

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ANTIOCH UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017080513

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on August 10, 2017, naming Antioch Unified School District. Student filed a first and second amended complaint with OAH on November 27, 2017 and January 19, 2018, respectively. On January 29, 2018, District served its written response to the second amended complaint on Student.

On March 7, 2018, for good cause, OAH continued the matter and set the hearing for March 20-22, and March 26-29, 2018.

Administrative Law Judge Cole Dalton heard the matter in Antioch, California, on March 20, 21, 22, 26, 27, 28, and 29, and April 3, 4, and 5, 2018.

Tania Whiteleather, Attorney at Law, represented Student. Father attended each day and Mother attended multiple days of hearing on behalf of Student.

Matthew Tamel and Kasmira Brough, Attorneys at Law, represented District. Special Education Director Ruth Rubalcava, Ph.D, attended each day of hearing on behalf of District.

OAH granted the parties' request to continue the matter to April 19, 2018, to

permit the parties to file written closing briefs. Upon timely receipt of closing arguments, the record was closed and the matter submitted for decision on April 19, 2018.

## ISSUES<sup>1</sup>

1. Did District deny Student a free appropriate public education by failing to implement the December 15, 2015 individualized education program's behavior intervention plan?

2. Did District deny Student a FAPE by failing to create documents, including record keeping or measurement tools, progress reports, and data collection required by the December 15, 2015 IEP's behavior intervention plan?

3. Did District offer and provide Student individualized services to address his IEP goals and objectives from his December 15, 2015 IEP in a manner that allowed him to make appropriate educational progress?

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<sup>1</sup> The issues were rephrased and reorganized for clarity, and agreed upon by all parties before the hearing commenced. The ALJ has authority to redefine a party's issue so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir 2010) 626 F.3d 431, 442-443.)

Student's closing brief argues the equivalent of a request for official notice of an expedited hearing request District filed on January 11, 2018 (expedited complaint), which was dismissed on February 1, 2018. Student's request to move the January 11, 2018 expedited complaint into evidence was denied during the hearing for the reasons stated on the record. For the same reasons, Student's motion for official notice is denied, and issues raised in that case are not addressed in this Decision.

4. Did District fail to implement agreed-upon IEP services of behavior consultation and training for Student that were part of his December 15, 2015 IEP?

5. Did District, prior to May 2016, assess Student fully and appropriately in speech and language, an area of suspected disability identified in his behavior intervention plan and other educational records?<sup>2</sup>

6. Did District, in May 2016, accurately identify Student's needs and baselines in speech and language, so that the goals and objectives could be created and so that the parents could meaningfully participate in the creation of the IEP?

7. Did District deny Student a FAPE by not conducting a manifestation determination review during the 2016-2017 school year?

8. Did District deny Student a FAPE by failing to assess him in the area of autism and by failing to address the impact of autism on his education?

9. Did District deny Student a FAPE by failing to create and provide suspension notices, incident reports, and emergency reports for all the times of restraints, suspensions, and behavioral incidents?

## SUMMARY OF DECISION

The underlying dispute in this matter arises from Parents' perception that District failed to implement Student's behavior intervention plan, and failed to understand his unique needs in autism and speech and language. From Parents' perspective, District's failures resulted in an increase in Student's maladaptive behaviors, such that District

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<sup>2</sup> At hearing, and in his closing brief, Student asserted he did not contest the appropriateness of District's May 2016 speech and language assessment. Rather, he contested District's failure to identify and serve pragmatic language needs before May 2016.

recommended one, in a series, of placement changes.

Student failed to meet his burden of persuasion on each issue. Student's maladaptive behaviors decreased in intensity, frequency, and duration during his tenure at the counseling-enriched program at Carmen Dragon Elementary School. Even so, his behaviors escalated in spring 2015, improved throughout the 2016-2017 school year, and escalated again in fall 2017. Parents blamed each escalation on District. The evidence did not show a material failure to implement Student's behavior plan. Rather, District engaged in continued training, implemented behavior strategies, created daily behavior charts, and monitored Student's progress, all strategies included in the behavior plan. District prepared all required documentation, including suspension notices. Since District did not suspend Student more than 10 school days during the 2016-2017 school year, it was not required to conduct a manifestation determination review.

Finally, District assessed and provided goals to address Student's needs in articulation and pragmatic language, after Parents consented to assessments. Similarly, District assessed Student for characteristics of autism and, like the majority of other assessors, did not find Student eligible under that disability category.

## FACTUAL FINDINGS

1. Student was nine years old at the time of hearing and lived with Parents within Antioch Unified School District's jurisdictional boundaries at all relevant times. District found Student eligible for special education in the fall of 2011, as a student with speech language impairment, due to articulation delays and some delays in expressive language.

2. Student had a twin brother who attended classes with him until January 2015. Student had XYY syndrome, which was associated with learning difficulties, maladaptive behaviors and impulsivity.

## 2014-2015 SCHOOL YEAR

3. During the 2014-2015 school year, Student changed placement multiple times due to behavioral outbursts. He attended kindergarten for two trimesters at Willow Wood, a private school located within the boundaries of Brentwood Union School District.

4. Brentwood conducted psychoeducation, occupational therapy, and academic assessments of Student in the fall of 2014, resulting in an IEP team meeting on November 3, 2014. The IEP team reviewed Parents' concerns with Student's attention, impulsivity, academic performance, behavior, emotions, sensory issues, and speech and language development. At home, Student exhibited difficulty calming, regulating emotions, and fighting. To address behaviors at home, Parents had Student attend behavior classes at Kaiser Permanente and behavioral therapy at Lynn Center in Pittsburg, California.

5. In school, Student required frequent redirection, did not appropriately seek help from the teacher, and shut down when tasks became too difficult. Cognitively and academically, Student functioned in the average range. The speech language pathologist reported that Student functioned in the low average range and should be exited from services. Parents did not agree.

6. The team discussed Student's sensory issues, which included sensitivity to head touching, messy items, and seeking movement. Brentwood recommended sensory diet activities to help regulate Student's behaviors, specifically tactile and heavy work activities.

7. Based upon assessments and Student's inattention and impulsivity, Brentwood recommended a change in eligibility to other health impairment. Parents agreed. Brentwood agreed to continue speech and language services for 30 minutes per week and offered psychological services for 30 minutes per week to work on social skills.

8. After the first two trimesters at Willow Wood, Parents pulled Student out of school due to behavior issues. Student attended one week at District's Jack London Elementary, then a week and a half at Light the Bay, a private school. He was asked to leave Light the Bay and returned to Jack London in the spring of 2015.

District's April 22, 2015 IEP

9. District held a 30-day IEP team meeting on April 22, 2015, to review placement and services. Speech therapist Carmina Tongol described Student's progress in her speech therapy sessions and reviewed Brentwood's prior speech assessment. Student tested in the average range in expressive speech and articulation. Ms. Tongol recommended, and Parents agreed, to exit Student from speech and language services.

10. Parents noted they placed Student on the Feingold diet, which meant that he should avoid foods with dyes. Parents provided Student with snacks and food for behavior rewards and observed that Student's maladaptive behaviors, at home, increased after eating foods with artificial coloring. There was no evidence, other than Parents' testimony at hearing that linked foods given at any school to an increase in Student's behavior issues.

11. The team discussed Student's social emotional issues. In the classroom, Student exhibited inattention, required frequent redirection, and shut down or threw a tantrum when tasks became too difficult. Tantrum behavior included crumpling work papers, dumping crayons or toys onto the floor, and throwing a chair.

12. District developed a behavior intervention plan to address throwing objects, hitting, kicking, scratching, and screaming. The plan identified the function of Student's behaviors as escaping non-preferred tasks and gaining attention of peers and teacher. Strategies to reduce these maladaptive behaviors included encouraging Student to say how he felt during the day and teacher check-in. He would be taught hand signals for requesting a break when he felt frustrated. During such breaks, Student

could proceed to a designated space for use of sensory items.

13. The team discussed eligibility. Mother represented that Student's developmental pediatrician stated on several occasions that Student did not have autism. District agreed to maintain other health impairment as Student's eligibility, but sought social emotional assessments. Parents already had scheduled a neuropsychological evaluation by an outside assessor for late April 2015.

14. District recommended a 60-day diagnostic placement in its therapeutic behavior support program at Kimball Elementary School to address Student's maladaptive behaviors. District offered to conduct a functional behavior assessment and other assessments during the diagnostic placement. Parents did not want to pull Student out of his general education setting or separate the twins and did not want to make any decisions before speaking with their educational consultant, Linda Geller. Parents requested paraprofessional support and agreed to observe the therapeutic behavior support program at Kimball.

15. District offered Student 180 minutes of daily specialized academic instruction with 30 minutes per week of psychological services to address behavior and social skills. District offered extended school year services to complete a 60-day diagnostic assessment.

#### Spring 2015 Neuropsychological Assessment

16. Carina Grandison, Ph.D, a child developmental neuropsychologist, conducted assessments and observations of Student from April 28, 2015, through May 6, 2015. Dr. Grandison held a bachelor and masters of art in psychology and a doctorate in developmental psychology. Dr. Grandison, at the time of hearing, maintained a license to practice clinical psychology in California for 22 years and in Massachusetts for 25 years. She had extensive experience in research, training, teaching, assessing, and writing in the field of pediatric and developmental neuropsychology. At hearing, Dr.

Grandison's testimony was candid and reflected the depth of her knowledge and experience. For these reasons, she was credible.

17. Dr. Grandison observed Student twice in her office, once at school, and once at home. Her observations were consistent with Parents' and school reports. She determined that Student exhibited anxiety and emotional regulation issues. When in a calm state, Student demonstrated the ability to be sociable, playful, and empathic. When anxious, Student's behaviors could escalate out of control. Student frequently became dysregulated during Dr. Grandison's assessments.

18. Dr. Grandison did not test Student for autism. At hearing, she described Student as distraught and distressed, with a high degree of easily escalating anxiety. She did not find the need to assess for autism, stating that was "not on her to do list at the time."

19. Dr. Grandison diagnosed Student with attention deficit hyperactivity disorder. She recommended keeping Student in general education with a behaviorally trained aide to provide positive reinforcement and help with emotional regulation, and these additional services: social skills training; continued occupational therapy to address writing skills; speech and language services; counseling support; and resource specialist program to address reading and writing. She opined that District should formally assess Student's classroom behaviors and update the behavior intervention plan.

20. When Dr. Grandison assessed Student, she observed a high degree of escalating anxiety, emotional regulation difficulties, difficulty focusing, and impulsivity. Academic activities, especially writing, were aversive to him so she was concerned that he was at risk for developing a learning disability. Parents had made her aware of Student's diagnosis of XYY syndrome.

21. At hearing, Dr. Grandison, rendered her opinions on Student's diagnoses and educational issues. She did not opine that Student had autism. She explained that some children with XYY syndrome also have autism or learning disabilities, but most do not. Further, most children with XYY do not even know they have it. Moreover, she did not assume a one-to-one correspondence between a diagnosis and educational issues. Each child presents differently, such that providers should look at each child's needs in education, not their diagnoses.

