 74 percent to 72 percent. His safety scores decreased from 92 percent to 86 percent. Student's scores in

the area of respect decreased from 83 percent to 79 percent. All of his scores were still above the 70 percent range considered successful by North County Academy. Overall, Student responded well to feedback and typically regulated himself.

94. For the first time, Parents, through their advocate, shared that Student's behaviors at home and in the community had increased. They told the Del Mar team members that Student was expelled from his martial arts program two weeks before the IEP team meeting due to his behaviors. Del Mar had also suspended Student from its afterschool program the prior week but were going to permit him to return because Parents offered to fund a one-on-one aide to support Student in the program. However, Parents did not divulge the extent of the problems or how they were affecting Student's sister. Although Parents were in the midst of a divorce, Parents did not inform the Del Mar team members of this fact. To the contrary, Mother specifically told Del Mar at this meeting that there were no changes within the home setting.

95. The majority of the June 9, 2017 IEP team meeting was spent reviewing Dr. Haytasingh's assessment and report, including his recommendations for supports for Student. Dr. Haytasingh agreed that the North County Academy program was a safe place, but he believed Student required a residential treatment center placement with wraparound services to address Student's severe anxiety, which resulted in his aggressive behaviors.

96. The Del Mar team members were surprised by Dr. Haytasingh's conclusion that Student required a residential placement. They acknowledged that Student's behaviors had increased substantially, but believed the increase was due to his conflicts with two new students who had recently joined the class. They also believed that escape and avoidance were still the primary functions of Student's behaviors, as described in his behavior support plan, although they did not have specific data to substantiate their belief.

97. Student continued to make academic progress. He was more engaged and had increased participation in the classroom than he had the previous semester. He transitioned more easily between tasks and environments. He attended field trips and generalized more social skills. Although Student had made statements of a suicidal nature, the program at North County Academy was designed to address those issues. Student met the profile of a child that North County Academy was designed to educate.

98. However, there is no dispute that Student's behavior regressed between February 16, 2017, and June 9, 2017. His relationship with peers was also not beneficial. Dr. Haytasingh made several recommendations in his report for services and accommodations, such as for cognitive behavioral therapy and social skills therapy, which the IEP team discussed at the meeting. Dr. Haytasingh was persuasive that Student needed additional services and/or accommodations to address his increased anxiety and maladaptive behaviors. Ms. Kitchens testified that North County Academy could have implemented the recommendations that Student did not then receive there. However, Del Mar did not offer to add additional services or accommodations at this IEP team meeting or any time prior to May 2018.

99. Del Mar requested permission from Parents to conduct Student's triennial review at the beginning of the 2017-2018 school year, to include an educationally related mental health services assessment. Mr. Roth, on behalf of Parents, refused to consent to the assessments. Mr. Roth mistakenly believed that Del Mar lost the right to assess Student when it refused Parents' request for an early triennial assessment. Parents mistakenly believed that Del Mar did not have the right to conduct its own mental health assessment because Dr. Haytasingh had done one as part of his psychoeducational assessment.

100. Through Mr. Roth, Parents rejected Del Mar's continued offer of placement at North County Academy. They gave notice to Del Mar that Parents intended to

privately place Student at a residential treatment center and would seek reimbursement for the costs of placement. They did not inform Del Mar at the IEP team meeting that they already visited Cherry Gulch and had made arrangements for Student to enroll there.

#### Events After the June 9, 2017 IEP Team Meeting

101. Parents transported Student to Cherry Gulch on June 15, 2017, a few days before the end of North County Academy's 2016-2017 school year, which ended on June 22, 2017.

102. On June 21, 2017, Ms. Schick sent a prior written notice letter to Parents on behalf of Del Mar, formally declining Parents' request that Del Mar place Student in a residential treatment center. Ms. Schick included an assessment plan for Parents to consent to Del Mar conducting an educationally related mental health services assessment.

103. Ms. Schick reiterated Del Mar's intention to provide Parents with an assessment plan for Student's triennial assessment on August 28, 2017, the first day of the fall semester. She did not offer to convene another IEP team meeting to discuss how Del Mar could address Student's escalating behavior issues, or if Del Mar would implement recommendations made by Dr. Haytasingh that were not already in place at North County Academy. Based on Student's increased anxiety and maladaptive behaviors, Del Mar should have offered to increase Student's counseling services. Since Del Mar had not done its own behavior assessment, it should have adopted Dr. Haytasingh's appropriate recommendation for cognitive behavior therapy and social skills.

104. Parents did not return the assessment plan consent form.

105. For the spring 2017 semester at North County Academy, Student made academic progress in all areas except math, where his grade was "Needs to Improve."



Student received "Satisfactory" in all other subjects graded.

#### STUDENT'S ENROLLMENT AT CHERRY GULCH

106. Cherry Gulch was a therapeutic boarding school located in Idaho. At the time of the hearing, Damon Zimmerman was its Executive Director. Parents enrolled Student on June 15, 2017. Mr. Roth subsequently informed Del Mar of Student's enrollment there.

107. Cherry Gulch was accredited by the state of Idaho for a maximum enrollment of 64 boys, aged nine to 17. Most boys were aged 10 to 14. The majority had issues of anxiety, attention deficit, school avoidance and socialization. The school utilized a three-step approach to address the boys' emotional and behavioral problems: correction, teaching, and building relationships.

108. Although Cherry Gulch had therapists on staff and provided individual, group, and family therapy to its students, as well as equine therapy, it was not a residential treatment center. It did not imbed therapy in a 24-hour modality at both school and in the students' residential setting, as did residential treatment centers. Importantly, it did not have 24-hour nursing care on staff to meet requirements for a residential treatment center. It was not certified by the state of California during the time Student was enrolled, but had obtained certification by the time of the hearing.

109. The Cherry Gulch students received academic instruction in classrooms, including special education instruction if needed. From Monday to Thursday, the boys' day started with assigned chores and a personal hygiene checklist each boy was expected to follow. The boys would then attend school, with the afternoon dedicated to therapy sessions. On Fridays, the boys had elective classes in the morning. After lunch, they had therapy sessions and planned outings. Academic instruction continued during the summer for those boys who needed it. Otherwise, the summer program consisted primarily of electives.

110. Cherry Gulch used restraint holds on its students only if they were aggressive or repeatedly destroyed property. They would not keep a student in a restraint for more than 15 minutes. Cherry Gulch did not use prone holds, where a child is restrained on the ground with all extremities held down, because it considered such holds unsafe.

111. If a student demonstrated continued aggression or property destruction, and the three-step approach did not work, Cherry Gulch would assign a one-on-one aide to the student 24 hours a day, restrict the student's privileges, and sometimes remove the student from contact with the other boys. To return to the regular environment, the student would have to demonstrate safe behaviors.

112. When Student enrolled at Cherry Gulch, it created a treatment plan for him that consisted of: 1) Addressing Student's anxiety by teaching him to understand and identify his feelings and develop coping skills to deal with the anxiety; 2) Developing emotional self-regulation skills; and 3) Reducing non-compliance.

113. Parents did not tell Cherry Gulch that Student had expressed suicidal ideation. They also did not inform Cherry Gulch that Student was highly aggressive at home and that his behavior had traumatized his little sister.

114. When Student started at Cherry Gulch, he was initially polite and affectionate to the animals that populated the school, including horses and dogs. Although at age 10 Student was one of the youngest students, he initially appeared to be a good fit for the program.

115. However, soon after arriving, Student's behavior challenges resurfaced. He threw rocks at his peers, at staff, and at buildings. Staff spent considerable time trying to prevent Student from hurting people or property with the rocks. Staff had to use restraint holds frequently because of the behaviors. His behaviors were much more intense than what Cherry Gulch was accustomed, and more intense than at North

County Academy. Normally, after a few weeks, the students adjusted to being away from home and became invested in the program. Student did not. He refused to attend class the majority of the time. He was not a willing participant in therapy. He consistently required restraint holds to prevent him from hurting others or destroying property. He demonstrated avoidance to every intervention Cherry Gulch attempted.

116. Cherry Gulch tried assigning a one-on-one aide to Student, but that was not successful in addressing his behaviors. There were times when Student needed three adults simultaneously to support him and prevent him from hurting others. Cherry Gulch was a property with some 220 acres, and had no fencing to prevent a student from just running away from the school. Mr. Zimmerman believed that Student required a more restrictive setting with an environment that did not permit students to be able to walk off the campus.

117. By the end of August 2017, Cherry Gulch concluded that it was not an appropriate placement for Student. He consistently refused to participate in occupational therapy sessions, attend class, and was not engaged during his counseling therapy sessions. His aggression continued unabated. He made no progress academically, socially, or behaviorally. Mr. Zimmerman acknowledged during his testimony that Student made significantly more progress while at North County Academy than he did at Cherry Gulch.

118. At the end of August 2017, Cherry Gulch informed Parents that it could not serve Student's needs and that he could not continue his enrollment there. Mr. Zimmerman suggested Parents either place Student in a residential treatment center or in a wilderness program. A wilderness program was one where the children were taken to a non-school setting, such as camping in the mountains, and provided therapy in that setting. The wilderness programs generally did not include any academic instruction because the programs wanted to remove stress caused by academics. Rather, the focus

was on addressing the therapeutic needs of the children.

119. On August 28, 2017, the first day of the 2017-2018 school year, Ms. Schick wrote to Parents reiterating that Del Mar continued to believe that Student did not require a residential treatment center placement. Ms. Schick requested Parents' consent to conduct Student's triennial assessment, including an educationally related mental health services assessment, once Student returned to Del Mar. Student's triennial IEP was due in October 2017. Ms. Schick did not suggest assessing Student at Cherry Gulch as neither Parents, nor Mr. Roth, had informed Del Mar of how long they anticipated Student would remain in Idaho.

120. Mr. Roth responded to Ms. Schick's letter on September 4, 2017. He reiterated Parents' position that Student required a residential placement. By the date of Mr. Roth's letter, Cherry Gulch had informed Parents that Student could not continue at the school and that Parents would have to place him elsewhere within a month. However, Mr. Roth failed to inform Del Mar of that fact. Rather, he led Del Mar to believe Student would continue his enrollment at Cherry Gulch, but that there was no reason for Del Mar to obtain Student's Cherry Gulch records.

121. Mr. Roth, on behalf of Parents, declined to consent to Del Mar's request to assess Student. He stated that Del Mar "gave up" its right to assess Student when Del Mar declined to conduct an early triennial assessment in spring 2017. Mr. Roth did not inform Del Mar that Student was changing programs and did not request Del Mar to assess Student at either Cherry Gulch or the program to which Student was transferring.

122. Ms. Schick responded to Mr. Roth's letter on September 18, 2017, reiterating Del Mar's present rejection of the need for a residential placement and again requesting Parents' consent to assess Student.

## STUDENT'S ENROLLMENT AT SUWS<sup>6</sup> OF THE CAROLINAS

123. Cherry Gulch agreed Student could remain until the end of September 2017, so Parents could find another placement for him. Parents chose to enroll Student at SUWS of the Carolinas, a wilderness program recommended by Mr. Zimmerman based in North Carolina. Student enrolled on September 30, 2017.

124. Parents completed a registration packet as part of Student's enrollment at SUWS. They stated that Student's primary behavioral issues were anxiety, depression, oppositional behavior and aggression. A question on the registration packet specifically asked if Student ever expressed suicidal statements, behaviors, or actions, and, if so, had Student acted on them. Parents' response was "not specifically." In response to the question "Does your child have any current self-harm plans or actions" Parents stated "Not that we are aware of."

125. In response to being asked to describe Student's relationship with Parents and other family members, Parents responded that Student's relationships were "relatively stable." Parents did not disclose to SUWS that Student's behaviors at home were uncontrollable or that he was aggressive with Parents and little sister. Nor did Parents disclose their recent divorce. Parents stated that their goal was to get Student to a point where he could perform in school.

126. No one from SUWS testified at the hearing. Mother stated that SUWS was purely a wilderness camping program. She acknowledged that there was no formal educational component to the program. The SUWS discharge paperwork for Student states that he was offered schoolwork every day during the program, but refused it each time except one occasion. However, there is no evidence that the schoolwork was part

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<sup>6</sup> The parties and witnesses referred to Schools of Urban and Wilderness Survival by SUWS throughout the hearing and this decision will use this designation for clarity.

of a formal academic program provided by certified teachers. Mother testified that Student continued to demonstrate behavioral and safety issues at SUWS.

127. The SUWS discharge notes for Student on January 3, 2018, state Student made progress in being able to attend therapy sessions, and had gained understanding in facing challenging and uncomfortable tasks, situations, and feelings. However, Student demonstrated no academic progress while at SUWS. Significantly, the lack of testimony from any SUWS personnel as to how SUWS reached the conclusions in the discharge summary undermined any validity the discharge summary might otherwise have.

128. Although SUWS graduated Student from its wilderness program, Parents decided to enroll Student in another residential program. They transported Student to Sandhill Child Development Center on January 5, 2018.

#### DECEMBER 4, 2017 IEP TEAM MEETING

129. On October 13, 2017, Ms. Schick again wrote to Parents reiterating Del Mar's request that Parents consent to Student's triennial assessment. Ms. Schick informed Parents that Del Mar was required by law to assess Student at least every three years. Therefore, if Parents again declined to assess to the assessment, Del Mar might file for due process to override Parents' lack of consent.

130. When Parents did not return a signed assessment plan, Del Mar filed for due process on November 3, 2017. Del Mar originally intended to hold a joint annual and triennial IEP team meeting for Student once it had conducted Student's triennial assessment. When Parents declined to sign the assessment plan, Del Mar tried to convene just an annual IEP team meeting since assessments were not completed. Ms. Schick wrote to Parents on November 7, 2017, to schedule an annual meeting, offering three proposed meeting dates. Parents thereafter signed the assessment plan on November 8, 2017, but did not sign any of the authorizations for release of information.

Parents did not give full consent to Del Mar's proposed mental health assessment until November 28, 2017. Del Mar withdrew its request for due process after Parents signed consent to the triennial assessment.

131. Student's IEP team met on December 4, 2017, for his annual IEP review.<sup>7</sup> Parents did not invite any staff from Cherry Gulch or SUWS to attend, either in person or telephonically. Parents did not inform Del Mar at any time before or during this meeting that Student left Cherry Gulch on September 29, 2017, and enrolled the next day at SUWS, or that Student was attending the SUWS program as of the date of the IEP team meeting.

132. Del Mar had no recent data on Student upon which to make concrete changes to his IEP. Student had not attended North County Academy or Del Mar school since June 2017. Parents had not provided permission for Del Mar to exchange information with Cherry Gulch and thus Del Mar had no information on Student's progress there. Del Mar had sent a copy of the proposed annual IEP to Parents prior to the meeting; Parents did not provide additional information on Student's progress based on that IEP. Parents did not inform Del Mar Student was presently at SUWS or provide any information as to his progress there. In sum, Del Mar had no new information about Student on which it could base changes to his IEP.

133. Despite the lack of information from Student's two residential placements, Del Mar reviewed the IEP with Parents, asked for their input, and updated goals based on the little information Parents were willing to give. Del Mar agreed to changes in the goals based on Parents' input, particularly Student's goal to increase his independent

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<sup>7</sup> The IEP document is dated November 27, 2017, the date on which the meeting was originally scheduled.

work capabilities, in which Del Mar agreed to Parents' request to focus on math instruction.

134. Del Mar provided Parents with another copy of authorization for release of information forms from Cherry Gulch. Parents accepted the copies, giving Del Mar no reason to suspect Student was no longer enrolled there. In response to Del Mar's questions as to how Student was doing at Cherry Gulch, Parents responded that he was doing "fine."

135. Based on its lack of new information, and its belief that Student did not require a residential placement, Del Mar continued to offer Student placement at North County Academy, with the same level of supports, services, and accommodations contained in Student's October 21, 2016 IEP. Parents did not accept the offer as they believed Student continued to require a residential placement.

136. On December 6, 2017, Parents signed the authorization form for exchange of information with Cherry Gulch. Parents did not inform Del Mar that Student was no longer enrolled at Cherry Gulch.

137. Del Mar, through Ms. Schick, emailed Parents on November 29, December 7, and December 10, 2017, asking Parents when and if Student would be back home so that Del Mar could conduct its triennial assessment. On December 11, 2017, Parents notified Del Mar that Student would not be home during the winter break.

138. Based on Parents stating that Student would not return home any time soon, Ms. Schick contacted Cherry Gulch to determine if Del Mar could go to Cherry Gulch in Idaho and conduct its assessment of Student there. On December 20, 2017, Cherry Gulch notified Ms. Schick that Student left its program on September 29, 2017.

139. On December 22, 2107, Ms. Schick wrote to Parents expressing concern that they had not informed Del Mar of Student's whereabouts. Since Del Mar did not know where Student was, it could not determine if it was appropriate to assess him at



his present location and could not arrange to do the assessment without knowing where he was. Ms. Schick asked Parents to inform her as soon as possible of when and where Student would be available for the assessment.

140. On December 23, 2017, Parents notified Ms. Schick that they placed Student at SUWS since September 30, 2017.

141. On January 24, 2018, Mr. Roth emailed Ms. Schick to inform her that Student had completed the SUWS program as of January 3, 2018, and that Parents had enrolled him that same day at Sandhill Child Development Center in New Mexico. On January 26, 2018, Ms. Schick wrote to Parents asking them to authorize exchanges of information with Sandhill so that Del Mar could determine if it was appropriate to assess Student there. Parents signed authorizations for all of Student's residential placements that day.

#### STUDENT'S ENROLLMENT AT SANDHILL

142. Sandhill was located in New Mexico. It was a residential treatment center certified by New Mexico to treat children ages five to 13. It was not certified by the state of California. It was designed as a 24-hour a day therapeutic environment to address its students' emotional regulation needs at school, in the home, and in the community. It served students with a variety of diagnoses, including anxiety, attention deficit, reactive attachment disorder, and oppositional defiance disorder.

143. Matthew McQueen was the Program Director and Principal at Sandhill. He explained that Sandhill's present philosophy was based on a neuro-sequential model that sought to determine what factors impacted a child's ability to organize or regulate his or her brain so that the child would be more conducive to learning. Sandhill provided Student with individual, group, and family therapy, and interventions both at school and in his residence.

144. Sandhill practiced a methodology called therapeutic crisis intervention to

address maladaptive behaviors in its students who were causing or were in danger of causing harm to self, others, or property. In theory, the methodology taught its practitioners to de-escalate behavior. In theory, the methodology taught that physical contact with or restraint of a child was only to be used as a last resort and only after all other interventions had been attempted and had failed. Therapeutic crisis intervention originally permitted the use of a prone hold, where a child is placed face down on the floor, with legs and arms immobilized. However, once guidelines issued from the United States Department of Education advising against prone holds in school, the developer of the therapeutic crisis intervention program discontinued teaching the use of them. However, in spite of the federal guidelines and the fact that prone holds were illegal in the public school setting under New Mexico state statutes, Sandhill continued to use them. Mr. McQueen's position was that since Sandhill was not a public school, it was not bound by the statute and could use such holds if staff found it necessary.

145. Student was sad, scared, anxious, and distant when he arrived at Sandhill on January 5, 2018. He did not have much verbal engagement with people. Notwithstanding three months at Cherry Gulch and three months at SUWS, Student's behavior was still angry, aggressive and out of control from the first week he was at Sandhill. It remained at that level through at least June 2018. Student was aggressive toward staff, kicking and hitting them and throwing rocks. He had difficulty reading cues from staff and peers, and had a high level of frustration. He did not participate in academics in class during the day and refused to do homework at night. Student refused to maintain his hygiene. He would not brush his teeth. Staff forced him to shower with a bathing suit on. He lied and attempted to manipulate situations to get his way. He needed one-on-one support almost round-the-clock.

146. Sandhill first used a restraint hold on Student on January 9, 2018, four days after his arrival. Between that date and May 9, 2018, Sandhill used a physical restraint to

restrict Student's movement over 40 times. On at least 28 occasions, the restraints lasted for 15 or more minutes; on at least 15 occasions, the restraints lasted for 30 or more minutes. One restraint lasted almost an hour and a half. Staff placed Student in a prone hold several times. In the four weeks between April 6, 2018, and May 7, 2018, Sandhill restrained Student six times, for a total of 193 minutes. One of the restraints lasted an hour.

147. Restraints were often employed even when Student's initial behavior was not harming himself or others, such as when Student threw a bandage at someone and when Student simply did not comply with an adult's directives. Sandhill used the restraints when Student threw small objects like pencils, when he refused to do his work, when he walked away from an adult, and when he kicked at things without the intention of hurting anyone or anything. On one occasion, Sandhill staff put Student in a child restraint because he spit some paper out of his mouth. Student responded aggressively to the restraint and staff ended up putting him in a prone restraint. On another occasion, staff put Student in a prone restraint when he kicked a door. On yet another occasion, Student was restrained because he began cursing and threatened to kill himself. None of the witnesses at hearing other than Sandhill staff believed these to be appropriate restraints. Student's expert witnesses Dr. Haytasingh and Dr. Crystal Bejarano agreed that prone restraints were not appropriate to use with children under any circumstance. Sandhill did not document times staff simply escorted Student from one area to another.

148. Student's response to the restraints generally was to kick and hit staff harder, use foul language, and call staff names. Student's behaviors, aggression, and use of expletives, were of much higher intensity and much higher frequency than any behavior he exhibited at North County Academy.

## DEL MAR'S MAY 2018 MULTIDISCIPLINARY ASSESSMENT

### Psychoeducational Assessment

149. Although Parents signed consent on November 8, 2017, for Del Mar to assess Student, it did not immediately inform Del Mar of Student's whereabouts. Parents did not fully disclose Student's enrollment at Sandhill and sign authorizations for Sandhill to release information to Del Mar until January 26, 2018. Ms. Schick then contacted Sandhill to determine if it would permit Del Mar assessors to conduct its assessment of Student at Sandhill. Sandhill did not respond to Ms. Schick until March 2018. At that time, it agreed to permit the assessment but asked that it be postponed due to its spring break and its own testing of Student. Del Mar was finally able to assess Student in March, April, and May 2018.

150. Del Mar school psychologist Raz Gibson conducted Student's psychoeducational and educationally related mental health services assessments. Ms. Gibson had a master's degree in educational psychology and a post-graduate certificate in school neuropsychology. She had administered over 250 psychoeducational assessments in her career. Prior to becoming a school psychologist, she worked as a behaviorist with non-public agencies.

151. Ms. Gibson spent a total of 10 days assessing Student. She used multiple assessment methods to identify Student's strengths and weaknesses. She reviewed Student's records, including his educational history and previous assessments; observed him at Sandhill; interviewed Parents, Sandhill staff, and North County Academy staff; and administered several standardized testing instruments.

152. Ms. Gibson interviewed Student's present teacher at Sandhill, Mr. McQueen, and two staff members who worked with Student at his residence at Sandhill. Student did not work independently and demonstrated significant task avoidance. He would not participate in discussions if he was not interested in the topic. Student

demonstrated significant anxiety if he perceived an academic subject or area to be too difficult. All Sandhill staff agreed Student did not interact appropriately with peers; misinterpreted social cues; had difficulties with personal grooming; had difficulty following through with directives; and tuned out when frustrated.

153. Ms. Gibson was chaperoned by Sandhill staff the entire time she was on its property. During her 10 days with Student, she witnessed Sandhill staff use restraint holds on him three times. On all three occasions she could not understand why staff found it necessary to restrain Student because he had not engaged in any behavior that was harmful to himself, others, or destructive of property at the time staff restrained him. Rather, Student was merely being non-compliant or would not stay in class. Instead of redirection, Sandhill staff chose to restrain him. Instead of deescalating the situation, Sandhill staff caused the situation to escalate. One of the restraints lasted 45 minutes. During another hold, which Ms. Schick also witnessed, Student kept saying that staff was hurting him, that staff was pressing on his genitals, and that he was going to pass out. Student ended up urinating on himself during one of the holds. Ms. Gibson's tone of voice and demeanor during her testimony indicated her disagreement and outright horror and distaste for the use of the restraints she witnessed. Even if a child might be lying about being in pain, she stated that proper procedures were to release the child from the restraint in case the child was telling the truth.