#### District's May 2015 Assessment Plan

22. On May 1, 2015, District provided Parents an assessment plan in the areas of motor development; social-emotional development; adaptive behavior; and functional behavior. Parents signed consent on May 8, 2015. District assigned the assessments to school psychologist Leslie Allen, who would conduct them after the summer break. At the time of hearing, Ms. Allen had 29 years of experience as a school psychologist. Over the past five years, she conducted 80 assessments annually, covering a District elementary school and two charter school campuses.

23. Since Ms. Allen did not know Student, she spoke with Sarah Maxwell, the school psychologist who attended Student's April 22, 2015 IEP team meeting and developed the assessment plan. Ms. Allen learned that the IEP team wanted to consider whether Student had autism. Ms. Allen called Mother in August 2015, after the start of the new school year, to explain the assessments and that she would be sending autism rating scales to Parents and the classroom teacher. Ms. Allen described Mother as being taken aback by the mention of autism and expressed feeling uncomfortable proceeding with assessments. Ms. Allen advised Mother that she could change her mind, but would need to express that in writing.

24. On September 2, 2015, Mother wrote a letter to Ms. Allen thanking her for the telephone call regarding the assessments. Mother confirmed that neither Parent

wanted emotional, social, and adaptive testing.

25. At hearing, Mother testified that District did not seek testing for autism. Instead, Ms. Allen called to “warn” her that District would assess for emotional disturbance and that the subsequent letter referred to testing for emotional disturbance, not autism. Mother’s testimony was not persuasive on this point. Mother attended the IEP team meeting from which the assessment plan arose, discussed concerns about autistic-like behaviors, and shared with the team Student’s developmental pediatrician did not believe her son had autism. There was no evidence that the IEP team discussed or sought assessments for emotional disturbance at the April 2015 IEP team meeting.

#### June 1, 2015 IEP Team Meeting

26. District held an addendum meeting on June 1, 2015, to discuss Parents’ concerns and make additions to Student’s program. All necessary District team members were present. Parents attended with Ms. Geller. District added extended school year services for skill development and data collection for a functional behavior assessment; aide support during extended school year and the first 30 days of Student’s first grade year to assist with data collection and transitions; and goals to address anxiety (identifying situations that cause stress, anxiety, or frustration) and emotional regulation (coping skills).

27. Parents shared that Dr. Grandison’s report was not yet complete and that they sought independent educational evaluations in occupational therapy and speech and language from Brentwood. Student’s teacher reported that Student made friends in class. Parents reported Student met with a Kaiser psychologist for one hour every other week. Parents expressed concern teachers were mad at Student and that teachers at a prior school told other children to laugh at him. Parents made similar allegations against staff at Jack London.

28. Parents signed consent to the amendment of the April 22, 2015 IEP at the June 1, 2015 IEP team meeting, exiting Student from speech services.

#### 2015-2016 SCHOOL YEAR

29. On August 19, 2015, Student entered a first grade general education class at Antioch Charter Academy II. District acted as the local educational agency for special education services and District staff conducted special education assessments and provided related services to Charter Academy students, as specified in their IEPs. Charter Academy retained responsibility for suspension and expulsion, even for students who received special education.

30. District completed a functional behavior assessment for Charter Academy on September 7, 2015, and reviewed the report at an IEP team meeting on September 16, 2015. District assessors and a District administrator, Student's Charter Academy teacher and a Charter Academy administrator attended the meeting. Mother, Ms. Geller, and Student's private speech language pathologist Tiffany Tabbert also attended the meeting.

31. The team discussed Student's behaviors, which consisted of shutting down and refusing to participate. Student made verbal protests to work by hissing, making noises, or yelling; and physical protests by sitting or lying on the floor, hitting, or throwing objects. The behaviors occurred daily, lasting from a few minutes to 20 minutes. Antecedents consisted of invasion of space or touching, transitions, and directives.

32. Charter Academy expressed that Student's behaviors improved during the extended school year at District, which had 15 students with five adults in a special day class. Charter Academy used a Montessori approach where 63 students in first through third grade shared one large classroom with no walls, assisted by three teachers, and one part-time aide.

33. Mother explained that foods contributed to Student's behavior and he should only eat food sent from home. Further, because Student was cognitively age-appropriate, she did not want him placed in a special day class, even one addressing behaviors. Ms. Geller requested an independent functional behavior assessment through Christine Meade, Ph.D. District granted the request.

34. On September 15, 2015, Mother emailed Charter Academy's administrator, Jeannie Dubitsky, regarding Student's behavior issues. Mother explained that Student had adjustment anxiety, but was not oppositional or "on the spectrum (so won't respond to ABA, etc.) as outlined in Dr. Grandison's report on [Student]."

35. On October 30, 2015, the IEP team met again for Student's annual IEP review. Parents attended the meeting with Ms. Geller and Dr. Meade. The team discussed the school setting, which Charter Academy did not believe was appropriate for Student. Parents believed Student seemed less averse to school work since attending Charter Academy. The team discussed the twin dynamic, namely that Student and his identical twin brother seemed to escalate each other's behavior. The team discussed exiting Student from speech and language. Parents now disagreed, as Brentwood agreed to conduct an independent speech evaluation. Ms. Geller asked to revisit present levels of performance in speech. The team discussed use of a weighted vest and head phones to reduce Student's startle response to noise. Charter offered to conduct assessments, through District, to address other areas that may have been affecting Student. Parents indicated they obtained an outside assessment, but did not share it with the team.

36. The team agreed to use behavioral strategies suggested by Dr. Meade, including a strip with visual choices, a point system, and the opportunity to work alone in a preferred location, until completion of the behavior intervention plan. The team agreed on behavior and social-emotional goals in emotional regulation, reducing

anxiety, and task engagement; and on academic goals for reading, and high frequency sight words.

37. Because of Charter Academy's concern for Student and his peers, Charter Academy and District team members recommended a diagnostic placement in the counseling-enriched classroom at Carmen Dragon Elementary School, operated by District. That classroom had fewer students, a special education teacher, two aides, embedded counseling strategies, and students working at grade level. Along with a change in placement, Student was offered psychological services, group counseling, occupational therapy consultation, and a one-on-one aide. Parents refused the offer.

38. On November 15, 2015, District offered Parents an assessment plan and prior written notice, seeking academic, health, intellectual development, speech and language, occupational therapy, social-emotional, adaptive behavior, processing and sensory assessments. The prior written notice explained assessments were needed to ensure all areas of suspected disability were identified, including autistic-like behaviors, emotional disturbance, and speech and language impairment, including possible deficits in expressive and receptive language, auditory comprehension, and pragmatics.

39. Parents signed consent to all assessments except for motor development on January 25, 2016, and provided the signed assessment plan to District on February 1, 2016.

#### December 15, 2015 IEP and Behavior Intervention Plan

40. Dr. Meade, at hearing, described herself as a serial entrepreneur. At the time of her functional behavior assessment, she worked as a behavior analyst and consultant. She held a doctorate in both special education administration and clinical psychology.

41. The IEP team met on December 15, 2015, to review Dr. Meade's functional behavior assessment and behavior intervention plan. Parents attended with Ms. Geller.

District team members included special education director Dr. Rubalcava; program specialist and general education teacher Christie DiBerardino; and general education teacher and resource specialist Debbie Johnson. Charter Academy team members included director Jeannie Dubitsky; co-administrator Todd Heller; and general education teacher Gina Leone.

42. Dr. Meade recommended placement in a very structured, self-contained setting with a sensory room. Dr. Meade believed Student required implementation of a reinforcement system to stay on task for at least six weeks before attempting to include him in a general education setting. During her site visit, Dr. Meade observed collaboration between teachers and aides in the counseling-enriched program at Carmen Dragon and believed the program was strong. Parents agreed to placement in the counseling-enriched classroom at Carmen Dragon with group counseling, a one-on-one aide, transportation, implementation of Dr. Meade's behavior intervention plan, and extended school year services. Though District did not yet have a contract for Dr. Meade's services, it agreed to fund her consultation and training of District's staff to support Student.

43. Dr. Meade's behavior intervention plan did not identify Student's target behaviors or offer a specific formula for addressing each. Instead, it referred back to the functional behavior assessment, which identified the sole target behavior of tantrumming, defined as throwing; head butting; kicking; spitting; biting; running while kicking, throwing, or slamming an object; screaming; and instruction refusal lasting at least three minutes.

44. Dr. Meade's assessment identified attainment as the function of Student's tantrumming. Attainment included predictable outcomes, items, or tasks, and escape from undesired tasks. Dr. Meade opined that Student sought control over his environment by engaging in behaviors that would provide an escape from undesired

tasks, environments, or people.

45. Dr. Meade, in her assessment, explained how Student's obsessive-compulsive disorder impacted his fear of failure or making mistakes. She identified behavior needs as Student remaining in his instructional environment, task completion; adapting to unexpected situations and errors; and coping with various feelings (frustration, anger, hunger, tiredness).

46. Neither the functional behavior assessment nor the behavior intervention plan mandated staff's use of daily behavior charts<sup>3</sup> or recording of antecedent-behavior-consequence (ABC) data. Dr. Meade's assessment identified significant antecedents for Student as fear of failure; appearing less able; making mistakes; and tasks not turning out as planned or good enough. The assessment did not specify that staff were required to record each antecedent to each behavior. Dr. Meade's testimony confirmed she did not dictate which forms staff should use to collect data. ABC data was not collected while Student attended Charter Academy. Dr. Meade offered no explanation why such data was necessary while Student attended District, but not Charter Academy.

47. At hearing, Dr. Meade discussed data collection, including use of daily behavior charts, as a strategy. On the other hand, Dr. Meade also opined that having Student take part in filling out a behavior chart as a self-rater was necessary to obtain his buy-in of the plan. She opined, that failure to fill out daily behavior charts accurately meant the behavior intervention plan was not being implemented. However, she did not demonstrate a connection between how staff filled out behavior charts and any increase in Student's maladaptive behaviors.

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<sup>3</sup> Dr. Meade used the term daily progress reports while staff used the term daily behavior charts. The latter term is used throughout for clarity.

48. Erin Peterson described the behavior data charts more succinctly. Ms. Peterson, at the time of hearing, owned Second Nature Behavioral Health Services for six years, through which she worked as a licensed marriage and family therapist. Her practice involved providing applied behavior analysis therapy and behavior consulting to a variety of school districts. For approximately six years before starting her own company, she worked as a therapist providing at home ABA services, and became the clinical supervisor of that program while attending graduate school. She held a bachelor and master of arts in psychology. Ms. Peterson provided behavior analysis and consultation to District staff after June 2016.

49. Ms. Peterson described staff's use of daily behavior charts. The reports included a row for Student's behaviors of following class rules, using school language, completing work, staying in his seat or area, and earning an extra break. Columns tracked Student's performance in each category during each period of the school day, including bus transportation, breakfast, morning work, speech, and so on.

50. Staff recorded a "3" for appropriate behaviors; a "2" for some prompting required to obtain appropriate behaviors; and a "1" for maladaptive target behaviors. If Student received a "1," staff would also fill out an ABC chart. The ABC chart identified what happened before the behavior, described the behavior, and described what staff did in response to the behavior.