154. Ms. Gibson interviewed Carol Blackshear, Student's teacher at Sandhill for the spring 2018 semester.<sup>8</sup> Ms. Blackshear stated that she was frustrated because she was not given a formal curriculum to use with her students and did not have textbooks. She had very few work samples to give to Ms. Gibson. Furthermore, Sandhill did not do any formal academic evaluations of its students. Nor did it take data on academic or

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<sup>8</sup> Ms. Blackshear did not testify.

behavioral progress. Student would not read much in her class; she did not know his reading level because it depended on his mood. Ms. Blackshear resigned prior to the end of the spring 2018 semester, because of the lack of academic support Sandhill provided its students. Ms. Gibson interviewed Ms. Chamberlain and Ms. Kitchens, who provided some samples of Student's schoolwork from his time at North County Academy.

155. Ms. Gibson interviewed both Parents. Parents told her they were concerned about Student's behavior at school, the increase in behavioral emergency reports in spring 2017 while at North County Academy, and what they believed to be Student's lack of educational progress. Ms. Gibson specifically asked Parents if Student had issues at home. Parents said that Student had normal interactions with little sister; that he was affectionate with her and with Parents; and that he never showed any signs of self-harm or harmed others. Parents never told Ms. Gibson that they had to restrain Student, that Student was aggressive with them, that he had hit his sister and Parents, or that little sister was traumatized by Student's behaviors at home.

156. Ms. Gibson also interviewed Student. Student said that he was bullied at Sandhill and did not have friends and had no one with whom to play.

157. To assess Student's cognition, Ms. Gibson administered the Kaufman Assessment Battery for Children, Second Edition. Student demonstrated weaknesses in short-term auditory memory; long-term storage and retrieval of information; and fluid and pattern reasoning. His test results indicated he needed visual support for learning and that verbal and oral content should be minimized.

158. To assess Student's adaptive skills, Ms. Gibson administered the Adaptive Behavior Skills Assessment – Third Edition. The test consists of rating scales which Ms. Gibson asked Parents and Student's residence manager at Sandhill to complete. The residence manager scored Student low to below average in all adaptive areas save one.

Parents scored Student as average in the majority of areas.

159. The Test of Auditory-Perceptual Skills – Third Edition assesses a child's auditory short and long-term memory, measuring how well the child can remember and understand what the child hears without the use of visual supports. Ms. Gibson gave this test because Student had demonstrated a weakness in processing skills on the cognition assessment. The auditory assessment confirmed that weakness. The results of both tests showed that Student needed instruction tailored to his unique learning style by a teacher who was trained to customize interventions and teach him necessary learning skills.

160. Ms. Gibson assessed Student's social, emotional, and behavioral functioning using several testing instruments. The first was the Autism Diagnostic Observation System – 2. This test produces scores that indicate whether a child demonstrates symptoms of autism. Student's scores were indicative of someone on the autism spectrum. To look at the possibility that Student might be on the autism spectrum, Ms. Gibson also had Parents; Ms. Blackshear; Jenna Barnes, Student's Sandhill therapist; and Mr. McQueen fill out the rating scales for the Autism Spectrum Rating Scale Test. Parents' scores did not indicate that Student had an autism spectrum disorder. However, Mr. McQueen and Student's Sandhill teacher and therapist all scored him in the elevated to highly elevated range on almost every subtest assessed.

161. Ms. Gibson administered the Conners Comprehensive Behavior Rating Scales – P to Student. This test also consists of rating scales which Father, Ms. Blackshear, and Ms. Barnes completed. Their scores indicated Student might have possible special education eligibility in the areas of autism; learning disabilities; speech and language impairment; emotional disturbance; and other health impaired.

162. To assess Student in the area of emotional disturbance, Ms. Gibson administered the Emotional Disturbance Decision Tree. The test measures a child's

inability to build or maintain relationships; inappropriate behaviors or feelings; pervasive mood or depression; and physical symptoms and fears. This test is also based on rating scales which Mother; Ms. Blackshear; and Ms. Barnes completed. Student's scores were more elevated at Sandhill than at home, and indicated he might have an emotional disturbance.

163. Ms. Gibson tested Student's academic achievement using the Kaufman Test of Educational Achievement – Third Edition. Student scored in the low or below average range in most areas. He scored in the average range only in the reading fluency composite and the oral fluency composite.

164. To assess Student's word recognition and reading comprehension, Ms. Gibson administered the Standardized Reading Inventory – Second Edition. Student was in the fifth grade at the time he took this test. His ability to recognize words at an instructional level was at the fifth grade level before he became frustrated. However, his frustration level with reading comprehension was at the third grade level. Student was reading at the fourth grade level in the classroom. He was below grade level in writing and math.

#### EDUCATIONALLY RELATED MENTAL HEALTH SERVICES ASSESSMENT

165. Ms. Gibson also conducted an educationally related mental health services assessment of Student. Her original report was dated May 7, 2018. She amended it on May 14 and 15, 2018, to add additional information.

166. Ms. Gibson approached the mental health services assessment similarly to how she approached her psychoeducational assessment. She reviewed Student's records, including his behavior plan, social/emotional, behavioral, and educational history; interviewed Student, Ms. Barnes, Parents, and Sandhill staff. She observed Student in and out of class. And, she administered two testing instruments.

167. Student did not have any friends and did not know how to interact with



peers. He consistently misinterpreted their comments and actions as being mean to him. He had conflicts on a daily basis with peers.

168. In class, Student displayed significant task avoidance and low attention and focus on his schoolwork. He became easily frustrated and angered. His productivity was very low. When presented with a non-preferred task, he bit his nails; coughed loudly; pretended he was asleep or sick; pretended he did not understand the instructions; or simply left the classroom without permission.

169. Ms. Barnes provided a minimum of 60 minutes per week of individual therapy to Student. She also provided group therapy at Student's residence to the eight-to-16 boys who resided there at any given time. Student did not actively participate in the group therapy and refused to share his concerns. Student's anxiety continued to interfere with his ability to use strategies he had been taught to regulate himself. Ms. Barnes did not believe Student raised any safety concerns; her opinion in this regard conflicted with the almost 40 instances where Sandhill staff restrained Student between January 9, 2018, and May 9, 2018.

170. Ms. Barnes also believed Student did not have any behavioral issues at home because Parents never disclosed any problems to her, either through the Sandhill intake process or during family therapy. She believed Student had a healthy relationship with Parents and little sister and that he had not demonstrated any aggression at home. The only issues Parents mentioned were Student's refusal to follow directions and his inability to respond at home to structure and routine. For these reasons, Ms. Barnes believed Student could easily transition back to home from Sandhill, once Parents learned to implement interventions Sandhill recommended regarding Student's ability to manipulate them.

171. Overall, Student struggled more in his residential setting than in the Sandhill classroom because the classroom was more structured and had a higher adult-

to-student ratio. In his residence, he would often refuse to get out of bed in the morning, often claiming unjustifiably to be ill. He was very distracted in the morning and refused to attend to his own hygiene, an issue that had not been significantly present when he lived with Parents. Staff at his Sandhill residence often restrained him more than once a morning because he would not listen to staff.

172. Student often demonstrated control by becoming oppositional. He did not respond to choices and consequences, choosing instead to demonstrate behaviors such as hitting, kicking, lying down on the floor, or kicking things. When Student would not accept an offer and choice offered by staff, such as refusing to return to class, staff would restrain him. Sandhill staff believed that it was important to restrain Student at times before he became aggressive or unregulated, so that he would learn to follow adult direction and learn to follow Sandhill's rules. At the time of Ms. Gibson's assessment, Sandhill staff restrained Student an average of three times a week, which had declined somewhat from when he originally enrolled there. Sandhill staff believed that Student's aggression was calculated and deliberate and that he was just oppositional and defiant, which interfered with his learning. However, it was clear from the evidence that Sandhill used restraints for behavior modification and control, and not to prevent any harm to Student or others.

173. Ms. Gibson observed Student during his math class. He refused to do the assigned work and became highly anxious when staff insisted he do the work. He was highly dependent on adults in the class to write down problems and complete tasks. Out of class, Student preferred the company of adults. He did not engage in conversations with peers or initiate interaction with them.

174. Ms. Gibson incorporated into her mental health assessment the results of the Conners she administered during her psychoeducational assessment. She also gave Student a test called the Roberts – 2, which measured a child's social understanding. The

child is shown a picture depicting an everyday experience and asked to write a story about the picture. Student's writing sample showed difficulty understanding reality; low problem solving skills; unrealistic perceptions of environments; and perseverating thoughts that peers were mean to him.

175. Ms. Gibson also had Student complete an informal sentence completion test. Student's response again indicated difficulty with peer interactions, and paranoia that peers were mean to him and did not like him. He did show awareness that aggression toward others was wrong. He did not show any signs of wanting to harm himself.

176. Ms. Gibson concluded that, although by May 2018 Student had been enrolled in three residential programs for 11 months, he had regressed academically, behaviorally, and socially. His emotional dysregulation had increased. He displayed poor coping skills under stress and was highly reactive to what he perceived as being difficult for him to do. Student had developed task avoidance and noncompliance behaviors instead of learning to problem solve. He had poor interaction with peers and he failed to retain any social communication skills. He failed to develop communication strategies to ask for help or communicate his needs. Instead, Student became angry and frustrated, which resulted in his non-compliance. The result was Student's inability to access his education on any level.

177. Ms. Gibson recommended that Student's educational program consist of: 1) Wraparound mental health services; 2) Individual and group counseling; 3) Therapeutic support; 4) Individualized interventions; 5) Support in the classroom; 6) Academic enrichment, including technology to access academics; 7) A data-driven program to monitor progress and make adjustments as needed; and 8) Access to related services.

178. Ms. Gibson believed that a residential treatment center placement was too

restrictive for Student and had resulted in much of his frustration and anger.

179. Del Mar originally included a functional behavior analysis as part of its triennial assessment. However, Mr. McQueen discouraged Del Mar from conducting one in spring 2018, since Sandhill staff believed that Student was too new to the program for a behavior assessment to yield accurate results. Staff also believed that the triennial assessment process itself would be such a change in Student's routine that his behaviors during testing would not be typical. Sandhill also believed that a behavior assessment should be done at a later time when Student was more regulated, or was at home. After completing its triennial assessment, Del Mar made several more attempts with Sandhill to coordinate its administration of a behavior assessment. Sandhill was not cooperative. As of the hearing, Del Mar still had not been able to conduct the behavior assessment.

180. Student provided no evidence that any of the assessments Del Mar conducted were inappropriate in any way. Student did not reference the assessments in his closing brief. The only expert witness Student offered who addressed Del Mar's assessments was Dr. Crystal Bejarano, who conducted an independent educationally related mental health services assessment of Student at Parents' request on August 8, 2018. Dr. Bejarano found Del Mar's assessments to be comprehensive and thorough, although she felt that Ms. Gibson's mental health assessment could have included more information on Student's needs.

#### MAY 2018 IEP

181. Del Mar convened joint annual and triennial IEP team meetings on May 8, and May 15, 2018, to review its triennial assessments and develop Student's IEP. The IEP team consisted of Parents, accompanied by Mr. Roth; Ms. Schick, who attended as Del Mar's administrative designee; educational specialist Emily Stengle; Ms. Gibson; a Del Mar general education teacher; occupational therapist Teresa Landgraf; speech pathologist Dina Irwin; Ms. Chamberlain; Ms. Cummins; and one of Del Mar's attorneys.

Sandhill representatives Matthew McQueen; Carol Blackshear; Jenna Barnes; and another Sandhill staff member attended by telephone on May 8, 2018; Mr. McQueen, Ms. Blackshear, and Ms. Barnes participated by telephone on May 15, 2018. All required IEP team members were present at both meetings.

182. Del Mar provided Parents with copies of their procedural safeguards and copies of the assessment reports, which had not been completed prior to the IEP team meeting. Del Mar's assessors reviewed their assessment results and their assessment reports. Ms. Gibson asked Parents if they wanted time to review her report; they did not want to take the time to do so. Parents had no questions for Ms. Gibson, the occupational therapist, or the speech pathologist about their test results, their report, or their recommendations.

183. Del Mar's IEP team members reviewed Student's present levels of performance. At the time of the IEP team meeting, Student was completing fifth grade. He was well below grade level in foundational reading skills, reading comprehension, and word recognition, although he was at the end of fourth grade level in reading fluency. Student was at a first grade level in written expression, spelling, and writing fluency. At Sandhill, Student could not generate writing independently. He was completely dependent on adult assistance.

184. Student was at a beginning second to beginning third grade level in math. He required frequent re-teaching of concepts and often could not retain information from one day to the next. He benefited from using manipulatives and from visual aids, and required adult support for even simple math computation problems.

185. Student could not learn or access his education. He was late to class four out of five times a week. He avoided tasks and required a heavy level of support from staff to initiate and complete work. Every directive from an adult in class required negotiation, coaching, and redirection for Student to complete a task. He required

academic and emotional support 90 percent of the time. As of the May 8, 2018 IEP team meeting, Student was not on task, did not make efforts, failed to complete work, and failed to participate, 50 percent or more of the time in the majority of his academic classes. He did not participate at all in math or writing. Sandhill did not give academic grades.

186. Student continued to have difficulties with articulation and pragmatic language. He misread his peers' comments and actions and needed significant assistance from adults in responding to and interacting with his peers. Student avoided interacting with peers, and believed that his peers lied to him or always wanted something from him.

187. Student continued to present with significant anxiety and was easily overwhelmed, particularly when he perceived a task or situation to be difficult. In response, he reacted by kicking at things and being verbally aggressive. He also bit and chewed on his fingernails until they bled. He avoided tasks. He struggled to use coping strategies independently. Student did not, however, have any suicidal ideation or demonstrate any incidents of self-harm at Sandhill.

188. The IEP team was unable to review Student's progress on past goals due to a lack of information provided by Sandhill.

189. Based on Student's assessment results, including review of Del Mar's mental health evaluation, Student's IEP team determined he met the criteria for special education eligibility under the primary category of other health impaired and the secondary categories of emotional disturbance, autism, and speech or language impairment. Ms. Gibson recommended educationally related mental health services for Student based on the results of her mental health assessment. Parents had no questions about Student's eligibility or about the mental health assessment or Ms. Gibson's recommendations.

190. Sandhill staff continued to take the position that a functional behavior assessment of Student at Sandhill would not yield valid results. Del Mar continued to recommend that a functional assessment be conducted. However, since it had been prevented from doing one, it was not able to update Student's behavior intervention plan. Until it was able to conduct the behavior assessment, it recommended addressing Student's behavior through behavior goals and accommodations that would support teaching him self-regulation and self-calming techniques.

191. Del Mar reviewed drafts of proposed goals. Del Mar proposed 13 goals to address all of Student's known needs. Goals one, two, and three addressed Student's pragmatic communication and social emotional deficits. Goal one sought to have Student learn to recall and ask questions about information concerning other people. The purpose of goal two was to teach Student how to ask questions during conversations. Goal three's objective was for Student to learn to make supporting comments and use social appropriate body language to demonstrate interest and understanding of other people's comments. Student's progress would be determined by the speech and language pathologist's records and observation. All three goals required Student to meet the objectives in a year. He would meet the goals by completing four out of five trials over a two-week period.

192. Goals four, five, 12, and 13 addressed Student's deficits in the areas of social/emotional, behavior, and vocational, including coping skills. Goal four sought to teach Student to determine the size of a problem bothering him and then state an appropriate reaction to the problem. Goal five sought to teach Student self-regulation strategies to increase his engagement in lessons and with his instructors to at least 70 percent, with no more than two prompts from the teacher. Goal 12 sought to teach Student to explain his previous behaviors, identify how his body felt during the behaviors and list or demonstrate one to two previously taught self-calming strategies

to implement the next time he experienced the same feelings. The objective of goal 13 was to teach Student appropriate ways to ask for help, clarification, to take a break, or to ask for a sensory motor fidget tool. Student would meet the goals by completing the objectives at least four of five times during a two-week period, as measured by data collected by educational staff and mental health staff, or through teacher observation.

193. Goals six and seven addressed Student's articulation deficits. Goals eight, nine, 10, and 11, addressed Student's academic deficits in reading comprehension, math, written expression, and conventions of writing. Goal eight sought to increase Student's reading comprehension to the end of a third grade level within a year. Goal nine sought to teach Student to add and subtract mixed double-digit equations. The objective of goal 10 was for Student to learn to compose five-sentence paragraphs independently. The objective of goal 11 was for Student to learn to edit his writing. All four goals required Student to demonstrate accuracy 80 percent of the time in three out of three trials, as measured by teacher-charted data and work samples.

194. The proposed goals were modified and adjusted during the May 15, 2018 IEP team meeting based on input from Sandhill staff, the Del Mar general education teacher present, and Ms. Stengle, the Del Mar educational specialist. Del Mar staff reviewing each goal asked Parents if they had questions. Each time, Parents said they had no questions. Del Mar asked Parents if they had additional goals they wanted included in Student's IEP. Parents responded in the negative.

195. The IEP team then discussed, modified, and added to the proposed supplemental aids, accommodations, and modifications to support Student at school. Del Mar agreed to Parents' request to write the accommodation of small class size as a student-to-teacher ratio. The team modified accommodations by adding extended time. The team added an additional person to support Student during non-academic time at school. The team deleted another accommodation after the team determined it was too



restrictive. Parents had no questions.

196. The IEP team discussed different placement options for Student. There was agreement among all team members that Student could not access his education in a general education classroom, even with substantial supports and accommodations. Del Mar discussed potential non-public school placements but did not think them appropriate, because the program would not meet Student's needs, or because the distant location of the school would require Student to make a long bus ride that would not be appropriate to his needs.

197. Del Mar discussed several possible public school placements. Del Mar team members did not believe Student could access a public school program that was less restrictive than the North County Academy middle school program that would be available to Student as a sixth grader during the 2018-2019 school year. Ms. Schick discussed the North County Academy middle school program, which had supports and services not available at the North County Academy elementary school program Student previously attended. The middle school program had access to additional therapeutic supports, animal therapy, a movement area, and staff trained to deal with the problems of adolescents.

198. Parents, Mr. Roth, and the Sandhill staff were adamant that Student required a residential treatment center placement. Father's main concern was that Student had made suicidal comments in the past. However, Ms. Perez, the therapist at North County Academy, had determined that Student's statements at North County Academy in spring 2017 were not substantial because Student never had an intention of following through with any suicidal ideation. Neither his school nor Parents believed at the time that Student needed intervention after he made the statements. Further, according to what Sandhill staff told Ms. Gibson, Student had not made similar comments since being enrolled at Sandhill. Parents again failed to inform Del Mar about

Student's past problems at home and the trauma suffered by little sister as a result.

199. Del Mar IEP team members did not believe Student required a residential treatment center placement. They believed that such a setting was too restrictive and that Student had not benefited at all from almost a year at three different types of residential placements. Del Mar thus declined Parents' request that it fund a residential placement. Instead, it offered Student placement at North County Academy's middle school with the following services:

- 1,455 minutes a week of specialized academic instruction;

- 2,700 minutes a year of group speech and language therapy,  
an increase from Student's previous IEP;

- 900 minutes a year of group occupational therapy;

- 120 minutes a week of group counseling and guidance;

- 60 minutes a week of individual counseling;

- 100 minutes a month of parent counseling;

- Extended School year services, including specialized  
academic instruction and related services; and

- Transportation to and from school.

200. Del Mar offered Student the following supplementary aids, services, and accommodations:

- Reduction of visual stimuli and chunking of tasks;

- Checking to make sure Student understood verbal

instructions and repeating instructions if necessary;

Frequent breaks, including providing Student with break cards to signal he needed a break;

Access to a word processor with spell check;

Access to a scribe for written assignments when writing was not the focus of the assignment;

Visual and gestural cues;

Access to a visual hygiene routine throughout the school day;

Access to sensory motor tools;

Visual or gestural cues for proper left margin orientation for paper;

Offering of limited specific choices;

Consistent positive reinforcement;

Provision of a visual schedule and advance warning of changes to routine;

Support for copying or note-taking;

Access to a quiet spot to work;

Frequent, specific praise;

Instruction in a highly structured environment with a teacher-to-student ratio of four to one;

Up to 50 percent more time to complete classwork and assignments; and

Use of sentence frames to support non-preferred writing activities.

201. Del Mar offered a plan to transition Student from Sandhill back to the public school program at North County Academy, including:

Parent observation of the North County Academy middle school program;

Student tour of the North County Academy campus and visit to his classroom prior to his starting school there;

Provision of an aide for the first 60 days of school, with the aide assistance fading out by the end of the 60 days;

Provision to Student's teacher of his current IEP information;

Having the incoming teacher consult with the IEP team;

Provide Parents with details on Student's new service providers;

Scheduling of an IEP team meeting within 45 days of Student's start at North County Academy;

Opportunity for Parents and Student to ask questions before

Student started at North County Academy;

Development of a communication system between school and home and vice-versa; and,

Completion of a functional behavior assessment on a timeline to be determined at the 45-day review IEP team meeting.

202. Del Mar did not follow Dr. Haytasingh's recommendation from May 2017, to place Student in a residential treatment center. However, Del Mar's May 2018 IEP offer incorporated several of Dr. Haytasingh's recommendations including offering different kinds of therapy; emphasis on teaching Student de-escalation techniques; offering a school environment with credentialed special education teachers and staff trained in de-escalation techniques; and accommodations, including decreased work output requirements.

203. Although Dr. Haytasingh recommended cognitive behavioral therapy as the methodology to address Student's mental health needs, Student put on no persuasive evidence as to why Student required that methodology over any other behavioral technique to address his mental health needs.

204. Parents disagreed with Del Mar's offer of FAPE, since it did not include placement at a residential treatment center. They did not consent to the May 2018 IEP. Parents retained Student at Sandhill.

205. The only aspects of the May 2018 IEP offer Student's witnesses criticized during their testimony were Del Mar's failure to offer a residential placement and the extent of Del Mar's plan to transition Student back to North County Academy. Student put on no persuasive testimony that any other portion of the IEP or the process to develop the IEP failed to constitute a FAPE.

## DR. CRYSTAL BEJARANO'S MENTAL HEALTH ASSESSMENT

206. Parents contracted with Dr. Crystal Bejarano to conduct an independent educationally related mental health services assessment in June 2018, which she completed on August 8, 2018 with her report. Dr. Bejarano had a doctorate in educational psychology. She was credentialed as a school psychologist. Prior to joining Dr. Haytasingh's private practice in July 2017, she had been a school psychologist and director of several school district special education programs since 2003. Dr. Bejarano conducted hundreds of psychoeducational and mental health assessments throughout her career.

207. For her assessment, Dr. Bejarano reviewed Student's records, including Del Mar's assessments. She also received information from Parents through interviews and email correspondence. Parents informed Dr. Bejarano of numerous instances prior to Student attending his residential placements where Student's aggressive, angry, and bullying behavior traumatized little sister. Mother told Dr. Bejarano that Del Mar's desire to return Student to his home was "repugnant" given his home behaviors. Mother failed to tell Dr. Bejarano that Parents had never disclosed to Del Mar any of the instances of Student's aggression with little sister or the extent of his behavioral interactions with Parents at home.

208. Dr. Bejarano also went to Sandhill at the end of June 2018 to observe Student. Student still failed to interact appropriately with his peers. Although she observed Student being on task during class, she also observed some of his defiant behaviors when he refused to do what was asked of him after class.

209. Dr. Bejarano recommended that Student remain in a residential treatment center because Student still demonstrated aggressive behaviors and had not developed coping skills. She was particularly concerned about keeping Student's family safe because Parents could not cope with Student's behaviors at home. She also believed

that to transition Student from his residential placement he needed first to come home for short visits. Dr. Bejarano also believed that Parents required wraparound services to learn to address Student's behaviors at home.

210. Dr. Bejarano was critical of the way Sandhill staff restrained Student because staff required Student to become compliant to be released from the hold rather than just determining that Student was no longer a danger to himself or others. That philosophy was counter to any training on restraints for children Dr. Bejarano had received.

211. Dr. Bejarano's assessment was not given any weight for a variety of reasons. First, Parents forbade her from speaking with anyone from Del Mar or North County Academy, so her assessment did not include any input from any of North County Academy's staff, including Student's former teacher or therapist at North County Academy. This created a substantial gap in the information Dr. Bejarano used to reach her conclusions. Second, Dr. Bejarano arrived at her recommendations based significantly on problems in Student's home environment. The first time Del Mar learned of these issues was when it received Dr. Bejarano's assessment report as part of Student's evidence for this hearing. Third, Del Mar was not aware of the information in Dr. Bejarano's assessment at the time it made its offer of FAPE in May 2018. Dr. Bejarano's conclusions are thus of little help in determining the appropriateness of Del Mar's May 2018 IEP offer.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>9</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);<sup>10</sup> Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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).)