51. Dr. Meade, at hearing, explained that her functional behavior assessment outlined a reinforcement system based on various strategies. The strategies included using punch cards; a log for self-recording of earned points; reinforcement of the compliant portion of inappropriate behaviors; an organized, safe learning environment with access to a calming area; and social stories. Reinforcement of compliance during an inappropriate behavior could, for example, mean reinforcing Student to keep quiet while he lay on the floor even though he wasn't sitting in his chair.

52. The plan consisted of eight steps beginning with identifying a new placement and support services. The plan outlined creation of a positive, directive feedback binder (with reinforcement protocols, self-rating system, behavior contract, social stories, task inventories, designation of staff to pre-teach Student coping skills, and the reinforcement system); training other staff to use the reinforcement system; then discussed varying the reinforcement schedule as Student mastered coping skills and could be taught new skills. The plan provided for modification of social stories; task inventories; and the frequency, duration, and type of reinforcement used.

53. Parents agreed to implementation of the October 2015 IEP, as amended at the December 15, 2015 IEP meeting.

#### Transition to Carmen Dragon

54. Student began attending the counseling-enriched program at Carmen Dragon on January 5, 2016, making District the local education agency responsible for offering Student a FAPE. In preparation for Student's transition, Dr. Meade began training the team at Carmen Dragon on December 17, 2015. Dr. Rubalcava and school principal Mark Hemauer met with Dr. Meade on January 5, 2016, Student's first day of school. Dr. Meade worked with the team in Student's new class on that date. At hearing, Dr. Meade described training Student's aide to record ABC data. In a January 6, 2016 email, Dr. Meade thanked school psychologist Juanita Scott, and the school team, for cooperation in transitioning Student into his new placement. In the email, Dr. Meade provided a "cheat sheet" or short list of behavior strategies to implement. She did not mention daily behavior charts.

55. Dr. Meade provided additional staff training two days in January, three days in February, and one day in March, prior to the March 4, 2016 IEP team meeting. Dr. Meade noted, in a February 1, 2016 email to Dr. Rubalcava, that Student's progress reports had been really good. In an email after the February 22, 2016 training, Mr.

Hemauer thanked Dr. Meade for her input, acknowledging that the team had already come a long way and seen Student's growth, but wanted to continue addressing deficiencies with support staff.

56. The staff of the counseling-enriched classroom, along with Mr. Hemauer and Ms. Scott, implemented positive reinforcements and behavior intervention strategies consistent with Student's behavior plan. For example, staff taught coping skills of positive self-talk; deep breathing; taking a walk; requesting a break; going to an alternate space for break/work (sensory room, feelings table, school psychologist's office, Mr. Hemauer's office; garden area); identifying situations that caused stress, anxiety, or frustration; and selecting a tool from the tool box, and engaging in that activity for three to five minutes.

57. During breaks, or for calming activities, Student could choose to watch a cat video or read a cat book (preferred items); use play dough; and read items at the feelings table; play with Legos; or preferred items from the treasure box. Student received positive reinforcement through Carmen Dragon's embedded Noble knights, which involved rewarding students for acts consistent with the school's "be kind, be safe, be responsible" slogan.

58. Ms. Alford supervised Student's aide and the classroom aides and oversaw their implementation of Student's behavior plan. Ms. Alford worked as a paraprofessional for 10 years before working for 15 years as a special education teacher. She held an education specialist degree, which provided a level of training between a masters and doctorate degree. She posted visual schedules and visual prompts for Student, consistent with the behavior plan. She kept the binder containing ABC data and behavior tracking data in her classroom. Copies of behavior data were sent home either through use of a blue folder or through email.

#### February 19, 2016 Suspension

59. On February 19, 2016, Student charged his aide, grabbed and pulled down on her lanyard, and scratched the aide's hand while she attempted to free herself. District notified Parents by telephone and sent home a suspension letter, indicating that Student was suspended for one day, on February 22, 2016.

#### February 22, 2016 IEP Meeting

60. District held an IEP team meeting on February 22, 2016, to discuss Student's recent suspension and to review implementation of the behavior plan. Father, Dr. Meade, Ms. Geller, Student's special education teacher Kim Alford, Mr. Hemauer, and Dr. Rubalcava attended the meeting.

61. Ms. Alford described the incident. Student's discomfort in how his shoes fit was an antecedent to his tantrumming. The team discussed what more could be done and District agreed to additional training with Dr. Meade. However, Dr. Meade had limited availability. Dr. Meade noted that Student's behaviors, overall, diminished with significant decreases in target behaviors. She shared a concern that suspending Student would reinforce behaviors in that the function of many behaviors is avoidance.

62. According to Ms. Geller, Student was suspended more than 10 school days during the 2015-2016 school year. However, she conflated suspensions from Student's prior placement at Charter Academy with his current District placement. February 22, 2016 was Student's first suspension from Carmen Dragon.

63. The team discussed that ABC data was not being taken. Ms. Alford agreed to communicate regarding daily concerns. Dr. Rubalcava suggested two staff be with Student to address behaviors. Due to time constraints, the team agreed to meet again on March 4, 2016. The team made no changes to the IEP.

March 4, 2016 IEP

64. The IEP team met on March 4, 2016, to review Student's placement. All required District team members and Dr. Meade attended. Father attended with Ms. Geller.

65. Mr. Hemauer provided Ms. Geller with the suspension and behavior incident report for the February 19, 2016 incident. Ms. Geller erroneously opined that suspension reports were also needed for days when Student was removed from class and worked in another location, but was not suspended. Ms. Geller asked for ABC data, which Ms. Alford had already emailed to her.

66. Student made progress in class participation, math, and reading. His behaviors, overall, improved since he began the program. His response to redirection improved. He responded appropriately when prompted to use his words and sometimes made requests of peers. He responded to staff use of a "first, then" strategy. He seemed comfortable in class and had a second grade peer buddy at recess.

67. Student made progress on annual goals in emotional regulation, reducing anxiety, task engagement, and reading sight words. Student used the Lexia reading program, a computerized program, which showed he read at a pre-kindergarten level. He could perform first grade math. Ms. Alford believed the score did not demonstrate Student's true abilities, as he became impatient using the program, wanting to move through it more quickly. He read 52 of his first 60 sight words. He verbally answered comprehension questions based on a short reading passage, read to him aloud.

68. Dr. Meade expressed that Student knew he had a teacher, liked to know who was in charge, and he adored his teacher. She observed that behavior incidents decreased even though he now was in a setting with 80 percent teacher-directed instruction and acted like a traditional Student.

69. Both Ms. Alford and Mr. Hemauer noted instances of Student taking his hood off, a sign that he was more comfortable. Student participated well in occupational therapist Marie-Josée Parayre's sensory group in the classroom. He did not like to be the first student to try something. Both Ms. Parayre and Ms. Alford worked with him on tolerating making mistakes and found that he gained understanding in that area.

70. Speech language pathologist Carly Gordon asked about areas of focus for her upcoming assessment. Dr. Meade described Student's language processing challenges and poor articulation, which led to frustration when others did not understand him.

71. Mr. Hemauer requested continued training and input for staff by Dr. Meade. Dr. Meade recommended the updated behavior plan, which was being corrected, be used for training. A copy of the behavior plan was attached to the IEP. The corrected behavior plan was a combination of information from Dr. Meade's functional behavior assessment and behavior intervention plan from December 15, 2015. The updated plan did not require collection of ABC data. No changes were made to Student's IEP.

72. On March 6, 2016, Deborah Severson trained staff. Dr. Meade's company retained Ms. Severson as an independent contractor behaviorist. The weight of the evidence demonstrated that Dr. Meade, Ms. Severson, or both trained and consulted with staff for several hours over several days from December 17, 2015 through May 27, 2016.

73. On March 8, 2016, Mother emailed Ms. Geller and Dr. Meade that she was still not seeing data, that there was no sheet for Friday, March 3, 2016. However, records indicated that data sheets were being filled out on a regular basis, including on March 3, 2016.

74. On March 16, 2016, Dr. Meade emailed Parents regarding a blue folder containing daily behavior charts and homework to be sent between home and school each day. There was some suspicion that Student was not providing it to Parents. At that point, Dr. Meade instructed staff to provide increased reinforcement using the bonus section of the daily progress report and to review bonus points with Student.

75. Bonus points presented a problem for Student, who became upset when he saw a "1" under bonus points, thinking that meant he engaged in maladaptive behaviors. The evidence demonstrated that staff implemented bonus points and self-rating on daily behavior charts in spring 2015. However, staff adjusted their strategy when it became problematic by providing Student with bonus breaks, without marking the bonus point or self-rating sections.

76. Dr. Meade asked Parents to note medication changes, lack of sleep, or other issues on the daily behavior charts going back to school so that staff could better manage behaviors as Student began his school day.

77. Dr. Meade opined, at the meeting, that Student had a terrific class and that Ms. Alford was "a natural in addressing his needs."

78. On April 3, 2016, Mother expressed concerns to Dr. Meade regarding an incident that occurred on March 22, 2016: staff did not follow the behavior plan in that Student was not given a schedule of what to expect; staff did not use de-escalation techniques such as use of the occupational therapy room; and staff told Student what to do rather than using positive reinforcement strategies. In response to Mother, Dr. Meade agreed with Mother that staff did not follow the behavior plan by pre-teaching that Student would be assessed, or using reinforcers, or a schedule.

79. However, the incident report, daily behavior chart, and ABC data for March 22, 2016, as well as staff testimony at hearing showed that staff used several strategies outlined in Student's behavior plan. At hearing, Dr. Meade opined that Carmen Dragon's counseling-enriched program remained the most appropriate placement, compared to a more restrictive setting, such as a nonpublic school.

80. On May 2, 2016, Student's lunch bag broke, causing his food to fall on the floor. He was able to retrieve all but the oranges. He was given the option of getting new oranges from the cafeteria. He began running around the cafeteria and screaming. He broke the salad bar tongs and threw them at another student. He punched the plexiglass on the cart, breaking it off. He hit, bit, and scratched his one-on-one aide. Staff called Father, who agreed to pick Student up from school. Mother then called and yelled at Ms. Alford saying, "You are not following the behavior intervention plan," and stating Parents would not come to get Student. Ms. Alford stated that staff would have to call the police, as Student was a danger to himself and others.

81. On May 2, 2016, because District believed Student may have been suspended 10 school days since January 5, 2016, District sent notice of a manifestation determination meeting, asking Parents to attend a meeting on May 11, 2016. Parents could not attend and asked that the meeting be recorded.

82. Dr. Rubalcava wrote to Parents on May 4, 2016, about the requirement to hold a manifestation determination review within 10 school days and asked for available dates within that timeframe. She offered for Parents to attend by telephone. She offered to hold a second meeting if Parents could not attend. She asked for Parents' consent to have Ms. Severson make unannounced site visits to observe and document whether staff followed Student's IEP and behavior plan. Parents did not consent.

#### May 11, 2016 Manifestation Determination Review

83. On April 20, 2016, Mother emailed Dr. Rubalcava, Mr. Hemauer, Dr.

Meade, and Ms. Alford regarding concerns about the lack of ABC data for an incident that occurred on April 19, 2016 and a refusal or failure to follow Student's behavior plan. In his reply email, Mr. Hemauer explained the incident and behavior plan strategies used by staff. He described staff's practice of placing daily behavior data sheets in Student's backpack, which Student did not like. Moving forward, Mr. Hemauer suggested Ms. Alford scan data sheets and email them to Parents to avoid further instances of disappearing data sheets. At hearing, records included a daily progress report and ABC data sheet for April 19, 2016.