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<sup>9</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>10</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.



3. In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

4. 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 to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that, despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-951 (*Mercer Island*).) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_\_, 137 S.Ct. 988 [197 L.Ed.2d 335]. It explained in *Endrew F.* that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student like *Endrew F.*, who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001; see *E.F. v. Newport Mesa Unified Sch. Dist.* (9th Cir. 2018) 726 Fed.Appx. 535 [nonpub. opn.] [in Ninth Circuit *Endrew F.* clarified but did not change *Rowley* standard], citing *M.C.*, *supra*, 858 F.3d at p. 1200.) The high court noted that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Endrew F.*, *supra*, 137 S.Ct. at p. 999 [italics in original].)

6. 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, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof for all of his issues, and Del Mar had the burden of proof for its issue.

7. Whether an IEP offers a student a FAPE is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). An IEP “is a snapshot, not a retrospective”; it must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Ibid.* [quoting *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (Mansmann, C.J., concurring); see also *L.J. v. Pittsburg Unified Sch. Dist.* (9th Cir. 2017) 850 F.3d 996, 1004 [“the ‘snapshot’ rule . . . instructs the court to judge the appropriateness of the determination on the basis of the information reasonably available to the parties at the time of the IEP meeting.” (*L.J.*)]; *JG v. Douglas County Sch. Dist.* (9th Cir. 2008) 552 F.3d 786, 801 (*J.G.*)).<sup>11</sup>

8. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the

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<sup>11</sup> In *E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2009) 652 F.3d 999, 1004-1005, a divided Ninth Circuit panel declined to apply the *Adams* rule to a 2007 assessment that the majority thought had relevance to a 2004 IEP team decision on eligibility. However, that was an interpretation of the IDEA’s provision that a district court “shall hear additional evidence at the request of a party.” (20 U.S.C. § 1415(i)(2)(C)(ii).) More recent decisions of the Ninth Circuit have returned to the routine application of *Adams*. (See *L.J. supra*, 850 F.3d at p. 1004; *Baquerizo v. Garden Grove Unified Sch. Dist.* (9th Cir. 2016) 826 F.3d 1179, 1187; *Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1058.)

State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.) (*Mercer Island, supra*, 592 F.3d at p. 947.)

9. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*).) The Ninth Circuit has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3 (*Park*); *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural error may be held harmless. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

#### ISSUES 1 AND 2(C): FAILURE TO CONVENE IEP TEAM MEETINGS AFTER JANUARY 1, 2017, TO ADDRESS STUDENT'S LACK OF PROGRESS, ESCALATING BEHAVIORS, AND DEL MAR'S USE OF RESTRAINTS

10. Student contends that Del Mar should have convened IEP team meetings to address Student's lack of progress and escalating behaviors during the spring 2017 semester. Del Mar contends that it noticed IEP team meetings which Parents initially agreed to attend, but later cancelled.

11. The law requires an IEP team to meet at least annually "to determine whether the annual goals for the pupil are being achieved, and revise the individualized education program, as appropriate, to address among other matters the following: (1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate...." (Ed. Code, § 56341.1, subd. (d).) An IEP team meeting

must be called when the "pupil demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

12. North County Academy took data daily on Student's progress. It measured his overall participation in his academic program and his work completion under the category of productivity. Student's scores in this area decreased slightly between the end of the fall 2016 semester and the end of the spring 2017 semester, decreasing from 74 percent to 72 percent, representing less than a three percent decrease. North County Academy also measured safety toward himself and others. Student's safety scores decreased from 92 percent to 86 percent from the end of 2016 to June 2017. This represented a six-and-a-half percent decrease in safety. North County Academy measured Student's ability to use kind words, follow directions, and demonstrate expected behavior and language under the category of respect. Student's scores in this area decreased from 83 percent at the end of 2016 to 79 percent by June 2017. This represented less than a five percent decrease in Student's overall respect in class.

13. Student's decreased scores in the areas of productivity, safety, and respect, were not remarkable. In no case did Student's scores slip more than six-and-a-half percent. These minimal changes, although something an IEP team probably would want to review at an annual meeting, were not significant enough to fall under the category of "lack of progress" as anticipated by the statute. This is particularly true given that the decrease happened over the course of only five months. Student's focus on the decreases as a basis for the need for Del Mar to convene an IEP team meeting is therefore not persuasive; by analogy, a school district would have to convene IEP team meetings for every child with an IEP whose grades decreased from "As" to "Bs" over the course of just one semester. Student does not provide any persuasive authority to support such a contention.

14. Student also argues that Del Mar should have convened IEP team meetings based on his escalating behaviors and the resulting use of restraints on Student. Del Mar responds that it did attempt to convene the meetings, but Parents refused to attend until June 9, 2017.

15. There is no dispute that Student's behaviors escalated after the start of the spring 2017 semester. During the fall 2016 semester, Student had only one behavior incident. In February 2017, Student's behavior issues increased significantly. Between February 16, 2017, and April 27, 2017, Student had 15 behavior episodes that required him either being escorted to another area, put into a restraint hold, or both. In response, on April 27, 2017, Del Mar agreed to convene an IEP team meeting with Parents. The parties agreed to meet on May 19, 2017. Parents, however, cancelled that meeting. They did not agree to attend an IEP team meeting until June 9, 2017.

16. It is disingenuous for Student to contend that Del Mar failed to meet to discuss his escalating behaviors when it was Parents who cancelled the first meeting. Parents did not give a reason for their cancellation.

17. Moreover, even assuming that Del Mar was somehow at fault and should have been more aggressive in attempting to convene an IEP team meeting, Student failed to persuasively show that the procedural violation rose to the level of a denial of FAPE. Student put on no evidence that his right to a FAPE was impeded or that he was deprived of an educational benefit by any delay in convening an IEP team meeting.

18. Special education law places a premium on parental participation in the IEP process. States that accept federal funding must ensure, inter alia, that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of

the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

19. To the extent Student argues that Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to him was significantly impeded because of any delay by Del Mar in convening an IEP meeting in spring 2017, the evidence is to the contrary. The evidence demonstrated that Parents' focus, beginning in March 2017, was on finding a placement for Student that would remove him from their home because Student's volatile behavior at home, unbeknownst to Del Mar, had increased to the extent that little sister had become traumatized. In response, Parents contacted Ms. Corey for assistance in finding a residential placement. Their decision to consult Ms. Corey was not based on Student's increased behavior problems at school. At the time they contacted her, Student had engaged in five behaviors that resulted in an escort and/or restraint. However, Del Mar failed to inform Parents of the four of the five and they were thus aware of only one incident at the time they decided to contact Ms. Corey.

20. The evidence further demonstrated that Parents sought to delay meeting with Del Mar because they wanted to make decisions as to how to address their issues with Student in the home prior to attending an IEP team meeting. Within a month of beginning to work with Parents, Ms. Corey contacted Cherry Gulch to see if it had room for Student and might accept him. Parents bought tickets on May 1, 2017, to fly to Cherry Gulch on May 25, 2017. Parents contracted with Mr. Roth on May 4, 2017. They thereafter contracted with Dr. Haytasingh for an independent psychoeducational evaluation. Parents did not inform Del Mar of any of these events. It is clear they wanted to visit possible residential placements before requesting funding for one from Del Mar.

21. For these reasons, even assuming Del Mar should have convened an IEP team meeting earlier than June 9, 2017, to discuss Student's escalating behaviors or its use of restraints, Student has failed to meet his burden of proof that any delay resulted in a denial of FAPE.

ISSUES 2(A) AND 2(B): FAILURE TO TIMELY INFORM PARENTS OF BEHAVIOR  
EMERGENCY REPORTS AND FAILURE TO PROVIDE THE REPORTS<sup>12</sup>

22. Student contends Del Mar committed procedural violation by failing timely to inform Parents of behavior emergency reports and by failing to create a report for an incident that happened on April 24, 2017. Del Mar responds that it informed Parents formally and informally of all behavior emergencies and, to the extent it did not, Student failed to prove a denial of FAPE.

23. Education Code section 56521.1 addresses the use of physical restraints on children with special needs, with a goal of preventing the overuse of such restraints or using restraints in lieu of developing a comprehensive behavior intervention plan. To that end, section 56521.1, subdivision (e), requires a school to notify a child's parent or guardian within one school day if the school needs to employ an emergency intervention. There is no requirement that the notification be given in writing. The

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<sup>12</sup> In his closing brief, Student raised several issues for the first time that were not raised in his request for due process or in the prehearing conference order. He alleged that Del Mar concealed the severity of his behaviors; that Del Mar unilaterally changed his behavior intervention plan; and that Del Mar failed to make changes to his behavior intervention plan in response to his behavioral emergencies. Since the issues were not previously raised, were not consented to by Del Mar, and were not fully litigated at hearing, they are not addressed in this decision. (*M.C.*, *supra*, 858 F.3d at p. 1196; 20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).)



section also requires the school immediately to complete a behavior emergency report and maintain the report in the child's file. The statute does not require that behavior emergency reports be given to the child's parents.

24. Section 56521.1, subdivision (e), also requires that the behavior emergency report contain: (1) The name and age of the individual with exceptional needs; (2) The setting and location of the incident; (3) The name of the staff or other persons involved; (4) A description of the incident and the emergency intervention used, and whether the individual with exceptional needs is currently engaged in any systematic behavioral intervention plan; and (5) Details of any injuries sustained by the individual with exceptional needs, or others, including staff, as a result of the incident.

25. Student contends that Del Mar failed to create a behavior emergency report for an incident that occurred on April 24, 2017. The evidence is to the contrary. Del Mar created a narrative report of the incident that was placed in Student's file. The narrative met the majority of the criteria established by statute. To the extent that it did not, Student did not provide any persuasive evidence that the failure to include the information denied Student a FAPE.

26. However, Student did meet his burden of proof that Del Mar failed timely to provide Parents with notice of five behavioral emergencies prior to providing them to Mr. Roth in early May 2017. Parents testified and the documentary evidence demonstrated that Parents did not receive either email or telephone notification of incidents that occurred on February 16, February 28, March 7, March 13, and May 4, 2017.

27. Student argues that Parents' failure to receive immediate notice of the five incidents significantly interfered with their ability to participate in the process of developing Student's IEP, because they did not know the extent of Student's behaviors and therefore could not adequately advocate for him.

28. On the surface, Student's argument has merit. As Student points out, parental participation in their child's IEP process is a cornerstone of special education law. (See, *Doug C. v. Hawaii Dept. of Education* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) However, in this case, Student presented no persuasive evidence that Parents' right to participate in developing his IEP was significantly impeded by their late receipt of notice of five behavior incidents.

29. On April 27, 2017, Del Mar scheduled an IEP team meeting for May 19, 2017, a date originally agreed to by Parents, to address Student's behavioral issues. By April 27, 2017, Parents were aware of at least 12 behavior emergencies. Parents were given full notice of all behavioral emergencies when Del Mar provided Mr. Roth with copies of all reports in early May 2017. In spite of having this information, Parents cancelled the May 19, 2017 IEP team meeting without giving Del Mar reasons for the cancellation. Parents cancelled the meeting because Dr. Haytasingh had not finished his assessment report and because Parents wanted to visit residential placements prior to meeting with Del Mar. It is disingenuous for Student to argue that Parents were significantly prevented from participating in his IEP process when it was they who delayed the process, even after receiving all the information concerning Student's behavioral emergencies. Furthermore, Parents decided to seek a residential placement for Student as early as March 2017, when they contacted Ms. Corey for help in finding a placement. The lack of timely notice of five behavior emergencies had no impact on Parents' decision to seek such a placement, especially as only two incidents occurred before Parents contacted Ms. Corey. Student failed to meet his burden of persuasion that he was denied a FAPE by Parents' untimely receipt of five behavior emergency reports.

### ISSUE 3: FAILURE TO TIMELY AND APPROPRIATELY ASSESS STUDENT FROM JANUARY 1, 2017, THROUGH THE END OF THE 2017-2018 SCHOOL YEAR

30. Although Student initially put at issue all assessments that Del Mar did or should have done from January 1, 2017, through the end of the 2017-2018 school year, Student did not submit any evidence at hearing or argue in his closing brief that Del Mar's May 2018 multidisciplinary assessment failed to meet legal standards. Rather, Student's evidence at hearing and his closing brief arguments focus on his contentions that: a) Del Mar should have agreed to Parents' May 1, 2017 request for an early triennial reassessment because of his deteriorating behaviors; and b) Ms. Gibson's May 2018 educationally related mental health assessment was inadequate. Del Mar contends that the facts did not warrant assessing Student in spring 2017, and Ms. Gibson's mental health assessment was appropriate.