84. Ms. Alford responded to Mother, conceding that sometimes she and staff could not identify an antecedent to Student's outbursts. Dr. Meade responded, explaining the antecedent consists of whatever happened right before the outburst. At hearing, several other witnesses agreed the antecedents may not always be obvious, including Father, who acknowledged that almost anything could set Student off.

85. On May 11, 2016, Dr. Rubalcava, Mr. Hemauer, Ms. Alford, Ms. Gordon, program specialist Matt Bennett, school psychologist Juanita Scott, Dr. Meade, and Ms. Severson attended the manifestation determination meeting. The team agreed to meet again with Parents at a mutually agreeable date.

86. The team agreed Student's behaviors were caused by, or had a direct and substantial relationship to, Student's disability; but disagreed on whether the behaviors were caused by a failure to implement the behavior plan. Dr. Meade and Ms. Severson believed staff did not fully implement the plan.

87. The team discussed strategies for de-escalating Student's physically aggressive behavior and questioned staffs' capacity to keep Student and others safe. Dr. Meade explained a strategy of planned ignoring of undesired behaviors while continually reinforcing desired behaviors. Her explanation was confusing to the team. She stated, "Do not try and engaging [sic] him with words." But contradicted herself, by

saying to "Remind him what the skill that was pre-taught when we're upset, we can go draw how we feel, we can go rip up papers in the office."

88. Dr. Rubalcava described Student's decreased removals, which showed the behavior plan worked. However, she was concerned about the effect Student was having on staff. Further, other students in the class had their own behavior issues and had to get re-acclimated and back to work on occasions when Student's behavior escalated to the point of evacuating the classroom. District proposed a nonpublic school placement.

89. Ms. Severson explained that it would take a lot of practice to get other children to ignore Student's behaviors. She expressed her belief that the teacher was angry. Ms. Alford expressed frustration that her team had been physically injured and was emotionally spent. She described providing Student with ongoing reinforcements, for example, bonus points for coming into class and sitting down. She wanted the behaviorists to look at Student as a human and not a set of behaviors. She wanted him to be happy and now he says almost every day, "I'm not happy. I want to be happy. I've never been happy." She related that unfamiliar tasks were the number one antecedent to maladaptive behaviors, but that anything could set him off.

90. Dr. Meade informed the team that what was missing was making time in Student's day to teach coping strategies. But Ms. Alford, Ms. Scott, and Student's aide already implemented pre-teaching and reinforcement strategies. They used first-then, social stories, and primed Student for novel tasks. Within the program, they used smiley faces, stickers, and 10 different ways to reward children. Student responded well to tangible rewards. Ms. Alford observed Student self-rating by making tally marks with his aide. She observed Student's excitement about being one tally mark away from earning a prize from the treasure box. Ms. Alford conceded that it may not always show up on paper, but they did that on a continual basis.

91. Ultimately, the team agreed to decrease academic demands and prioritize behavior plan implementation. Ms. Severson agreed to observe and train the team further. Ms. Alford agreed to have Ms. Severson and Dr. Meade observe and obtain data on plan implementation. Dr. Rubalcava welcomed observations to help bridge the gap between Parents' distrust and District's behavior plan implementation. Dr. Meade said that her schedule was booked and Ms. Severson would do the observations. District agreed to place an additional teacher in the classroom to increase staff support and address safety concerns.

May 17, 2016 Speech and Language Assessment<sup>4</sup>

92. Carly Gordon assessed Student's speech and language needs in March, April, and May 2016. Ms. Gordon held a master of arts in speech pathology and audiology, a certificate of clinical competency, and a California license in speech language pathology. She reviewed Student's history, which showed he met IDEA eligibility criteria for speech language impairment in 2011 due to articulation delays and decreased intelligibility, while testing in the borderline to low average range in receptive and expressive language. At the time of Ms. Gordon's assessment, Ms. Alford reported Student's ability to verbally express himself for immediate needs.

93. Ms. Gordon used a variety of standardized assessments, observations, record review, and alternative assessments to determine Student's needs. Ms. Gordon used various strategies from Student's behavior plan to complete the assessments.

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<sup>4</sup> Student conceded, at hearing, he did not dispute that District's speech and language assessment met required legal criteria, a point confirmed in his closing brief. Student contends merely that District failed to identify needs in pragmatic language before May 2016.

Assessment times were placed on Student's schedule. When he refused, he was offered choices such as cat toys, a cat book, an iPad, Legos, and an alternate time to participate in the assessments. Ms. Gordon implemented behavior plan strategies such as use of first-then, a timer, social stories, testing with a peer partner, and testing in Ms. Scott's room.

94. Student did not meet eligibility criteria for speech language impairment under the IDEA. However, Ms. Gordon found that Student had needs in pragmatic language and articulation. She recommended that Student receive speech and language services two times per week, for 30 minutes each.

95. Deborah Burns McCloskey conducted an independent speech and language evaluation of Student, funded by Brentwood, in January 2018. Ms. McCloskey, who had essentially the same qualification as Ms. Gordon, had over 30 years experience as a speech language pathologist at the time of hearing. She reviewed Ms. Gordon's assessment and opined that the use of alternate assessments, where standardized scores could not be obtained, were appropriate and provided information on Student's needs. She agreed with the areas of need identified by Ms. Gordon and found the assessment to be thorough. By the time Ms. McCloskey assessed Student, his articulation issues were remediated. She determined needs in vocabulary and comprehension.

96. During Ms. McCloskey's classroom observations, she observed visual supports on the walls and their use during instruction; a visual schedule; a teacher providing clear directions to Student and his aide reiterating those directions. She agreed with Ms. Gordon's recommendations in the assessment report of May 2016 and opined that the report was sufficient to develop speech and language goals.

May 23, 2016 Psychoeducational Assessment

97. Valerie Lopes, Ph.D, conducted a psychoeducational assessment of

Student over six days from March 24, 2016, through May 19, 2016. Dr. Lopes held a bachelor of arts in social science and a master of arts in international administration. She held a master of science in clinical child and school psychology and doctor of philosophy in clinical psychology. Dr. Lopes was credentialed in school psychology and administrative services and a licensed educational psychologist, at the time of hearing. Dr. Lopes had training and experience conducting comprehensive neuropsychological evaluations under the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) and psychoeducational assessments for all areas of eligibility under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973.

98. Dr. Lopes reviewed Student records, interviewed Ms. Alford and Mother, observed Student in his classroom and at recess, and conducted standardized assessments. All tests were administered in English, Student's primary language. The assessment materials were selected and administered without racial, cultural, or gender discrimination. Dr. Lopes was qualified to administer the tests and interpret results. Dr. Lopes administered the tests used in conformance with testing instructions and each test was valid for the purpose for which the test was used. She used no single test or procedure to determine Student's eligibility for special education or to determine his educational program.

99. Dr. Lopes determined that Student continued to meet eligibility for special education services under the category of other health impairment due to attention deficit hyperactivity disorder. She opined that his emotional dysregulation was probably innate and impacted his alertness and attention. Further, his diagnosis of XYY syndrome was consistent with dysregulated behavior, emotions, and attention.

100. Dr. Lopes found phonological processing deficits, but a normal capacity to learn and, on that basis, found Student did not have a specific learning disability. Dr.

Lopes concluded Student met the criterion for emotional disturbance because he exhibited inappropriate types of behavior or feelings under normal circumstances in several situations. She found Student was extremely reactive to normal stresses and changes and to perceived lack of success. Student demonstrated a general pervasive mood of unhappiness or depression in that he had a high level of sadness, pessimism, negative emotions, self-criticism, and sense of inadequacy in terms of academic competency. Student did not meet the criteria for inability to learn or to build or maintain satisfactory interpersonal relationships. Student intellectually, fell within the average to above average range. He demonstrated the ability to maintain relationships with children in his playgroup, according to Mother.

101. Dr. Lopes determined that Student did not meet eligibility criteria under autism. Student did not consistently present with verbal, nonverbal, or social interaction difficulties across all environments, which adversely impacted his education. At hearing Mother asserted that she underestimated Student's behaviors when filling out autism rating scales given to her by Dr. Lopes. Dr. Grandison, at hearing, opined that it was uncommon for parents to over-or under-report behaviors, but it does happen.

102. Dr. Lopes observed Student demonstrate some sensory reactivity; inconsistently understood motivation and perspective; and difficulty distinguishing facial expressions. He interacted with peers at school, but typically waited for them to initiate. He engaged in gestures and game playing that showed typically emerging mutual enjoyment and engagement in social interaction. He maintained several rounds of reciprocal conversation with Dr. Lopes.

103. Dr. Lopes found that Student's social-emotional and adaptive functioning was seen quite differently between home and school, which did not support a finding of autism. Rather, children with autism present more consistently across settings. Mother rated Student from normal to high in socialization and communication, while Ms. Alford

rated these areas as marginal. He exhibited executive functioning issues in emotional and behavioral control, areas of volatility and impulsivity across all evaluators, consistent with attention deficit hyperactivity disorder. Ms. Alford and Mother also agreed on clinically significant ratings of worry, sadness, and defensiveness around Student's problem solving skills.

#### May 27, 2016 IEP Meeting

104. On May 27, 2016, District held an IEP team meeting to review recent assessments and the manifestation determination. Father attended with Ms. Geller. All necessary team members were present, including Dr. Rubalcava, Dr. Meade, and Ms. Severson. Father reviewed District's audio recording of the manifestation determination review and did not want to discuss that further.

105. Father shared several concerns with the team, including his perspective that staff did not read the behavior plan, did not know the behavior plan was approved, and did not want assistance from the behaviorists. He shared negative things he believed staff said about Student including that he was stinky, a baby, his head should be shaved, and his jacket burned. He characterized the staff as "unnecessarily stubborn" and did not want to hear that the current placement was inappropriate.

106. At this point, relationships were broken. Staff viewed Ms. Geller as being overly aggressive at meetings. Parents and the outside behaviorists believed staff had not implemented the behavior plan. Parents insisted that District not discuss the placement as being inappropriate. Meanwhile, District expressed concern that, while staff implemented the behavior plan, Student's needs exceeded the capacity of the site and setting. The counseling-enriched program existed on a general education campus, which had too many variables for staff to control.

107. The team reviewed Student's progress and recent assessments. Student made progress on, but did not meet, behavior and social-emotional goals. He asked for

a break in two of five trials, with prompting, demonstrating progress toward his emotional regulation goal. However, he still often refused a break or alternate activity, choosing to throw an object and scream. He demonstrated regression on the reduction of anxiety goal. In February 2016 he was able to identify stressors. But in May 2016, he could not do so until he was in crisis mode. The team noted that stressors changed daily and included someone touching him or his desk; looking at him; or his perception that others were talking about him. He showed regression where he previously made progress toward task engagement. He required moderate guidance to choose a tool that would help him work, such as going to the occupational therapy room. In academics, Student met his reading goal and made good progress toward his high frequency sight word goal.

108. Ms. Gordon presented new goals for articulation and social language or pragmatics. The pragmatic goal addressed Student's need to more consistently verbally express emotions and feelings, to identify the feelings of others and the impact of behaviors on others. New goals were offered to address social-emotional deficits in self-regulation, classroom and school skills, safety, and social awareness. Academic goals were offered in writing and math. District offered extended school year services. Father consented to implementation of extended school year services. No other changes were made to Student's program.

109. The conflict at the May 27, 2016 IEP team meeting continued in emails from May 29, 2016, through June 25, 2016. Ms. Geller accused District of abusing Student's rights, suspending Student for more than 18 days, failing to develop emergency behavior reports and ABC data sheets, and requested a neutral facilitator. Mother reiterated some of the same complaints and asked for a non-public agency aide. She accused Dr. Lopes of pushing Student to a point of frustration and alleged that valid assessment results could not be obtained due to her conduct.

110. Dr. Rubalcava explained, in correspondence dated June 6, 2016, that she regretted the level of conflict generated from what she perceived as a sincere disagreement on how best to support Student. She opined that Ms. Geller's level of aggression removed the focus from Student. She provided prior written notice denying the request for a non-public agency aide. She denied the request for a neutral facilitator based upon her prior experience with Ms. Geller maintaining an aggressive position at meetings even with such facilitators. Dr. Rubalcava responded to Mother's May 31, 2016 email requesting Student records by indicating the records sought had been sent previously and would be sent again.

111. Parents asserted, at hearing, that District failed to respond to record requests including production of binders used in conjunction with Student's behavior plan. Student did not subpoena records to hearing and presented scant evidence of his requests for records, namely, just the May 31, 2016 email request. Dr. Rubalcava credibly described her office's response to record requests generally and to Student's requests specifically.

112. The weight of the evidence demonstrated that two "binders" existed. Dr. Meade created one binder with behavior strategies, which she left in Student's counseling-enriched classroom at Carmen Dragon. The second "binder" was Student's blue folder. During the 2015-2016 school year, daily behavior charts reflected that staff sent the blue folder back and forth to Parents. Many of the charts contained a note about homework; specifically asked for the folder back; notified Parents when a substitute would be in class; or had other notes to and from Parents. When staff determined Student did not like having the behavior charts in his backpack and Parents did not always receive them, Ms. Alford began scanning and emailing them to Parents. The parties produced approximately 1,000 pages of daily behavior charts and ABC data charts in their evidence binders.

113. District staff did not physically restrain Student while he attended Carmen Dragon during the 2015-2016 school year and did not, for that reason, create any behavior emergency response reports. District suspended Student three times for a total of five days and sent suspension notices home for each of the three suspensions. District released Student to Parents before the end of the school day, without suspension, on February 1, 2016 for hitting his aide and screaming, "I will kill you," over a period of 30 minutes. Antecedents were noted on the daily behavior chart. District removed Student to an alternate learning environment on four occasions in April 2016. Staff prepared daily behavior charts for all but one day of suspension or removal. Staff identified antecedents either on the behavior chart or on ABC data sheets, or both, on eight of the nine dates of suspension and removal.

114. At hearing, Student's evidence binders contained numerous daily behavior charts out of order and not paired with their corresponding ABC data charts. Daily behavior charts were missing for many of the dates from January 5, 2016 through June 2, 2016, the end of the school year. Cross-referencing the behavior data with other exhibits showed that behavior data was missing for 16 of Student's 96 school days at District. Absences and school holidays were accounted for when noted in the records or District's school calendar. Neither party submitted Student's attendance records. Even without taking Student's attendance into account, District compiled daily behavior charts on a regular basis. The behavior data showed consistent implementation of strategies identified in Student's behavior plan, and an understanding of Student's target maladaptive behaviors and their antecedents.

#### Compliance Complaint Regarding 2015-2016 School Year

115. On September 7, 2016, Mother filed a compliance complaint against Charter Academy and District regarding, among other things, the use of physical restraints, behavior emergency response reports, suspension notices, whether the

behavior plan was implemented, and whether a manifestation determination review should have been held during the 2015-2016 school year. California Department of Education investigated the complaint by interviewing witnesses, and reviewing emails, IEPs, daily behavior charts, and declarations. On November 9, 2016, CDE issued a compliance complaint investigation report. Mother sought reconsideration and a final reconsideration report issued on December 13, 2016.

116. CDE reviewed Student's behavior intervention plan and found that it did not require the school to track ABC data, but did require an analysis of Student's behavior, which required data collection. Further, from evidence presented by the parties, CDE determined Student's behavior was tracked from January 6, 2016, to September 16, 2016. Evidence from the instant hearing included a behavior data sheet from January 5, 2016, Student's first day at District. CDE did not note a gap in behavior data reporting. A reasonable inference can be drawn that data provided to CDE was more comprehensive than what was provided at the instant hearing, for the time period of January 5, 2016 through June 2, 2016.

117. CDE's review of Student's records also showed that District issued suspension notices for each date it suspended Student.<sup>5</sup> Moreover, there was no evidence of District using restraints on Student during the 2015-2016 school year.

118. CDE reviewed District's visitor sign-in sheets, staff declarations, Dr. Meade's billing statement, emails between District and Dr. Meade regarding trainings,

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<sup>5</sup> CDE erroneously combined Student's suspensions from Charter Academy with suspensions from District when it held District responsible for not holding a manifestation determination meeting after removals of more than 10 school days in a school year. Removals are only counted from a child's current educational placement, not a combination of placements in a given school year. (34 C.F.R. § 300.536.)

and photographs from Student's classroom; the same evidence presented in the instant hearing. That evidence was supplemented at hearing with testimony from Ms. Sanchez, Ms. Alford, Ms. Scott, Mr. Hemauer, Ms. Gordon, Dr. Lopes, and Dr. Rubalcava. The evidence established that District received training and consultation from Dr. Meade and Ms. Severson consistent with the behavior plan. District provided Student with positive reinforcement such as computer or iPad time; time reading a favorite cat book; Lego time; video time; and garden time. Student received a coping skills checklist; class rules; reinforcement rules; a visual schedule; a positive directive feedback binder with visual cue cards and progress charting. All of the strategies used by District were consistent with Student's behavior plan.

119. In the fall of 2015, Charter Academy had experienced a complete loss of instructional control over Student. After Student transitioned to Carmen Dragon, Student's maladaptive behaviors dropped significantly in frequency, intensity, and duration, even with increased incidents at the end of the school year.

#### 2016-2017 SCHOOL YEAR

120. When Dr. Meade's contract ended in June 2016, District continued training and consultation with Ms. Peterson. Ms. Peterson attended IEP team meetings, observed staff implement Student's behavior plan, met with staff individually and in groups, reviewed daily behavior charts and ABC data sheets, compiled ABC data, and prepared behavior analysis charts at team meetings. She spent at least two hours every other Thursday supporting implementation of Student's behavior plan.

121. On November 14, 2016, District held an annual IEP review. All necessary team members were present. Father attended with Ms. Geller and Dr. Meade, who was then the family's consultant.

122. District again offered speech services with goals in articulation and pragmatics (social language) but Ms. Geller did not believe the speech goals fully addressed Student's needs.

123. The team discussed Student's progress. Academically, Student continued to make progress in reading, vocabulary, math, spelling, and writing. He read 97 percent of kindergarten and first grade sight words and 82 percent of second grade sight words, demonstrating significant improvement. He wrote two cohesive sentences using teacher modeled sentence frames and graphic organizers.

124. He was able to sit at his desk and read a book of his choice. Student worked on conversations with peers on non-preferred topics. He demonstrated the ability to take turns during conversations and did well when using a talking stick during structured activities.

125. Student improved in the areas of reciprocal play, group play, toleration of new situations, and increased acceptance of redirection. He engaged successfully in group counseling, used appropriate humor, and was working on peer relationships and branching off from his preferred interests. Emotionally, Student demonstrated greater flexibility and resilience. He was able to revisit upsetting topics and situations after the fact.

126. Student continued to demonstrate needs in English Language Arts, math, speech and language, behavior, social-emotional activities, and self-regulation. District developed or continued goals in these areas.

#### Regional Center Autism Diagnosis

127. Kim Foster Miller, Ph.D, held a bachelor of arts in psychology; a master of arts and science in clinical psychology; and a doctor of philosophy in clinical psychology. She had over 15 years of experience assessing children for developmental disabilities as

a licensed clinical psychologist at the time of hearing. Dr. Miller assessed Student for autism spectrum disorder using criteria set forth in the DSM-IV and V, resulting in a report dated January 1, 2017. Parents did not provide Dr. Miller's January 1, 2017 report to District until September 29, 2017. Dr. Miller did not review eligibility under the IDEA, nor did she assess for any other DSM diagnoses.

128. Dr. Miller agreed with Dr. Grandison that an autism diagnosis can be tricky and two assessors can look at the same data and come to different conclusions. She tried to be thorough because she did not want anyone to be denied services they need. She acknowledged that schools use different criteria when looking at autism, as they do not make a clinical diagnosis. She reviewed the National Institute of Health's study of Student, which did not diagnose Student with autism.

129. Overall, Dr. Miller identified Student's needs in social-emotional and behavior, similar to other assessors. She found that Student was able to show empathy and play well at times with others; exhibited a range of appropriate social skills; and was on the mild end of the spectrum in terms of his social skills. She also saw fear and anxiety but related that to the autism spectrum rather than an anxiety disorder or attention deficit hyperactivity disorder. She observed he had fluent speech. She did not assess for, but agreed with, Student's prior diagnosis of unspecified anxiety disorder and attention deficit hyperactivity disorder.

130. Before hearing, Dr. Grandison reviewed Dr. Miller's 2017 Regional Center eligibility assessment for autism. She found the assessment thorough and appropriate. However, Dr. Grandison did not agree or disagree with Dr. Miller's diagnosis of autism. Nor did Dr. Grandison opine that Student should have been found eligible for District services under the eligibility category of autism.

131. Dr. Grandison explained that two assessors can see the same child and come to different conclusions regarding autism. Rating scales used in diagnosis were not objective measures, she explained, as every rating scale reflects both the child and how the assessor subjectively views the child.

132. Student's maladaptive behaviors decreased significantly compared to the 2015-2016 school year. Student had a total of four days of on-campus suspension during the 2016-2017 school year, which lasted from September 1, 2016 through June 8, 2017. He had a two-day on-campus suspension beginning December 15, 2016, and another two-day suspension beginning March 23, 2017 (the aide confiscated a sharp spring Student found on the playground; Student screamed, charged Ms. Alford and kicked her twice).

133. Overall, the intensity, frequency, and duration of Student's maladaptive behaviors significantly declined from the prior school year, as evidenced by daily behavior charts, ABC data, and observations of Ms. Sanchez, Ms. Alford, Ms. Peterson, Ms. Scott, Mr. Hemauer, and Dr. Rubalcava. The weight of the evidence demonstrated District staff implemented behavior strategies to address maladaptive behaviors, allow Student to regulate, and re-introduce schoolwork. Strategies included offering choices, alternative work spaces, and reinforcing positive behavior.

#### March 2017 IEP Meetings

134. Addendum IEP team meetings were held on March 2 and 21, 2017. Student's behaviorist, Ms. Peterson, shared her continued staff training on behavior interventions and use of daily behavior charts. She noted an increase in Student's behavior and, in response, compiled ABC data and shared the graphed data with the IEP team. Ms. Peterson worked on an updated behavior intervention plan but it was not reviewed because Parents' behaviorist, Dr. Meade, did not attend either March meeting.

135. At both meetings, Ms. Geller and Father sought modification of goals and asked for additional goals in punctuation; reading comprehension for second grade text; and reading fluency, and written expression. Ms. Alford agreed to draft new academic goals. Reeni Kraft, speech language pathologist, agreed to draft an additional goal on preferred topics of conversation. Father agreed to goals for math word problems; emotional regulation; social-emotional development; articulation; and communication/comprehension.

136. Parent concerns were attached to the meeting notes, reflecting their belief they were not receiving suspension notices, behavior emergency reports, or daily behavior charts. They expressed concern over staff sending Student home on February 24, 2017, as they believed that could only escalate undesired behaviors.

137. Student demonstrated continued progress in academics and significant social-emotional and behavior progress. The frequency, intensity, and duration of Student's maladaptive behaviors decreased dramatically during the 2016-2017 school year. Mr. Hemauer described, at hearing, how Student maintained eye-contact and held deeper reciprocal conversations with him.

138. Staff continued to implement the behavior plan by receiving ongoing training, providing positive reinforcement, using supports identified in the behavior plan. Moreover, staff continued monitoring Student's progress using daily behavior charts and ABC data sheets. Documentary evidence presented by the parties at hearing demonstrated that District missed up to 15 days of behavior tracking out of 180 school days. District exhibited 92 percent compliance with data tracking, not considering that Student may have been absent any of those 15 days.

#### 2017-2018 SCHOOL YEAR

139. Parents emailed Dr. Miller's Regional Center autism assessment report to

District on September 29, 2017. Mother delayed sending the report to District because she feared staff would discriminate against her son. At hearing, she offered no explanation of what she thought staff would do.

140. On October 3, 2017, District held an IEP team meeting to review its assistive technology assessment. All required team members were present. Father attended the meeting with Ms. Geller. District acknowledged receipt of Dr. Miller's autism assessment. District did not offer an assessment plan for autism. Ms. Geller asked for an educationally related mental health assessment to address concerns over Student's anxiety. The team scheduled an annual review for November 14, 2017.

141. Because Ms. Geller did not believe two hours set for the annual meeting was long enough, District sent out notice of additional proposed meeting dates for November 29, 30, or December 4, 2017. Father sought confirmation of the November 14th meeting but did not receive confirmation in time and did not attend the meeting on November 14, 2017.

142. Since the beginning of the school year on August 16, 2017, Student was suspended approximately nine days. On November 30, 2017, Student refused to come onto campus and, once there, engaged in work refusal all morning. At the end of his speech therapy session, he refused to leave the room. Staff offered him choices but he went under the table and attempted to flip the table over. He threw chairs, hitting the aide in the leg. Mr. Hemauer came and offered Student use of the iPad. Student screamed and threw a chair, hitting Mr. Hemauer's leg. Student tore up speech manipulatives, threw pens, and turned over a small file cabinet. He eventually played a game on the iPad and went with Mr. Hemauer to his office. Father picked Student up. Student received an out-of-school suspension the following day.

143. Student had another behavior outburst on December 8, 2017, throwing chairs, a stapler, turning over three desks, ripping up papers, pulling items off the wall, and hitting Mr. Hemauer on the hand with a keyboard. Daycare arrived to pick him up but he locked himself in the bathroom where he screamed for nearly 20 minutes before leaving. He received three days of out-of-school suspension.

144. District held a manifestation determination review on December 15, 2017. Father, Ms. Whiteleather, Ms. Alford, Mr. Hemauer, Ms. Kraft, Dr. Rubalcava, Mr. Tamel, Ms. Scott, Ms. Peterson, and occupational therapist Beth Jackson, attended the manifestation determination review. Ms. Whiteleather and Ms. Peterson appeared by telephone. District staff sought to also hold the annual review that day, but Parents and their attorney declined.

145. District staff believed Student's inattentive, impulsive, and dysregulated behaviors, along with obsessive compulsive disorder, language processing disorder, contributed to inhibit communication, especially when Student was angry or frustrated. His behavior had a direct and substantial relation to his disability. Parents agreed that Student's behavior was a manifestation of his disability, but also believed staff was not implementing the behavior intervention plan.

146. Father wasn't sure that he received all suspension notices or behavior charts. Mr. Hemauer had sent all incident reports and suspension notices to Father, and agreed to send them again. The team discussed prior issues with the family's email account causing them to not receive documents. Mr. Hemauer had been copied on emails to Parents with daily behavior charts and received them daily. The team agreed to send the charts again.

147. During the meeting, Father tossed a bag of Trolley brand jelly beans and ring pops onto the table, expressing anger that staff would provide candies with dyes or artificial ingredients after being advised against that in Student's IEPs. Ms. Alford

believed the comments were directed towards her and that Father threw the bag of candy towards her. Father believed Ms. Alford was overly sensitive.

148. There was no evidence that Student ate candies at school or that eating candy set him off at school. Father opined that because the food restriction was not being followed, he lacked confidence that anything else was being followed. He conceded there might not always have been an obvious antecedent to Student's behaviors; there were a lot of things that set Student off; so it was very hard for Father to say what else might be triggering Student. District asked for communication from Parents when Student was having a bad morning.

149. Ms. Peterson agreed with Father that sometimes antecedents were not obvious. However, based upon data collection and her observations, she opined that Student seemed to have some internal distress during the fall 2017. Ms. Peterson modified Student's behavior intervention plan with Dr. Meade's input in spring 2017. She re-dated it December 2017, anticipating that it would be attached to the new annual IEP, which she thought would follow the manifestation determination review.

150. On December 18, 2017, Student had a substitute teacher. He began tantrumming in response to schoolwork. His daily behavior chart reflected that he arrived at school upset because Father told him Ms. Alford claimed his dad threw something at her, but he did not. Student refused morning activities, even with his aide's encouragement. He hissed, growled, and tore up papers. Staff implemented strategies from Student's behavior plan, including a break, a walk, and alternative location. Student refused and, for three hours, tore signs and student work from classroom walls, screamed, and turned over desks and chairs. Staff and students were removed from the classroom for their safety. District suspended Student for five days. Because of the impending winter break, Student would not return to school until January 11, 2018.

151. The evidence demonstrated that District staff completed data behavior charts and ABC sheets on a regular basis, as in prior years. Such documents were present for 95 percent of Student's school days from August 16, 2017, through January 16, 2018, without accounting for any absences Student may have had during that time frame.

152. The importance of the percentage of behavior data charts and ABC sheets filled out by staff lies not in the actual number of sheets but how the sheer volume of data informed Student's IEP team about Student's behaviors. Ms. Peterson had no difficulty preparing graphs on the frequency of Student's behaviors based upon the data collected by District staff. She brought graphs to IEP team meetings, reviewed them with team members, and was able to discuss trends with the team.

153. Student's behaviors had not reached the frequency, intensity, and duration of his behaviors at Charter Academy. Based upon the information provided during the December 15, 2017 manifestation determination review and as demonstrated by the evidence, neither Parents nor District knew what caused Student's behaviors to increase so dramatically at the end of 2017.

154. District sought Parents' agreement to a nonpublic school placement to address Student's behaviors, which District saw as a threat to the safety of staff and others. Mr. Hemauer recalled offering placement at Sierra School, a nonpublic school located within District's boundaries. District made the offer at a manifestation determination review in January 2018. Parents dis-enrolled Student from District in February 2018. From February 2018 through the hearing, Student attended California Virtual Academy, an online school, with the help of a one-on-one aide.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>6</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>7</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their Parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

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<sup>6</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>7</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test' . . . ." (*Andrew F. v. Douglas School Dist. RE-1* (2017) 580 U.S.\_\_\_\_ [137 S.Ct. 988, 1000] (*Andrew F.*)). The Supreme Court in *Andrew F.* stated that school districts must "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student had the burden of proof on all issues.

#### ISSUES 1-4: FAILURE TO IMPLEMENT DECEMBER 15, 2015 BEHAVIOR INTERVENTION PLAN AND GOALS

6. Student contends District failed to implement the behavior intervention plan addressed in his December 15, 2015 IEP by refusing to follow the behavior strategies identified in the plan; failing to create documentation to measure Student's progress, including data collection; and failing to implement consultation and training required by the plan. Student further contends District failed to implement goals from the December 2015 IEP. District contends that behavior consultants trained District staff regularly; created daily behavior charts and used ABC data collection to measure progress; and used strategies consistent with the plan. District further contends Student made progress toward goals from the December 2015 IEP.

## Legal Authority

### DEVELOPMENT OF BEHAVIOR INTERVENTION PLAN

7. The IEP team must consider the use of positive behavioral interventions, supports and strategies when a child's behavior impedes his or her learning or that of others. (34 CFR §300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Implementing regulations of the IDEA do not require the team to use any particular method strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).) The team may address the behavior through annual goals (34 CFR §300.320(a)(2)(i)), and may include modifications, support for teachers, and any related services necessary in the IEP to achieve those behavioral goals. (34 CFR § 300.320(a)(4).)

8. The IDEA does not require a functional behavior assessment prior to development of a behavior intervention plan unless the child's placement has been changed for disciplinary reasons and the conduct that resulted in discipline is determined to have been a manifestation of the child's disability. (See 20 U.S.C. § 1415(k)(1)(f).) The United States Department of Education, in promulgating regulations implementing the IDEA, explained that the IEP team determines whether a behavior intervention plan is required, and although a functional behavior assessment may assist the team to address behavioral issues, the IDEA does not require functional behavior assessment in order to formulate a behavior intervention plan. (71 Fed. Reg. 46683 (Aug. 14, 2006); see also *J.C. v. New York City Dept. of Educ.* (2d Cir. 2016) 643 Fed.Appx. 31 [pre-planned functional behavior assessment is not necessary if the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior].) Moreover, neither Congress, the U.S. Department of Education, nor any statute or regulation has created substantive requirements for the BIP contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004)

375 F.3d 603, 615.)

9. In California, an IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd. (b)(1).) A behavior intervention is “the systematic implementation of procedures that result in lasting positive changes in the individual’s behavior.” (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student’s individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student’s behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

#### IMPLEMENTATION OF IEP

10. Minor discrepancies between services provided by a school district and services called for by the IEP do not give rise to an IDEA violation. (*Van Duyn v. Baker Sch. Dist.* (9th Cir. 2007) 502 F. 3d 811, 822.) Only a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) “A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child’s IEP.” (*Ibid.*) “There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” (*Ibid.*) “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail.” (*Ibid.*)

#### Analysis

#### FAILURE TO IMPLEMENT DECEMBER 15, 2015 BEHAVIOR INTERVENTION PLAN

11. Student began attending District’s counseling-enriched special day class at Carmen Dragon on January 5, 2016. From that time, Student’s maladaptive behaviors declined in frequency, duration, and intensity, as compared with his attendance at

Charter Academy in fall 2015, where he could not attend instruction with peers.

12. The weight of the evidence demonstrated that District staff followed strategies outlined in and consistent with Student's December 2015 behavior plan. District staff provided Student with positive reinforcement such as time using an iPad or computer; reading a favorite cat book; Lego time; video time; and garden time. Staff provided Student with a coping skills checklist; class rules; reinforcement rules; a visual schedule; use of a timer; visual cue cards; a positive directive feedback binder and daily behavior charts.

13. Ms. Scott and Ms. Alford persuasively explained their use of behavior plan strategies, including teaching coping skills of positive self-talk; deep breathing; taking a walk; requesting a break; going to an alternate space for break/work (sensory room, feelings table, school psychologist's office, Mr. Hemauer's office); identifying situations that caused stress, anxiety, or frustration; and selecting a tool from the tool box to engage with for a brief period of time.

14. Ms. Alford supervised Student's aide and classroom aide on implementation of the plan. She did so with other children in class who also had behavior plans. Staff used social stories to prepare Student for upcoming activities or to teach new skills. Moreover, staff continually modified the reinforcement system to promote new skill acquisition and integrate more challenging tasks over the course of Student's attendance at Carmen Dragon.

15. Ms. Alford described keeping Student's positive directive feedback binder in her class, a binder prepared by Dr. Meade and brought to the class when Student began attending Carmen Dragon. Moreover, from January to March 2016, during his initial months at Carmen Dragon, Student was able to participate in class, increased response to redirection, responded appropriately when asked to use his words, and sometimes made requests of peers. Student's behaviors diminished, overall, with

significant decreases in target behaviors. He showed signs of gaining comfort at school like taking his hood off, participating in sensory group, and gaining tolerance of making mistakes.

16. Over the 2016-2017 school year, Student was able to sit at his desk and read a book of his choice. He worked on turn-taking and conversing on non-preferred topics with peers. Student showed improvement in reciprocal play, group play, toleration of new situations, and acceptance of increased redirection. He engaged successfully with peers during group counseling and showed appropriate use of humor. He demonstrated greater emotional flexibility and resilience when reviewing behavior outbursts with Ms. Scott. He engaged in deeper conversations and maintained eye-contact with Mr. Hemauer.

17. Student's increased ability to remain emotionally fluid and responsive to staff was reflected in fewer emotional outbursts and resulting discipline during the 2016-2017 school year. Though Student's maladaptive behaviors began to increase in fall 2017, at hearing, he failed to demonstrate that was related to District's failure to implement his behavior plan.

18. District staff demonstrated a knowledge of Student's antecedents and strategies to address maladaptive behaviors. Staff's consistent creation of daily behavior charts and ABC data allowed Ms. Peterson to graph Student's maladaptive behaviors and address trends with new strategies.

19. Both Student's experts and District providers conceded that Student presents with a complex profile. Ms. Geller underscored this complexity by requesting an educationally related mental health assessment at Student's October 2017 IEP. Even Father admitted, consistent with the weight of the evidence, that Student's antecedents of behavior were not always evident and anything could set him off. Dr. Lope's opinion that Student met eligibility criteria for emotional disturbance is consistent with these

facts in that Student presented as extremely reactive to normal stressors, changes, and a perceived lack of success.

20. In light of the weight of the evidence, it was not enough for Student to show that District staff sometimes did not implement his behavior plan with fidelity. Rather, Student's behaviors appeared to increase in intensity in December 2017 without a corresponding change in his school environment and without evidence that staff materially failed to implement his behavior intervention plan.

21. The weight of the evidence demonstrated that District adequately implemented Student's behavior plan throughout his tenure at Carmen Dragon. Accordingly, Student did not prevail on Issue 1.

#### FAILURE TO CREATE DATA COLLECTION OR OTHER DOCUMENTS

22. Student's December 15, 2015 behavior intervention plan did not require staff to track ABC data but did require an analysis of Student's behavior. Ms. Peterson explained that she could analyze Student's behavior by observing him in class for periods of time or by review of staff's behavior data.

23. On the other hand, Dr. Meade's explanations were often circular and confusing. At hearing, she described a binder with daily data sheets, social stories, cue cards, and other strategies to be just that, a strategy. At another point, she described use of the binder as a requirement under the behavior plan, though she was not 100 percent sure. Her explanation of the ABC sheets was equally circular and confusing. Taken as a whole, emails she sent to Parents demeaning staff and inconsistent explanations of the behavior plan she created diminished her credibility. She erred on the side of supporting Parents, who obtained her services privately before and after her contract with District.

24. Ms. Peterson credibly demonstrated that District staff's data collection was so thorough she did not have to observe Student in class to collect her own data.

Rather, she could graph Student's behaviors based upon daily behavior charts and ABC data collected by staff. Moreover, staff's data collection paralleled Ms. Peterson's observations of Student's in class behavior.

25. Both parties produced several hundred pages of daily behavior charts and ABC data collection. Student's documents placed several pages out of order, making it appear as though ABC data was only randomly collected and never dated. District's exhibits showed that, although a handful of ABC data sheets were undated, they were created at the time of their corresponding daily behavior sheets, and sent home together.

26. A thorough review of all data sheets in comparison with other Student records demonstrated that District prepared daily behavior sheets for nearly every school day at Carmen Dragon and that staff routinely collected ABC data when Student's behaviors escalated to a "1."

27. Moreover, the data sheets provided a wealth of information on Student's behaviors throughout the day, including the frequency, duration, and intensity of behaviors along with antecedent information and strategies used to de-escalate behaviors.

28. Student argues, in his closing brief, that District failed to provide all of the data sheets to Parents, resulting in a denial of parental participation. The behavior plan did not require Parents to receive all the data sheets. Moreover, the preponderance of the evidence showed that District forwarded charts to Parents on a regular basis, initially by use of a blue folder, which held Student's daily behavior charts and homework. The folder went back and forth in order to allow Parents to communicate necessary information back to school staff. Such communications are reflected in some of the charts.

29. Once District determined Student did not like transporting the charts in his backpack, staff emailed them to Parents, instead. Ms. Scott, Mr. Hemauer, Ms. Alford, and Dr. Rubalcava credibly explained their process of sending documents to Parents and resending when asked. Ultimately, Mr. Hemauer was carbon copied on emails to ensure they were being sent.

30. District tried various ways to provide charts and data to Parents. To the extent some pages may have been missing or not all daily charts were exchanged, the weight of the evidence was that any discrepancy in the exchange of this information did not constitute a material failure to collect and exchange the information required. Accordingly, Student failed to meet his burden of proof on Issue 2.

#### FAILURE TO IMPLEMENT GOALS

31. Student presented no evidence showing that District failed to implement his goals and made no reference to this issue in his closing brief. By contrast, Ms. Alford credibly described her work with Student. Her testimony, corroborated by progress reporting in Student's IEPs, demonstrated that Student made progress on academic, behavior, and social-emotional goals from his December 15, 2015 IEP.

32. By his March 4, 2016 IEP, Student made engaged in class participation. He copied from the board, which he could not do when he first started at Carmen Dragon. He demonstrated some progress on each of his goals in reading, emotional regulation, reducing anxiety, and task engagement.

33. By May 2016, Student had more behavior outbursts, and showed some regression on goals for reduction of anxiety and task engagement. However, he demonstrated some progress on his emotional regulation goal; made good progress on his high frequency sight words goal; and met his reading goal.

34. By his next annual IEP in November 2016, Student made progress academically in reading, vocabulary, math, spelling, and writing. He read 97 percent of

first grade sight words and progressed to 82 percent of second grade sight words. He accessed second grade curriculum in math and English. Behaviorally, as noted above, Student made progress in reducing anxiety, emotional regulation, and task engagement.

35. The weight of the evidence demonstrated that Student continued to progress academically during the 2017-2018 school year. Overall, he made gains in behavior and social-emotional functioning, though experiencing increased difficulties in December 2017. Accordingly, Student failed to meet his burden of proof on Issue 3.

#### FAILURE TO IMPLEMENT BEHAVIOR CONSULTATION AND TRAINING

36. District staff received several hours of training and consultation by Dr. Meade and Ms. Severson from December 2015 through the end of the 2015-2016 school year, based on testimony by Dr. Meade and District staff. Student's IEP documents, campus sign-in sheets, Dr. Meade's invoices, several emails, and testimony from District staff corroborate that District sought such training and did not refuse it, as Student contends.

37. When Dr. Meade's contract ended in June 2016, District continued training and consultation with Ms. Peterson through January 2018. Ms. Peterson spent approximately four hours per month working with staff to address Student's behavior needs. She met with staff individually and in groups, reviewed daily behavior charts and ABC data sheets, compiled ABC data, and prepared behavior analysis graphs, which she reviewed at IEP team meetings.

38. Student failed to present any credible evidence that District materially failed to implement consultation and training requirements from his behavior intervention plan. Accordingly, Student failed to meet his burden of proof on Issue 4.

#### ISSUE 5 AND 6: SPEECH AND LANGUAGE ASSESSMENT AND GOALS

39. Student contends only that District failed to identify his needs in

pragmatic language until May 2016, requiring it to provide compensatory services. District contends Parents agreed to exit Student from speech services in mid-2015, while Student attended Charter Academy, and did not consent to District's speech and language assessment plan until February 1, 2016.

#### Legal Authority

40. Assessments are required in order to determine eligibility for special education, and the type, frequency and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

41. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 Fed. 3rd 1025, 1031-1033.) Procedural violations of the IDEA only constitute a denial of FAPE if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

42. An IEP must contain a statement of the child's present levels of academic achievement and functional performance and a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(i) and (ii); Ed. Code, § 56345, subds. (a)(1) & (2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) Failure to provide a statement of appropriate annual goals is a violation of the IDEA's procedural requirements for the formulation and revision of IEPs. (See 20 U.S.C. § 1415(d)(1)(A)(i); Ed. Code 56345, subd. (a).)

43. The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges v. Spartanburg County Sch. Dist. Two, Bridges ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011, No. 7:10-CV-01873-JMC) 2011 WL 3882850 (the use of percentages tied to the completion of discrete tasks is an appropriate way to measure student progress).)

44. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is "a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.)

#### Analysis

45. Student initially qualified, in 2011, for special education under the category of speech language impairment due to delays in articulation and expressive language. Triennial assessments in 2014 showed improvement and, Brentwood recommended exiting him from speech and language services, though Parents did not consent.

46. At District's April 22, 2015 IEP team meeting, Parents verbally agreed to discontinue speech services after the speech language pathologist reviewed data showing Student was understood by others and speech skills did not impact his ability to learn. Parents and Ms. Geller attended an addendum meeting on June 1, 2015, where Parents signed consent to end speech services.

47. Subsequently, Parents sought an independent educational evaluation from Brentwood, which ultimately did not occur until January 2018. In the interim, District offered to conduct a speech and language assessment on November 15, 2015. Parents did not return the signed assessment plan until February 1, 2016. District began its assessment of Student's speech and language needs shortly after Parents provided their consent. Student did not prove District should have assessed earlier, or could have, over lack of parental consent.

48. District's speech language pathologist, Ms. Gordon, began conducting the assessment in March 2016. Due to Student's behaviors, Ms. Gordon assessed Student over several sessions, consulted with Dr. Meade and Ms. Scott regarding strategies to facilitate testing, and completed her assessment in May 2016.

49. Ms. Gordon identified areas of need in articulation and pragmatic language and recommended Student receive 30 minutes of speech and language services, twice per week. The pragmatic goal addressed Student's need to more consistently verbally express emotions and feelings, to identify the feelings of others and the impact of behaviors on others.

50. The IEP team, including Father and Ms. Geller, reviewed Ms. Gordon's assessment on May 27, 2016. Father and Ms. Geller provided input to the team but did not consent to services. They did not disagree with present levels identified in speech goals, at that time.

51. At hearing, Ms. Kraft and Ms. McCloskey corroborated the appropriateness of Ms. Gordon's assessment and goals. Though Ms. McCloskey recommended Student receive three, 30 minute sessions per week, she conducted her assessment two and one-half years later, at a time when Student's behavior issues had significantly increased. Moreover, she noted Student's progress from May 2016 through the time of her January 2018 assessment.

52. Father consented to implementation of the articulation goal and the updated pragmatics goal on March 21, 2017. Father and Ms. Geller attended each of the IEP team meetings that reviewed Ms. Gordon's assessment, provided input on the speech goals, and asked for and obtained modifications to goals before consenting to their implementation.

53. Throughout the time Student attended the counseling-enriched program at Carmen Dragon, Ms. Alford worked with him on social language by talking about feelings, turn taking, and staying on topic. Ms. Scott worked with Student on emotional regulation and coping skills, which included being able to identify how he was feeling.

54. Considering the timing of District's assessment plan, Parents' consent, and District's initiation of the assessment, Student did not demonstrate by a preponderance of the evidence that District failed to address his pragmatic language needs before May 2016.

55. Moreover, Parents participated in the development of Student's IEPs surrounding speech and language by attending IEPs with Ms. Geller; choosing whether to agree to services and assessment; providing input on goal development; and obtaining modifications to speech goals. Accordingly, Student failed to carry his burden of proof on Issues 5 and 6.

## ISSUE 7: FAILURE TO HOLD MANIFESTATION DETERMINATION REVIEW IN 2016-2017

56. Student contends District failed to conduct a manifestation determination review during the 2016-2017 school year, after suspending him for more than 10 school days. District contends Student was suspended fewer than 10 school days during the 2016-2017 school year.

### Legal Authority

57. When a school district decides to change the placement of a special education student for violating a code of student conduct, the district must convene an IEP team meeting within 10 school days to determine whether the conduct that gave rise to the violation is a manifestation of the student's disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).)

58. A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a).) A change of placement occurs where a child has been subjected to a series of removals that constitute a pattern (a) because the series of removals total more than 10 school days in a school year; (b) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (c) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. (34 C.F.R. § 300.536(a)(2).)

### Analysis

59. Throughout the 2016-2017 school year Student had a total of eight days of on-campus suspension. During on-campus suspensions, after Student de-escalated,

he worked in alternate settings on campus, typically in either Ms. Scott's or Mr. Hemauer's office.

60. Student presented no evidence supporting his claim that he experienced more than 10 days of removal during the 2016-2017 school year and did not argue the point in his closing brief. Accordingly, Student failed to meet his burden of proof on Issue 7.

#### ISSUE 8: FAILURE TO ASSESS AND ADDRESS STUDENT'S UNIQUE NEEDS RELATED TO AUTISM

61. Student contends District failed to assess in all areas of suspected disability when it did not respond to a Regional Center diagnosis of autism by Dr. Miller during the 2016-2017 school year. District contends Parents did not share the assessment with it until September 29, 2017, that District sought consent to an autism assessment, Parents consented in February 2016, and that District's assessor, Dr. Lopes, did not find Student met the Education Code and regulatory definitions for eligibility for as a student with autism. District further contends it addressed Student's unique needs, in any event.

#### Legal Authority

62. Under California law, autism is a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child's educational performance. Characteristics often associated with autism are repetitive activities, stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

63. A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child

may have a particular disorder. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21.) That notice may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior. (*Id.* at p. 13 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary Sch. Dist.* (9th Cir. 2008) 541 F.3d 1202].)

### Analysis

64. District staff discussed Student's social-emotional issues and eligibility with Parents at an IEP team meeting on April 22, 2015, while Student attended Jack London. Student exhibited inattention, required frequent redirection, and threw tantrums. He required use of sensory items. Student had attended behavior classes at Kaiser during the 2014-2015 school year. His developmental pediatrician, Parents reported, told them on several occasions that Student did not have autism.

65. District provided Parents an assessment plan on May 1, 2015. Student argues the assessment plan should identify the specific area of eligibility District proposed testing for, or else Parents would not be able to provide informed consent to the plan. Student's argument lacks merit, given the actual notice provided to Parents. Parents attended the April 2015 IEP team meeting wherein autism was discussed, and Mother was provided further information through a direct conversation with school psychologist Ms. Allen. Parents were aware District intended to assess Student for autism and declined permission to assess.

66. Subsequently, Dr. Grandison, Student's independent neuropsychologist, who was an expert in autism, diagnosed Student with attention deficit hyperactivity disorder. She determined Student had needs in the areas of anxiety, emotional regulation, focus, and impulsivity, but did not see the need to assess Student for autism.

67. District provided Parents with another assessment plan on November 15, 2015, in part, to assess for characteristics of autism. Parents refused to allow autism assessments until February 1, 2016. Dr. Lopes conducted a psychoeducational assessment of Student over a two-month period beginning in March 2016. She determined that Student did not demonstrate characteristics of autism consistently, and across environments. She found this fact particularly important as a child with autism demonstrates the same behaviors on a consistent basis over multiple environments.

68. Dr. Lopes' opinion that Student met the eligibility criteria under emotional disturbance<sup>8</sup> is instructive. "Read naturally and as a whole," emotional disturbance as defined by education law applies to children whose emotional composition prevents them from choosing normal responses to normal situations. (See, *Independent Sch. Dist. No. 284 v. A.C.* (8th Cir. 2001) 258 F.3d 769.) Dr. Lopes found that Student exhibited extreme reactivity to normal stressors, changes, and perceived lack of success or doing things wrong. Student's reactivity drove his need for a behavior plan and was observed by all providers, across all settings. Despite disagreement on eligibility categories, Student's providers agreed on unique needs driving his need for services.

69. Dr. Lopes and Dr. Grandison made similar determinations regarding Student's heightened needs in the areas of anxiety, impulsivity, emotional and behavioral control, and volatility consistent with attention deficit hyperactivity disorder. Both Dr. Grandison and Dr. Lopes made reasoned, thorough, and insightful determinations, were candid and found credible.

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<sup>8</sup> If a child's educational performance is adversely affected primarily because the child has an emotional disturbance, then he cannot also be eligible under the category of autism. (34 C.F.R. § 300.08(c)(1).) The IEP team here did not agree on either category.

70. Student's diagnosis under autism spectrum disorder came through a Regional Center eligibility assessment by Dr. Miller on January 1, 2017, when he was eight years old.<sup>9</sup> Dr. Miller reviewed the National Institute of Health's assessment report of Student, which did not diagnose Student with autism. Dr. Miller also made reasoned and thorough determinations, was candid and found credible. However, she had no knowledge of IDEA criteria for autism and could not express an opinion on whether Student should be eligible for special education under that disability category.

71. Dr. Miller identified Student's needs in social-emotional and behavior, similar to other assessors. She found that Student was able to show empathy and play well at times with others; exhibited a range of appropriate social skills; but believed he was on the mild end of the spectrum in terms of his social skills. She also saw fear and anxiety but related that to the autism rather than anxiety disorder or attention deficit hyperactivity disorder. She observed he had fluent speech. She did not assess for, but agreed with, Student's prior diagnosis of unspecified anxiety disorder and attention deficit hyperactivity disorder.

72. Parents did not provide Dr. Miller's assessment to District until September 29, 2017. At the October 3, 2017 IEP team meeting, Parents noted the new diagnosis of autism, indicated the assessor highlighted areas of need, and reiterated their desire for District to help Student become an independent learner, access peers, and work with peers. Ms. Geller requested an educationally related mental health assessment to address concerns about Student's anxiety. She did not request another autism assessment or a thorough review of the Regional Center assessment.

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<sup>9</sup> According to Dr. Grandison, children are usually diagnosed with autism by age three.

73. Student, in his closing brief, argues District's 2016 psychoeducational assessment for autism was not appropriately thorough. However, Student did not raise that issue in his complaint.

74. A party who requests a due process hearing may not raise issues at the hearing that were not raised in the request, unless the opposing party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) Here, District did not agree and in fact affirmatively declined to add to the issues being redressed at hearing.

75. District was aware of Student's social-emotional, adaptive behavior, and sensory needs, which were attributable to anxiety disorder, attention deficit hyperactivity disorder, obsessive-compulsive disorder, and XYY syndrome. The evidence from all experts showed that professionals can have a disagreement on diagnosis or eligibility and the important factor is addressing the needs underlying the diagnosis or eligibility determination.

76. Student failed to demonstrate by a preponderance of evidence that District failed to assess and address Student's unique needs in autism. Accordingly, Student did not prevail on Issue 8.

#### ISSUE 9: FAILURE TO CREATE OR PROVIDE BEHAVIOR INCIDENT DOCUMENTATION

77. Student contends District used restraints in response to his maladaptive behaviors and failed to both create and provide Parents with behavior emergency reports. Student further contends District failed to create and provide Parents with reports of suspensions or behavior incidents. District contends it did not use restraints on Student at any time and that it provided Parents with all legally required notices of suspension and behavior incidents.

## Legal Authority

78. Emergency interventions such as physical restraint may be used on special education students only to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the student or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Ed. Code, § 56521.1, subd. (a).) Emergency interventions shall not be used as a substitute for a systematic behavioral intervention plan designed to change, replace, modify, or eliminate the behavior. (*Id.* at subd. (b).) The parent shall be notified within one school day if an emergency intervention is used and a behavioral emergency report shall immediately be completed. (*Id.* at subd. (e).) If a behavior report is written regarding a student with a positive behavioral intervention plan, the report must be forwarded to the IEP team to review and determine if the behavior plan requires modification. (*Id.* at subd. (h).)

## Analysis

79. Student presented no evidence of emergency interventions used on him while he attended Carmen Dragon. A review of over 1,000 pages of daily behavior charts, ABC data, IEPs, emails, letters, and 10 days of testimony does not support Student's claim that District staff restrained Student or otherwise implemented emergency interventions such that it was required to complete a behavioral emergency report.

80. Moreover, Student failed to identify any legal authority, requiring District to provide suspension notices or other documentation regarding behavior incidents. Nonetheless, the weight of the evidence showed District provided Parents with suspension notices pertaining to each incident of suspension and otherwise provided Parents with behavior incident documentation consistent with implementation of Student's behavior intervention plan, addressed under Issues 1-4. Accordingly, Student

failed to meet his burden of proof regarding Issue 9.

## ORDER

All of Student's claims for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: May 9, 2018

\_\_\_\_\_/s/\_\_\_\_\_  
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COLE DALTON

Administrative Law Judge

Office of Administrative Hearings