31. A special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

32. If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five school days, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321,

subd. (c)(4).) Once a student has been referred for a reassessment, an IEP team meeting shall occur within 60 days of receiving parental consent for the assessment. (See 20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).) The 60-day timeline is tolled during school vacations of more than five days; the 60-day timeline recommences when school starts again. (Ed. Code, § 56344, subd. (a).)

33. Student's contention that Del Mar should have moved up the date of his triennial assessment from October 2017, to May 2107, as Parents requested, is not persuasive. Student presented no evidence that Student's academic, occupational therapy, or speech and language needs had changed over the course of the spring 2017, to the extent that an early re-assessment was necessary or required. In declining to do the early triennial assessment, Del Mar explained to Parents that Student would be doing state-mandated testing at the same time Parents requested the early triennial and the additional tests would cause Student unnecessary stress.

34. Del Mar also explained that it would not be able to complete the triennial assessment by the end of the school year. Districts have 60 days to complete assessments and convene an IEP team meeting to review the results. The 60 days are tolled during summer breaks. Del Mar would have had until 30 days after the next school year began to complete the assessment. Therefore, even had it agreed to start the assessment process, there is no evidence it would have been able to complete it before the end of the school year. Del Mar informed Parents that it would start the assessment process the first day of the 2017-2018 school year. It provided Parents with an assessment plan on August 28, 2017. Yet, Parents did not consent to the assessment until November 2017. There is no evidence that Del Mar's rejection of an early triennial denied Student a FAPE.

35. However, Student did demonstrate that Del Mar should have initiated a behavioral assessment of him by at least late April 2017. Between February 16, 2017, and

April 27, 2017, when Del Mar agreed to convene an IEP team meeting, Student had 15 behavioral instances that required either an escort hold or a child restraint. That was a 15-fold increase over the prior school semester in less than a two-and-a-half months' time.

36. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park, supra*, 464 F.3d at pp. 1031-1033.) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119 (*Timothy O.*)) The Ninth Circuit Court of Appeals in *Timothy O.* held a school district's failure to assess the student may result in substantially hindering a parent's ability to participate in a child's educational program, and seriously deprive the child's parents, teachers and district staff of the information necessary to develop an appropriate educational program with appropriate supports and services for the child. Failure to assess the student therefore resulted in a denial of FAPE. (*Id.*, at pp. 1124-1126; *S.P. v. East Whittier School Dist.* (9th Cir. 2018) 735 Fed.Appx. 320, 322-323.)

37. Special education law requires that in the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

38. Ms. Chamberlain, North County Academy's vice principal, acknowledged at hearing that Student's significant increase in behavior's warranted the administration of a functional behavior assessment by spring 2017. Del Mar argues that her testimony was contradicted by Ms. Kitchens and Ms. Schick, who both opined that conducting an assessment late in the school year would not yield accurate results or be in Student's

best interests. Del Mar also argues that its IEP team members determined that the function of Student's behavior remained either wanting attention or wanting to escape non-preferred or frustrating tasks, as identified in Student's behavior intervention plan.

39. Del Mar's argument is not persuasive. Its contention that the function of Student's behavior remained the same is speculation. The contention was based solely on the observations and opinions of Ms. Kitchens and Ms. Schick. While they both are experienced special education educators, and Ms. Kitchens is studying to become a board certified behavior analyst, their opinions as to the functions of Student's behavior in spring 2017 were not based on any data collection or analysis. A functional behavior assessment would have tested their hypotheses to determine if the reasons for Student's behavior remained the same. An assessment also would have assisted a determination as to why Student's behaviors increased so dramatically.

40. Had Del Mar assessed Student's behavior, it would have been able to modify Student's behavior plan, if necessary, when it reviewed his educational program and progress at the June 9, 2017 IEP team meeting. Student lost the benefit of any such changes. Additionally, the failure to assess Student deprived Parents of the information the assessment would have provided. Because Del Mar did not agree to assess Student when they requested, Parents had to seek an independent assessment from Dr. Haytasingh. Student therefore met his burden of proof that Del Mar's failure to conduct a behavior assessment of him in spring 2017 denied him a FAPE.

41. Student also contends that Ms. Gibson's May 2018 mental health assessment was not appropriate because it failed to include sufficient information about Student to understand his mental health needs. Ms. Gibson reviewed Student's records, including his behavior plan; reviewed his social/emotional, behavioral, and educational history; and interviewed Student, Ms. Barnes, Parents, and Sandhill staff. She observed Student in and out of class. And, she administered two testing instruments. While her

assessment may not have been as comprehensive as was the one Dr. Bejarano administered, it included all the components necessary for her to make conclusions and recommendations about Student's need for educationally related mental health services. For those reasons, Student did not meet his burden of proof as to this issue.

42. To the extent Student raised issues about Del Mar's May 2018 multidisciplinary assessment, he failed to prove the remaining assessments did not meet legal standards. He did not present evidence that the tests and assessment materials were not valid, were not administered by trained personnel, or that the assessors did not follow proper test protocols. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subds. (b)(2), (3) and (g).) Nor did Student put on any evidence that Del Mar's assessments were racially, culturally, or sexually discriminatory; or were not administered in the student's primary language. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

43. Student also failed to prove that Del Mar's May 2018 multidisciplinary assessment was untimely. The assessment was due in October 2017. Del Mar attempted to get consent to the assessment as early as August 28, 2017. Parents did not provide consent until after Del Mar filed for due process to be able to assess Student without consent. Any delay between the time Parents provided consent and the time Del Mar started the assessment process was due to Parents' obfuscation and actual misrepresentations about Student's whereabouts. Later delays were caused by Sandhill's failure to cooperate in the assessment process. It is well settled that parents' failure to cooperate with an assessment is tantamount to refusing to consent to the assessment, when the non-cooperation, or parent imposed conditions, impedes the school district's ability to assess. In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, affd. (11th Cir. 2012) 668 F.3d 1258, for example, parents purported to agree to a reassessment. However, they attached conditions to their approval, including requiring particular assessors, meetings with parents before and after the assessments, and

limitations on the use of the assessments. The District Court deemed this a refusal to consent, noting, "With such restrictions, Plaintiffs' purported consent is not consent at all." (*Id.*, 704 F.Supp.2d at p. 1309.) In affirming, the Eleventh Circuit found that parents' conditions "vitiating any rights the school district had under the IDEA for the reevaluation process . . . ." (*Id.*, 668 F.3d at p. 1264.) Similarly, in *R. A. v. West Contra Costa Unified School Dist.* (9th Cir. 2017) 696 Fed.Appx 171, it was parent's conduct of restricting the school district's ability to assess student that interfered with student's special education program. Here, evidence showed that parent's omissions and misrepresentations regarding Student's whereabouts impeded Del Mar's ability to timely assess Student. It is inequitable to hold Del Mar responsible for Parents' conduct. Student also provided no authority to support Parents' position that Del Mar had no legal right to conduct its assessment simply because it did not agree to Parents' request for an early triennial.

44. In sum, to the extent that Student raised issues challenging the timeliness or appropriateness of Del Mar's May 2018 triennial assessment, Student failed to meet his burden on the issues.

#### ISSUES 4(A), 5, 6 AND 7: FAILURE TO OFFER STUDENT A RESIDENTIAL PLACEMENT

June 9, 2017 IEP

45. Student contends that the significant escalation of his behaviors, starting in February 2017, should have convinced Del Mar that only placement at a residential treatment center would address his needs and allow him to access his education. Del Mar contends that it was able to address Student's needs in the therapeutic environment at North County Academy and that a residential placement was not his least restrictive environment.



46. A student with a disability has the right to a FAPE under the IDEA (20 U.S.C. § 1400 et. seq.) consisting of special education and related services. A school district must provide a residential placement to a student with a disability if such a placement is necessary to provide the student with special education and related services. (34 C.F.R. § 300.104.) The test for determining whether a residential treatment center placement provides FAPE is whether the placement is necessary to provide special education and related services to meet the student's educational needs. (*Ashland School District v. Parents of RJ* (D. Or. 2008) 585 F. Supp.2d 1208, 1231, affirmed, (9th Cir. 2009) 588 F.3d 1004 (*Ashland v. RJ*); *Ashland School District v. Parents of Student E. H.* (9th Cir. 2009) 587 F. 3d 1175 (*Ashland v. E.H.*)). The analysis for determining whether a residential treatment center placement is appropriate hinges on whether the placement is necessary for educational purposes. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.3d 635, 643 (*Clovis*)). In *Clovis*, the Ninth Circuit Court of Appeals identified three possible tests for determining when a school district is responsible for the cost of a residential placement: (1) when the placement is "supportive" of the child's education; (2) when medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement primarily aids the student to benefit from special education. (*Ibid.*) By this standard, Student had the burden of proving that a residential treatment center was necessary for educational purposes.

47. In the instant case, the evidence shows that Student was making progress on some of his goals as of the June 9, 2017 IEP team meeting. He had increased his participation in counseling therapy and in other related services. He increased his participation in classes and progressed academically. Although he had a number of behavioral emergency reports, most behaviors resulted in Student being escorted to

another area so he could regulate his behavior; only about a third were situations where Student had to be placed in a hold.

48. Student's reliance on his minor regression in productivity, safety, and respect to justify the need for a residential placement is misplaced. Student's scores in all areas decreased less than seven percent from the end of the fall 2016 semester to the date of the June 9, 2017 IEP team meeting. The minimal regression does not support a contention that Student was regressing to a point that he was unable to access his education or benefit from it. The minimal regression does not support the need for a residential placement.

49. Student's reliance on his instances of suicidal ideation as a support for a residential placement is also misplaced. Ms. Perez properly responded to each incident by doing a threat analysis to determine whether Student had the intent and ability to harm himself. In each case, she ultimately determined that Student did not have the intent or ability to do so. She took no further action than notifying Parents and sending them a safety protocol packet for their referral in case Student's suicidal ideation happened at home. She did not feel it necessary to contact the county psychiatric emergency response team because Student's comments were not serious enough to require hospitalization or any other immediate medical or psychiatric attention.

50. Although Student argues that his suicidal mental state should have alerted Del Mar that he required a residential placement, his Parents did not believe at the time that Student's mental state was deteriorating to such an extent that they needed to respond to the suicidal ideation. They did not take Student to see a therapist or psychologist. They did not take Student to see his primary care physician. They did not hospitalize Student. Their lack of response to Student's statements of desire to harm himself demonstrate that the statements were not serious enough to warrant intervention other than the counseling Ms. Perez provided as part of each incident.

51. The evidence instead supports a finding that it was Student's behavior at home that prompted Parents' request for a residential placement. Parents first contacted Ms. Corey by mid-March 2017. At that time, they were aware of only one behavior emergency report. There was no evidence at the time that Student was not participating in class or was failing to make any progress at school. Rather, Parents contacted Ms. Corey because Student at home was eloping, was oppositional and defiant, and refused to do basic hygiene like showering. More significantly, he was terrorizing his little sister with aggression such as running after her, screaming at her, and even hitting her, to the point where she ran away from and hid from Student. It was little sister's traumatized state that propelled Parents to contact Ms. Corey and initiate a search for a residential placement.

52. Even assuming that the behavior at home was affecting Student at school, Del Mar had no notice of it as of the June 9, 2017 IEP team meeting. Del Mar did not know the extent of Student's maladaptive behaviors at home. It did not know that Parents were going through a divorce, which might have affected Student's behavior at school. It did not know that Student's behavior traumatized his little sister. It did not know the extent of Student's conflicts with Parents or their inability to address it. Del Mar did not discover this information until August 2018, when it received Dr. Bejarano's assessment report. Looking at the information that was available at the time to Del Mar, there was no reason for it to believe that Student's behaviors at home were affecting his access to his education at school. (See *Adams, supra*, 195 F.3d at p. 1149; *L.J., supra*, 850 F.3d at p.1004.)

53. Finally, Dr. Haytasingh's recommendation for a residential placement also is not persuasive. He recommended the placement based primarily on Student's increased behavior incidents and Student's anxiety at school. However, his recommendation contradicted the findings in the Student Observation Form that was

part of his assessment report. Dr. Haytasingh found that Ms. Kitchens's lessons were appropriate for Student. Dr. Haytasingh concluded that the instructional expectations were reasonable for Student. He also found that instructions were given clearly in the class. He also concluded, based on observations of Student in class, that Student's teacher and aides handled the behaviors correctly when they occurred. Dr. Haytasingh noted that the classroom staff properly addressed Student's inappropriate behaviors and encouraged him when he made good choices.

54. During his testimony, Dr. Haytasingh did not directly address the contradictions between his conclusions on the observation report and his ultimate recommendation that Student required a residential placement; in spite of the appropriate instruction provided at North County Academy and the appropriate responses to Student's behaviors. It is therefore unclear why Dr. Haytasingh reached the conclusion that North County Academy could not continue to offer appropriate instruction and appropriate responses to Student's behaviors. North County Academy was designed to educate students with behaviors such as Student's. It had highly trained staff, including special education teachers, trained aides, and counseling staff available during the entire school day. All staff members directly working with Student were trained to respond to aggressive behaviors and were able to respond to Student's behaviors using the CPI techniques. Dr. Haytasingh's assessment and testimony do not support a finding that North County Academy was not an appropriate placement for Student.

55. For these reasons, Student failed to meet his burden of persuasion that he required a residential placement as of June 9, 2017.

May 2018 IEP

56. Student's IEP team met on May 8 and May 15, 2018, to review Del Mar's multidisciplinary assessment and develop an annual and triennial IEP for Student.

Parents renewed their request for Del Mar to place Student at a residential treatment center. Del Mar declined. Student contends that Del Mar's failure to offer the residential placement denied him a FAPE because he could not access his education in a lesser restrictive educational setting.

57. At the time of these IEP team meetings, Del Mar still was not privy to the information regarding how Student's behavior had impacted his family and the trauma it caused. It therefore could not consider whether Student's behavior at home was intertwined with his behavior at school, or whether the behavior in the home impeded his ability to access his education.

58. Student additionally failed to prove that he required a residential placement to access his education and make educational progress. As stated above, the evidence showed that he made educational progress at North County Academy, that the instruction there was appropriate, and that staff was able to properly respond to his behavioral issues.

59. Moreover, the evidence demonstrated that Student was not able to access his education at any of the three residential placements he attended. To the contrary, the overwhelming evidence demonstrated that Student regressed academically and behaviorally at Cherry Gulch and Sandhill, and that he failed to access any academics at SUWS.

60. Cherry Gulch attempted to address Student's behavioral issues through therapy sessions. It attempted to provide academic instruction to Student. Student refused to go to class and thus made no academic progress. Cherry Gulch was unsuccessful also at addressing Student's behavior, even when it increased the number of adults supplying one-on-one support to Student. Cherry Gulch ultimately discharged Student because it could not serve his needs.

61. The purpose of any placement under the IDEA, even a residential one to

address behavioral, emotional, or mental health needs, is to provide a child with an academic education. (*Clovis, supra*, 903 F.3d at 643). SUWS did not provide formal academic instruction as part of its program. Mother acknowledged this at hearing. The SUWS discharge report states that the instruction it did attempt with Student failed. SUWS stated in its discharge report that it provided therapy successfully to Student. No one from SUWS testified at hearing to explain the conclusions in its report; the report therefore was not given any weight. Furthermore, Student began demonstrating maladaptive behaviors at Sandhill within five days of transferring there from SUWS. Even assuming Student's behavior at SUWS was regulated, the program failed to provide any lasting benefit to Student.

62. The evidence is also overwhelming that Student regressed academically and behaviorally at Sandhill between the time he enrolled and the May 2018 IEP team meetings. Student's progress academically and behaviorally at North County Academy was consistently above the 70 percent mark. At Sandhill, Student needed behavioral and academic support 90 percent of the time. He failed to make any progress at all in a number of areas. He made only 50 percent progress in others. He regressed in all academic areas.

63. Student regressed behaviorally as well at Sandhill. In the four months he was there prior to the May 8, 2018 IEP team meeting, Sandhill applied at least 40 restraint holds on him to address maladaptive behaviors. At least 15 of the holds lasted more than 30 minutes; some lasted an hour or more. In contrast, during the same period of time the prior year at North County Academy, Student was placed in a restraint hold approximately eight times. None of the restraint holds at North County Academy lasted more than 18 minutes; the majority was for 10 minutes or less. A residential placement is not appropriate where the child does not make any progress. (See, *S.H. v. Mt. Diablo Unified Sch. Dist.* (C.D.Cal. July 3, 2017) 2017 WL 2840705 \*17 - \*19 (*S.H.*.)

64. Parents stated that their primary reason for placing Student residentially was to address his maladaptive behaviors at school. Yet, Student's behavior at Cherry Gulch and Sandhill significantly regressed. Given this overwhelming evidence, there was no basis for Del Mar to believe that Student required continued residential placement to make meaningful progress.

65. Student argues that Dr. Bejarano's assessment and testimony supports his need for a residential placement. However, Dr. Bejarano's conclusions are not persuasive in this case. Significantly, she assessed Student months after the May 2018 IEP meetings. Any progress Student made between May and August 2018 was not information available to Del Mar during the May 2018 IEP discussions. (*Adams, supra*, 195 F.3d at p. 1149.)

66. Moreover, Dr. Bejarano's conclusions were significantly informed by the information Parents provided regarding Student's aggressions in the home, particularly how his behaviors had terrorized his little sister. Dr. Bejarano concluded that a residential placement was necessary in part to keep Parents and sister safe. Yet, school districts are not obligated to residentially place a child where the evidence shows that the behaviors in home are the reason a residential placement is needed. (*Ashland v. R.J., supra*, 588 F.3d at pp. 1009-1011; *Ashland School District v. E. H.* 587 F. 3d at p. 1185). Student did not present any persuasive evidence that his issues at home impacted him at school.

67. Even if the issues at home were intertwined with Student's behavior at school, Del Mar was not aware of the behaviors when it made its IEP offer. Student's issues at home therefore are not a valid reason for finding Del Mar should have offered Student a residential placement. Given the totality of the circumstances, particularly Student's significant academic and behavioral regression during the 11 months he was in residential placements, Del Mar's failure to offer Student a residential placement in

May 2018 did not deny Student a FAPE.

ISSUES 4(B), (C), AND (D): FAILURE TO PROVIDE APPROPRIATE SERVICES, SUPPORTS, AND ACCOMMODATIONS TO MEET STUDENT'S THERAPEUTIC AND BEHAVIOR NEEDS

October 21, 2016 IEP

68. Although Student did not address the October 21, 2016 in his closing brief, in his due process request and at hearing he contended that the IEP failed to meet his therapeutic and behavior needs. That contention is not supported by the evidence. The October 21, 2016 IEP included a behavior goal for Student to use self-calming strategies such as deep-breathing, asking for a break, or reading a book, instead of engaging in the maladaptive behaviors. The IEP provided Student continued placement in the North County Academy program with these services: 1) 120 minutes per week of group counseling and guidance; 2) 50 minutes per week of individual counseling; 3) 1,455 minutes a week of specialized academic instruction; 4) 100 minutes per month of parent counseling for Parents; 5) 1,800 minutes per year of group speech and language therapy; 6) 900 minutes per year of group occupational therapy; 7) Transportation to and from school; and 8) Extended school year services, to include group and individual counseling and Parent counseling.

69. The IEP also included supplementary aids, accommodations, and supports in the classroom. These consisted of sensory tools; prompting, chunking of assignments, and comprehension checks; pairing verbal instruction with visual cues or schedules; providing Student with breaks; limiting distractions in Student's work area and in the written assignments; provision of visual and verbal cues to use positive coping strategies; the use of a token reward system; and front loading Parents and Student for testing and practice sessions.

70. The October 21, 2016 IEP also included a behavior intervention plan to



address Student's maladaptive behaviors, which consisted of: 1) Student's work refusal, which included his elopement from assigned areas or hiding under chairs and desks, refusing to follow instructions, and refusal to complete assignments; 2) Destruction of school supplies; and 3) Aggressive behavior, which included attempting to or actually knocking over tables, desks, and chairs, hitting staff and peers, and throwing items at staff and peers. The IEP team determined that Student engaged in these behaviors to avoid tasks and situations, and to garner attention.

71. The behavior plan contained strategies to address Student's behaviors. These consisted of using a visual schedule at the beginning of each day that indicated the time for all school activities; "chunking" or breaking up of tasks; giving Student choices for task completion; providing Student with a break area in class when he asked for one; providing him with an opportunity to "pass" once during group activities; the use of a token economy for Student to earn for appropriate behavior; a daily incentive time rewarded for meeting thresholds in respect, compliance, and productivity; and the use of positive praise for on-task behavior.

72. The behavior plan included a description of replacement behaviors for Student to use instead of the maladaptive behaviors in which he was engaging. The plan also included strategies for staff to employ if Student's behaviors continued.

73. Del Mar addressed Student's mental health and behavior needs through his placement in North County Academy's therapeutic environment; through sufficient accommodations, supports, and supplemental aids; and through a thorough behavior intervention plan. Student did not meet his burden of proof that the October 21, 2016 IEP failed to provide him with the supports and services he needed to meet his unique needs.

June 9, 2017 IEP

74. Student contends that the June 9, 2017 IEP failed to provide him with

sufficient services, supports, and accommodations to meet his therapeutic and behavioral needs.

75. Del Mar contends that there was no reason to modify Student's IEP as of the date of that meeting. It therefore continued all aspects of Student's October 21, 2016 IEP. It also argues that any failure to reconvene the IEP to continue discussion modifications to the IEP is attributable to Parents' failure to collaborate with Del Mar.

76. Del Mar's assertions are not persuasive. At the time of the June 9, 2017 IEP team meeting, Del Mar was aware that Student's behaviors had exponentially increased and needed to be addressed. At the IEP team meeting, Dr. Haytasingh reviewed his assessment with the IEP team. Although his recommendation that Student needed a residential placement was not persuasive, he made several recommendations for services and accommodations to address Student's anxiety and increased maladaptive behaviors that North County Academy was capable of implementing.

77. Ms. Kitchens testified that North County Academy would have been able to implement Dr. Haytasingh's recommendations. But, Del Mar made no attempt to do so. It is understandable that Del Mar was unable to recommend changes immediately at the IEP team meeting because it was not aware Dr. Haytasingh had assessed Student and would present his assessment to the IEP team. However, Del Mar made no attempt to schedule a follow-up IEP team meeting before the end of the North County Academy school year, which occurred on June 22, 2017. Nor did Del Mar attempt to convene an IEP team meeting during the summer break. Del Mar's contention that it intended to assess Student at the beginning of the following school year to determine if changes needed to be made at his triennial IEP team meeting, does not remedy the lack of attention given to the issue of how to address Student's behaviors. Even had Parents given immediate consent to the August 28, 2017 assessment plan, Student's extended school year program and his fall 2017 school program would not have included any increased

or modified services to address his escalating behaviors.

78. Student's maladaptive behaviors increased substantially over the four months between February 16, 2017, and June 9, 2017. It was apparent that, as good as the North County Academy program was, additional services needed to be added to meet Student's needs and respond to the increase in his problem behavior. Dr. Haytasingh recommended cognitive behavior therapy and social skills therapy to address those needs. His report and testimony persuasively supported those recommendations. Del Mar presented no evidence that either services would not address Student's increased needs or that either service was inappropriate. Given the combination of Student's escalated maladaptive behaviors and the concrete recommendations Dr. Haytasingh presented, Del Mar's failure to modify or increase behavioral services to Student in June 2017 denied him a FAPE.

#### ISSUES 4(B), 4(C), 4(D) AND ISSUE 7: APPROPRIATENESS OF THE MAY 2018 IEP

79. In addition to contending that Del Mar denied Student a FAPE in its May 2018 IEP, due to the failure to offer placement at a residential treatment center, Student contends that the May 2018 IEP was inappropriate because it did not contain an adequate plan to transition Student from Sandhill to North County Academy. Student also contends that the IEP failed to offer behavior supports in Student's home. Del Mar, in the issue it presented for hearing, contends that the May 2018 IEP procedurally and substantively constituted a FAPE for Student in the least restrictive environment.

#### Procedural Requirements

80. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of

assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent; and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).) All required IEP team members were present at the two May 2018 IEP team meetings.

81. School districts are required to provide parents with a copy of a notice of procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) Del Mar provided Parents with a copy of the procedural safeguards at the beginning of the May IEP team meetings.

82. A student's parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a).) Here, Del Mar gave Parents every opportunity to participate during the development of Student's IEP. Parents, for the most part, had no questions, comments, or input. To the extent they did have suggestions or concerns, Del Mar responded to them, including modifying information in the IEP, including changes to goals. There is no evidence that Parents were not invited to actively engage in the IEP process. That they chose not take advantage of the opportunity does not constitute a violation of Student's right to a FAPE.

83. A district may not predetermine its IEP offer. Predetermination occurs when an educational agency has decided on its offer prior to the meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858 (*Deal*); *H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342,

344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*J.G., supra*, 552 F.3d at p 801, fn. 10.) There is no evidence Del Mar predetermined its offer of FAPE in this case. It discussed several placement options with Parents and was consistently open to considering non-public school placement possibilities if Parents wanted to consider them.

#### Required IEP Contents

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

85. Student’s May 2018 IEP described the placement Del Mar was offering, including the amount of time Student would spend outside general education. The IEP described the related services Del Mar was offering and the duration and frequency of the services. The IEP also included a description of the classroom accommodations and modifications Student’s IEP team believed he needed in order to access his education.

86. A school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decision based on it. (*Ibid.*) Del Mar's May 2018 IEP met this requirement.

#### Present Levels of Performance and Goals

87. An IEP must include a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general education curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).)

88. Del Mar's May 2018 IEP contained an in-depth and comprehensive description of Student's present levels of performance based on the results of its triennial assessment, input from Parents, and input from Sandhill staff. Based on those present levels and the information gleaned from all sources, Student's IEP team developed 13 goals for Student in the areas of pragmatic communication; social/emotional and behavior; articulation; and academics. The goals were comprehensive, measurable, understandable, and addressed all of Student's unique needs.

#### Substantive Validity of May 2018 IEP Offer

89. In resolving the question of whether a school district has offered a FAPE,

the focus is on the adequacy of the school district's proposed program, not that preferred by the parent. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*) For a school district's offer of special education services to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the his IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Id.* at 1314-1315; *Rowley, supra*, 458 U.S. 176, 203.)

90. The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) A school district is required to provide educational instruction, specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley, supra*, 458 U.S. 176, 188-189; *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1468 (*San Diego*).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *San Diego, supra*, 93 F.3d at pp. 1467-1468.)

91. As discussed above, Student did not prove that he required a residential placement in May 2018 to receive a FAPE. Del Mar's offer of placement at North County Academy's middle school campus, with specialized academic instruction the entire school day, and supporting related services, including individual and group therapy, addressed all of Student's known needs.

92. Student contends that Del Mar's offer of 100 minutes a month of parental counseling was insufficient. Student contends Del Mar should have offered wraparound

services in Student's home. This contention is not persuasive. At the time of the IEP, Del Mar knew very little about Student's challenges at home. It had no reason to believe that Student was aggressive at home, that Parents were not able to cope with his behaviors, or that he had terrorized his little sister. Del Mar had no reason to believe that offering Parents supportive parental counseling services were insufficient to meet Student's needs. Parents did not provide any information at the IEP team meeting that put Del Mar on notice of the need, never said that 100 minutes a month was insufficient, and never requested additional services based on their inability to address Student's behavior.

93. Student also contends that Del Mar's plan to transition Student from Sandhill to North County Academy was not sufficient. Del Mar's plan included having Parents observe the North County Academy middle school program; providing Student with a tour of the school and his classroom prior to starting school, and the ability to ask questions of staff before starting the program; provision of a one-on-one aide during the first 60 days of school, with the aide fading out by the end of the 60 days; providing the North County Academy teacher with Student's current IEP information; having the teacher consult with Student's IEP team; providing Parents with details of Student's new service providers; development of a communication system between school and home; convening a 45-day IEP team meeting to review Student's progress; and completion of a functional behavior assessment.

94. Student contends that it would have been harmful to step Student down from the high level of care at Sandhill to the North County Academy placement, particularly since Student had not been home since first going to Cherry Gulch in June 2017.

95. Student's argument is not persuasive. The end result of adopting his position would be an order that Del Mar fund Student's placement at Sandhill for an



unknown period of time even though Student did not require a residential placement and even though the placement itself, at least at the time of the May 2018 IEP team meeting, had resulted in Student's significant behavioral and academic regression. Additionally, Sandhill's excessive use of restraint holds on Student, including the use of prone holds, militated against continuing his placement there. Finally, Sandhill was not certified by the state of California. Therefore, Del Mar could not prospectively fund Student's placement.

96. Del Mar developed a comprehensive transition plan to ease Student's return to North County Academy. It sufficiently met Student's needs.

97. In conclusion, Del Mar's May 2018 IEP offer procedurally and substantively provided Student with a FAPE. Del Mar met its burden of proof as to the sufficiency of its IEP offer.

## REMEDIES

1. Student partially prevailed on Issue 3 by proving that Del Mar should have administered a functional behavior assessment to him in spring 2017, to try to determine why Student's maladaptive behaviors exponentially increased during the spring 2017 semester. He also partially prevailed on issues 4(b) and 4(c) by proving that Del Mar should have modified his IEP after the June 9, 2017 IEP team meeting, to address his increased behavioral issues. Student is entitled to a remedy for prevailing on these issues.

2. As remedies in this case, Student seeks reimbursement for the costs of his placements at Cherry Gulch, SUWS, and Sandhill, including costs Parents incurred in visiting him at the various placements, and the costs of his placement at Sandhill to date. He seeks reimbursement for the cost of Dr. Haytasingh's psychoeducational assessment and Dr. Bejarano's educationally related mental health assessment. Finally, Student seeks an order that his IEP be modified to include a prospective placement at a

residential treatment center, funded by Del Mar.

3. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); *School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

4. Reimbursement for the costs of a private school may be reduced or denied in any of the following circumstances: (1) at the most recent IEP meeting the parents attended before the student was removed from public school, the parents did not provide notice rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (2) the parents did not give written notice to the school district ten business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (3) before the parents removed their child from the public school, the school district gave the parents prior written notice of its intent to evaluate the student, but the parents did not make the student available for evaluation; or (4) the parents acted unreasonably. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

5. There is broad discretion to consider equitable factors when fashioning relief. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at p. 1496.) Factors to be considered when considering the amount of reimbursement to be awarded include

the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the parents and school district. (*Target Range, supra*, 960 F.2d at p. 1487; *Almasi*, 122 F.Supp.2d at 1109.)

6. The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement found to be reimbursable where it had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade, and where expert testimony showed that the student had made substantial progress]; *C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159-1160 (*C.B.*) [a private placement need not provide all services that a disabled student needs to permit full reimbursement].)

7. However, a student must still show that he or she received some educational benefit from the placement for reimbursement to be appropriate. (*C.B., supra*, 635 F.3d at 1160 [student proved that he benefited educationally from the private placement]; *S.L. v. Upland Unified Sch. Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159-1160 [student received educational and social benefit from the private placement].) Reimbursement is appropriately denied where the Student did not receive educational benefit. (See, e.g., *San Diego, supra*, 93 F.3d 1458, 1466; *Ashland v. Parents of Student R.J., supra*, 588 F.3d at p. 1009; *S.H., supra*, 2017 WL 2840705 \*17 - \*19 [student failed to demonstrate he made educational progress in the area of academics, behavior, or social skills at the private placement].)

8. Student is not entitled to reimbursement for his residential placements. First, he failed to prove that he required a residential treatment center placement at any

time at issue in this case. Second, the evidence overwhelmingly demonstrates that none of the three placements were appropriate. Student made no progress in any area at Cherry Gulch; that school discharged Student because of his lack of progress and its admirable conclusion that it could not serve his needs. Student failed to persuasively demonstrate any progress at SUWS, which did not even have an educational component. Finally, the evidence shows that Student significantly regressed while at Sandhill, academically, behaviorally, and socially, from where he had been the year before at North County Academy, especially with Sandhill's inappropriate use of restraints for behavior modification.

9. Student is also not entitled to reimbursement for his residential placements based on equitable considerations. Parents concealed material facts from Del Mar during the entire time covered by this case, including the affect his behavior had on Parents and, in particular, his little sister. Parents stymied Del Mar's appropriate attempts to assess Student by significantly delaying consent to Del Mar's assessment. And, they stymied Student's IEP process by actively and deliberately concealing that Student had been discharged from Cherry Gulch and that he was attending a wilderness program at SUWS.

10. Finally, Student has only prevailed on two aspects of this case: Del Mar's failure to conduct a behavior assessment in spring 2017, and Del Mar's failure to add services to Student's IEP at the June 9, 2017 IEP team meeting to address the escalation in his behavior. Neither violation warrants reimbursement to Parents for the cost of a year of residential treatment center placements in three different programs.

11. Parents funded Dr. Haytasingh's assessment because Del Mar did not agree to assess Student. As determined above, Del Mar should have conducted its own behavior assessment by late April 2017, due to Student's escalation of maladaptive behaviors. Parents are therefore entitled to reimbursement for Dr. Haytasingh's

assessment in the amount of \$3,500.

12. Student is entitled to a remedy for Del Mar's failure to provide services to address his escalation in behaviors in spring 2017. Student did not present any specific evidence of a remedy for the violations he alleged in his complaint other than the cost of his residential placements and the cost of Dr. Haytasingh's assessments. However, Dr. Haytasingh's assessment included several recommendations that Del Mar did not implement. Ms. Kitchens testified that North County Academy could have implemented the recommendations that were not already in place at North County Academy. Two recommendations, those for cognitive behavioral therapy and for specific social skills training, were not part of the North County Academy program during the 2016-2017 school year.

13. As stated above, ALJs have broad discretion in fashioning remedies. Given Student proved he should have received additional services as of June 9, 2017, it is appropriate and equitable to award him compensatory education in the areas of cognitive behavioral therapy and social skills, for the 2017-2018 school year. (See, e.g. *S.H., supra*, 2017 WL 2840705 at \*18 - \*19 [district court upheld ALJ's decision to award compensatory education based on information in the record although the student did not present evidence of specific losses of services].) North County Academy's regular school year was 36 weeks; it also offered Student a four-week extended school year session. Student is entitled to one hour a week of compensatory cognitive behavioral therapy for a total of 40 hours, and one hour a week of compensatory social skills for a total of 40 hours, as a remedy of Del Mar's violation. Del Mar shall either directly contract with providers of Student's choice, or reimburse Parents for the cost of the therapy, at Parents' discretion. The cost of the therapy shall not exceed \$200 per hour. Student shall have two years from the date of this decision to access the total 80 hours of compensatory education. He may access the hours whether or not he is enrolled at a

Del Mar school, and whether or not he resides in Del Mar's boundaries.

14. Del Mar met its burden of persuasion that the May 2018 IEP constituted a FAPE. It may implement the IEP without parental consent should Parents wish for Student to receive special education and related services from Del Mar.

## ORDER

1. Within 45 calendar days of the date of this Order, Del Mar shall reimburse Parents \$3,500 for the cost of Dr. Haytasingh's assessment. The documentary evidence of payment provided at hearing is sufficient evidence of costs incurred by Parents and no further documentation is required.

2. Del Mar shall fund 40 hours of compensatory cognitive behavioral therapy for Student, either by directly contracting with a provider or by reimbursing Parents, at Parents' discretion, up to \$200 dollars for each hour of services. Student shall have two years from the date of this decision to access the hours. Student may access the hours irrespective of where he resides or where he attends school.

3. Del Mar shall fund 40 hours of compensatory social skills therapy for Student, either by directly contracting with a provider or by reimbursing Parents, at Parents' discretion, up to \$200 dollars for each hour of services. Student shall have two years from the date of this decision to access the hours. Student may access the hours irrespective of where he resides or where he attends school.

4. All other relief sought by Student is denied.

5. Del Mar may implement its May 2018 IEP without Parents' consent, if Parents wish for Student to receive special education and related services from Del Mar.

## 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 partially prevailed on issues 3, 4(b), and 4(c). Del Mar fully prevailed on issues 1, 2, 4(a), 5, 6, and 7. Del Mar partially prevailed on issues 3, 4(b) and 4(c).

## RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

Dated: December 6, 2018

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/s/

DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings