

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

FULLERTON SCHOOL DISTRICT.

OAH Case No. 2017090443

---

FULLERTON SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

---

OAH Case No. 2017060283

DECISION

Fullerton School District filed a request for due process (complaint) with the Office of Administrative Hearings, State of California, on June 6, 2017, naming Parents on behalf of Student. Student filed a complaint on September 11, 2017, naming District.<sup>1</sup> OAH granted the parties' motion to consolidate the two cases on September 15, 2017.

---

<sup>1</sup> District filed its response to Student's complaint on September 21, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

On October 19, 2017, OAH granted the parties' motion for a continuance.

Administrative Law Judge Darrell Lepkowsky heard this matter in Fullerton, California, on February 20, 21, 22, 27, and 28, 2018, and on March 1, 12, 13, 14, 15, 21, and 22, 2018.

N Jane DuBovy, Attorney at Law, represented Student throughout the hearing. Also present at various times during the hearing from Ms. DuBovy's law firm were attorney Maeve Crommie and paralegal Carrie Watts. Mother attended each day of the hearing and testified over several days. Father was present on the last day of hearing. Student did not attend.

Lauri Arrowsmith and Karen VanDijk, Attorneys at Law, represented District. Robin Gilligan, District's Director of Special Education, attended most of the hearing. Katherine Purnick, District Program Specialist, attended the entire hearing.

At the parties' request, OAH granted a continuance until April 30, 2018, for the parties to file written closing arguments. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

## ISSUES<sup>2/3</sup>

### STUDENT'S ISSUES

(1) During the 2015-2016 school year, with regard to the development of Student's January 11, 2016, January 29, 2016, February 17, 2016, March 24, 2016, and May 18, 2016 individualized educational programs, did District infringe upon Parents' right to meaningfully participate in Student's IEP process and cause Student a loss of educational benefit, thereby procedurally denying Student a free appropriate public education, by:

- a. Failing to take into consideration Parents' concerns in the development of the IEPs;
- b. Failing to include all required content in the IEP document including;

---

<sup>2</sup> After the start of the hearing, Student withdrew his issues that alleged District improperly conducted his March 2016 occupational therapy assessment (a portion of issue 5) and improperly failed to provide appropriate assistive technology and/or augmentative assistive communication devices or services during the 2015-2016 and 2016-2017 school years (issues 8(e) and 9(e) of the prehearing conference order). Student also withdrew his request for an independent occupational therapy educational evaluation. District in turn withdrew its issue of whether its March 2016 occupational therapy assessment met all legal requirements. The issues for hearing have therefore been re-numbered from the issues as stated in the prehearing conference order in accord with the parties' withdrawal of issues.

<sup>3</sup> The issues have been reorganized for clarity. 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. (*J.W.*.)

- i. A statement of Student's present levels of developmental, functional and academic performance in all areas;
- ii. Annual goals in all areas of need arising from Student's disability;
- iii. A statement of the special education and related services to be provided based on peer-reviewed research;
- iv. A clear and concise statement of the frequency and duration of services; and
- v. A clear description of the placement offered, with sufficient details to allow Parents to understand what was offered and provide informed consent;
- c. Failing to ensure that Parents were members of any team that made decisions regarding Student's educational placement and program;
- d. Predetermining and/or unilaterally determining Student's program and the content of Student's IEP outside of the IEP process; and
- e. Failing to consider the results of private and independent evaluations and private treatment providers' recommendations in determinations regarding placement, services, and the provision of FAPE?

(2) During the 2016-2017 school year, with regard to the development of Student's October 3, 2016, November 17, 2016, March 20, 2017, and May 4, 2017 IEPs, did District infringe upon Parents' right to meaningfully participate in Student's IEP process and cause Student a loss of educational benefit, thereby procedurally denying Student a free appropriate public education, by:

- a. Failing to take into consideration Parents' concerns in the development of the IEPs;
- b. Failing to include all required content in the IEP document including;
  - i. A statement of Student's present levels of developmental, functional and academic performance in all areas;
  - ii. Annual goals in all areas of need arising from Student's disability;

- iii. A statement of the special education and related services to be provided based on peer-reviewed research;
- iv. A clear and concise statement of the frequency and duration of services; and
- v. A clear description of the placement offered, with sufficient details to allow Parents to understand what was offered and provide informed consent;
- c. Failing to ensure that Parents were members of any team that made decisions regarding Student's educational placement and program;
- d. Predetermining and/or unilaterally determining Student's program and the content of Student's IEP outside of the IEP process; and
- e. Failing to consider the results of private and independent evaluations and private treatment providers' recommendations in determinations regarding placement, services, and the provision of FAPE?

(3) Did District infringe upon Parents' right to meaningful participation in Student's IEP process, thereby procedurally denying Student a FAPE, by failing to provide copies of all of Student's records upon Parents' written requests made on August 5, 2016 and in April 2017?

(4) Did District infringe upon Parents' right to meaningful participation in Student's IEP process, thereby procedurally denying Student a FAPE, by failing to allow Parents' expert to conduct observations of the program in March and April 2017?

(5) Did District deny Student a FAPE by failing to conduct an appropriate evaluation<sup>4</sup> in the following areas because the evaluations were not sufficiently comprehensive to identify each of Student's unique educational and related services

---

<sup>4</sup> The terms "assessment" and "evaluation" are synonyms. Professionals conducting such tests use the terms interchangeably, as did the parties and many of the witnesses at this hearing. The terms are used interchangeably in this decision.

needs, did not rely on a variety of assessment tools and strategies, and were not conducted by assessors with expertise in Student's complex multiple diagnoses:

- a. District's March 2016 psychoeducational evaluation;
- b. District's March 2016 speech and language evaluation; and
- c. District's March 2016 functional behavior assessment?

(6) Did District deny Student a FAPE by failing to conduct an appropriate evaluation in all areas of suspected disability when it reevaluated Student in March 2017, specifically because its social-emotional assessment was not sufficiently comprehensive to identify each of Student's unique special education and related service needs, did not rely on a variety of assessment tools and strategies, and was not conducted by assessors with expertise in Student's complex multiple diagnoses?

(7) Did District deny Student a FAPE during the time period from September 11, 2015, to the filing of his due process complaint, by failing to conduct evaluations in the areas of:

- a. Central auditory processing disorder; and
- b. Vision processing and vision therapy?

(8) Did District deny Student a FAPE during the 2015-2016 school year, including extended school year 2016, in the April and May 2015 IEPs and September 2015 IEP (as implemented from September 11, 2015 forward), as well as in the IEPs of January 11, 2016, January 29, 2016, February 17, 2016, March 24, 2016, and May 18, 2016, by failing to:

- a. Develop appropriate and ambitious goals in all areas of need to enable Student to make progress toward the general education curriculum;
- b. Offer and provide appropriate and sufficient related services in the area of language and speech to address Student's needs and allow him to make adequate progress;

- c. Offer and provide sufficient related services in the area of occupational therapy to address Student's needs and allow him to make adequate progress;
- d. Offer and provide related services in the area of auditory processing to address Student's needs and allow him to make adequate progress;
- e. Offer and provide appropriate and sufficient related services in the area of social skills;
- f. Offer and provide sufficient and appropriate levels of behavior intervention that included additional applied behavior analysis support provided outside of the school day for direct skill development;
- g. Offer and provide appropriate related services in the area of parent training to address Student's needs; and
- h. Offer and provide an appropriate program for extended school year that included direct behavioral interventions, sufficient related services, structured learning opportunities, and appropriate opportunities for socialization with typical peers to prevent regression and provide Student with a FAPE?

(9) Did District deny Student a FAPE during the 2016-2017 school year, including extended school year 2017, in Student's October 3, 2016, November 17, 2016, March 20, 2017, and May 4, 2017 IEPs, by failing to:

- a. Develop appropriate and ambitious goals in all areas of need to enable Student to make progress toward the general education curriculum;
- b. Offer and provide appropriate and sufficient related services in the area of language and speech to address Student's needs and allow him to make adequate progress;
- c. Offer and provide sufficient related services in the area of occupational therapy to address Student's needs and allow him to make adequate progress;

- d. Offer and provide related services in the area of auditory processing to address Student's needs and allow him to make adequate progress;
- e. Offer and provide appropriate and sufficient supports and strategies in the area of behavior, including an appropriate behavior intervention plan;
- f. Offer and provide sufficient and appropriate levels of behavior intervention that included additional applied behavior analysis support provided outside of the school day for direct skill development;
- g. Offer and provide appropriate and sufficient related services in the areas of counseling/mental health to include individual therapy outside of school to address Student's needs and allow him to access an educational benefit;
- h. Offer and provide appropriate and sufficient related services in the area of social skills?
- i. Offer and provide appropriate related services in the area of parent training to address Student's needs;
- j. Offer and provide an appropriate program for extended school year that included direct behavioral interventions, sufficient related services, research based interventions for language comprehension deficits, and appropriate opportunities for socialization with typical peers to prevent regression and provide Student with a FAPE; and
- k. Offer and provide an appropriate placement?

DISTRICT'S ISSUES:

(10) Was Student's March 15, 2016 triennial assessment (with the exception of the occupational therapy assessment) conducted in accordance with all legal requirements?

(11) Was Student's March 24, 2016 functional behavior assessment conducted



in accordance with all legal requirements?

(12) Was Student's March 2017 and April 2017 social-emotional assessment conducted in accordance with all legal requirements?

## SUMMARY OF DECISION

Student was a young boy with autism and related speech and language impairments. He asserted various procedural and substantive violations against District stemming from District's attempts to address those concerns through its assessments and IEPs. Student also had a diagnosis of generalized anxiety disorder that he contended District failed to address through the IEP process.

District met frequently with Parents to address their concerns about Student's needs. District took their concerns into consideration, as they did the input from Student's outside providers and assessors. Student failed to demonstrate that the behavioral issues he experienced at home occurred at the same level of severity at school or that District failed to respond appropriately to the much less severe issues Student manifested in his school setting. Student exaggerated the severity of his deficits by failing to acknowledge that what Parents viewed as behavioral problems requiring intensive services were just behaviors that Student's typically developing classmates exhibited. Student failed to demonstrate that District procedurally or substantively denied him a FAPE in any of its IEPs or amendments to the IEPs with the exception of District's failure to permit Student's expert to observe him at school in April 2017 and District's failure to offer Student speech and language services and behavior consultation during summer 2017. Student is entitled to a remedy for these violations.

Both parties in this case raised the issue of whether four of District's assessments were legally valid. District, in its case, met its burden of proving that its March 2016 psychoeducational and speech and language assessments met legal criteria. It also proved that its social/emotional assessment likewise met legal criteria. However, it did

not demonstrate that its functional behavior assessment was legally valid. Student is therefore entitled to an independent functional behavior assessment at District's expense. Student did not prove that the invalid functional behavior assessment denied him a FAPE.

## FACTUAL FINDINGS

### BACKGROUND INFORMATION ABOUT STUDENT

1. Student was eight years old at the time of the hearing. He moved into District's boundaries in the spring of 2015 and resided with his parents within District's boundaries at all times relevant to this case. Student was eligible for special education and related services under the primary eligibility category of autism and a secondary category of speech or language impairment. Student was of average to high average intelligence. At the time of the hearing, he attended school at the University of California, Irvine's Child Development School.

2. Autism is a neurodevelopmental disorder generally marked by impaired social and communicative skills, "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."<sup>5</sup>

3. Student was diagnosed with autism and language impairments when he was three years old. That same year, his private medical providers diagnosed him with a general anxiety disorder. Through their medical insurance, Parents began providing Student with speech and language therapy, occupational therapy, and in-home applied behavioral analysis therapy. They continued providing Student with these services, funded by their insurance, through the date of the hearing.

---

<sup>5</sup> 34 CFR §300.8(c)(1)(i) (2006); Cal. Code Regs., tit. 5, § 3030, subd. (b).

4. Student demonstrated significant behavioral issues at home. He was anxious, impulsive, hyperactive, inattentive, and easily frustrated. He had difficulty with change. He cried a lot. He had some self-injurious behaviors, such as head-banging. He made inappropriate noises and had repetitive behaviors. Student also engaged in two to three tantrums a day, which would last up to 20 minutes each. The tantrums occurred when Student was in conflict situations, when he woke up, when he had to complete self-help routines, when he had to wait, when he had to transition, and when separating from Mother.

5. Student was enrolled in a general education preschool program during the fall of 2013. However, Parents were extremely concerned about his behaviors at home. In October 2013, they enrolled Student in an intensive outpatient program at Pediatric Minds, a clinic that provided programs for children with issues such as autism and anxiety. Dr. Pantea Hannauer, a medical doctor with a specialty in child neurology, was the medical director of Pediatric Minds. Dr. Hannauer received her medical degree from the Chicago Medical School, did a residency program in neurology at the University of California, Los Angeles School of Medicine where she later was a fellow in the Division of Pediatric Neurology. As of the time of the hearing, Dr. Hannauer had been a clinical instructor of pediatric neurology at UCLA School of Medicine since 2006.

6. Among other methods, the program at Pediatric Minds used cognitive behavioral therapy to address Student's anxiety and other issues. Cognitive behavioral therapy is a type of psychotherapy that seeks to work on a person's problems by modifying thoughts, emotions, and behaviors.

7. Anxiety disorders are co-morbid in about 40 percent of autistic children, particularly those who have higher cognitive abilities. Autistic children with higher cognitive abilities are more apt to have higher anxiety because they are aware they are different and cannot make sense of it. Along with worsening anxiety symptoms, anxiety

can increase maladaptive behaviors and gastro-intestinal problems. It also interferes with motivation and causes anhedonia, which is the inability to feel pleasure or enjoyment in things.

8. Student participated in the Pediatric Minds program three hours a day, five days a week, for over three months. Because his anxiety and behavioral issues continued after completing the program, Parents enrolled Student in the early childhood partial hospitalization program at UCLA. The UCLA program was for children with autism, developmental disabilities, and behavior disorders. The program developed individual educational, behavioral, and social intervention plans for each child. It also provided family intervention to assist parents in understanding their child's needs and how to manage their child's behavior. The UCLA program was six hours a day, five days a week. It is not clear from the record how long Student remained in the program.

#### Dr. Chris Davidson's March 2014 Psycho-Educational Assessment

9. In November 2013, Parents contracted with Dr. Chris Davidson for her to administer a psychoeducational assessment to Student. Dr. Davidson is a licensed educational psychologist who recently became a Board Certified Behavior Analyst. She has worked as a school teacher, a school psychologist, a director of special education at a California school district, and as an assistant school superintendent. She has conducted well over 1,000 assessments. Dr. Davidson was trained in applied behavior analysis concepts but had no training in cognitive behavioral therapy.

10. Dr. Davidson assessed Student between November 2013 and March 2014. Her test results showed that Student had performance intelligence score of 134, in the very superior range. Student also scored above average on two achievement tests. Student continued to meet criteria as a child with autistic-like characteristics, and continued to meet criteria as a child with a speech and language impairment. Student also continued to have behavioral challenges both at home and at school.

11. Student's prior school district adopted Dr. Davidson's recommendation that Student attend school at the Buena Park Speech and Language Development Center, a non-public school with a preschool classroom where typically developing children attended preschool with children with special needs.

#### APRIL 20, 2015 ANNUAL IEP

12. District convened an annual IEP team meeting for Student within a few weeks of Student and his family moving within District boundaries. Student's annual IEP was developed over the course of four IEP team meetings between April 20, 2015, and May 26, 2015.

13. Mother had questions about potential District placements. District answered all her questions. Unlike the preschool classroom that Student attended, the kindergarten classroom at the Development Center did not have any typically developing children; it was comprised solely of special needs children. Student's IEP team members agreed that Student needed exposure to typically developing peers, but there was some disagreement whether Student should be placed full-time in a general education classroom. Mother and District IEP team members observed several potential District kindergarten programs to help decide Student's placement.

14. The IEP team developed 25 goals for Student. The IEP team, including Parents, discussed all the goals, and modified them with input from District staff, Parents and staff from the Development Center. The goals consisted of: five occupational therapy goals; a goal in number relationships; a coloring goal; and a goal to improve Student's ability to catch a ball.

15. The IEP team developed 13 speech and language goals for Student, in the areas of expressive, receptive, and pragmatic language. Pragmatic language is basically the rules of language and of social communication, that is, knowing what people are really saying and what they are implying and what appropriate responses are. People

with autism generally have deficits in pragmatics. Student's IEP team therefore developed several goals to address Student's deficits in pragmatic language.

16. At the May 22, 2015 meeting, the District team included Nancy Karcher, a District teacher for its multi-age elementary school classroom at Orangethorpe Elementary school. This was one of the classrooms Parents observed, and a classroom in which they were interested for Student's placement. Ms. Karcher had been a kindergarten teacher from 1998 to 2011. She co-taught the multi-age classroom at Orangethorpe since August 2011.

17. The multi-age classroom was a District parent-choice program, meaning parents had to request District to place their children in the program. The classroom included children in kindergarten, first, second and third grades. One parent of a child was required to volunteer in the classroom once a week for three hours. The parent-volunteers were not academic supports for the class but informally helped guide the students through the program by leading group study activities. The class had approximately 50 to 65 children with two credentialed teachers. The classroom consisted of three adjoining classrooms, with different learning centers in different classrooms. Teaching was done primarily in the center classroom that had a large carpeted area where children sat to receive instruction. The other rooms had tables and desks where the children worked in small groups or individually. The instructional method placed emphasis on teaching each child at his or her own academic and developmental level. Although there was large-group instruction in the class, the children were required also to learn independently and in small groups. The teachers worked one-on-one with the students and then expected them to take that instruction and work independently to complete work.

18. All of Student's IEP team members agreed that Student did not require placement in a special day class. All team members, including Mother, agreed that

Student could access his education in a general education classroom with supports. Teachers and staff from the Development Center and District team members believed that Student required a structured program that a traditional general education program would provide. Parents, however, decided to apply for an intra-district transfer for Student to attend the multi-age classroom at Orangethorpe.

19. District's offer of FAPE for the 2015-2016 school year was placement in a general education classroom at Student's home school, with the following supports and services: a full-time aide (identified in Student's IEPs as intensive individual services); specialized academic instruction seven-and-a-half hours a week; two hours of weekly occupational therapy clinic; 30 minutes a week of occupational therapy in the classroom; 60 minutes a month of occupational therapy consultation; three, 30-minute sessions a week of individual speech and language therapy outside of the classroom; one, 30-minute session of group speech and language therapy in the classroom; 30 minutes a month of speech and language consultation; four hours a month of behavior intervention services, to include consultation with Student's home applied behavior analysis team, the classroom teachers, and Student's aide; and 60 additional minutes of behavior intervention services during Student's first month at school to aid his transition from the non-public school to a District classroom.

20. District included as part of this IEP the behavior intervention plan Student's previous school district developed for him while he attended the Development Center. The behavior plan identified four areas of concern that impeded Student's learning and addressed those areas: 1) Talking out of turn; 2) Inappropriate touching of others; 3) Elopement; and 4) Physical aggression toward others.

21. District offered to convene an IEP team meeting approximately 30 days after Student started school to review his progress and determine if changes needed to be made to his annual IEP. On May 28, 2015, District provided Parents with a complete

copy of the proposed annual IEP. Parents thereafter enrolled Student through an intra-district transfer in the multi-age classroom at Orangethorpe.

#### Mother's Request for Modifications to 2015 Annual IEP

22. On July 8, 2015, Mother wrote to District indicating to which parts of the IEP Parents consented and requesting certain modifications and additions. Mother accepted all 25 proposed goals. Mother made several requests for modifications to goals and for District to correct errors and omissions Mother found in the IEP document. District agreed to the majority of Mother's requests. Parents asked for and received clarification on some areas and then accepted the May 2015 IEP.

#### 2015-2016 SCHOOL YEAR: STUDENT'S KINDERGARTEN YEAR

##### Transition to Multi-Age Classroom

23. Student began attending the District's multi-age classroom on August 10, 2015, for kindergarten. Ms. Karcher co-taught the class with teacher Pamela Keller. For administrative purposes, District assigned one teacher each year to the kindergarten and first grade students and the other to the second and third grade students in the multi-age class. That teacher would complete the report cards each year for the students assigned to her. However, both teachers co-taught all students in the class and interacted fairly uniformly with all. For the 2015-2016 year, Ms. Karcher was assigned to the kindergarten and first grade students when Student was in kindergarten. Student remained in the multi-age class for first grade during the 2016-2017 school year and Ms. Keller was his assigned teacher.

24. Ms. Keller had a bachelor's degree in child development and a master's degree in educational leadership. She received her bilingual multi-subject teaching credential in 1992. In addition to a wealth of community-related work and volunteer experience, Ms. Keller had worked for District for almost 25 years, first as a bilingual



kindergarten teacher, then as a teacher on special assignment, as the Executive Director for the Fullerton Collaborative, and as the Healthy Start coordinator. She returned to the classroom full-time in 2014 to co-teach the multi-age classroom, and was assigned there at the time of the hearing.

25. Ms. Karcher and Ms. Keller presented a professional demeanor. They had great enthusiasm for their jobs and the children they taught. They recalled many details about Student's time in their classroom. They recognized Student's needs and how they, as general education teachers, could meet those needs and implement his IEP with the additional supports provided to Student. Given both teachers' education, experience, enthusiasm, and demeanor during testimony, their opinions on Student's educational needs, his behavioral issues in their classroom, and his progress was very persuasive and was given great weight.

26. Ms. Karcher and Ms. Keller persuasively testified that Student had few problems his first semester at Orangethorpe. He had friends in class and participated in class instruction. Student was good at following directions and did not cause any significant disturbances. He did not interfere with his classmates' access to their education and did not have behaviors significant enough to interfere with his access to his own education. Student could independently take care of his bathroom and other adaptive living needs. He had one toileting incident at the beginning of the school year, but this was not unusual for kindergarten aged children and his teachers addressed the issue for the entire class. Student was academically at grade level or above grade level. Student had some episodes of crying; both teachers, who had many years' experience teaching kindergarten students, opined the behavior was typical of children that age and it raised no red flags with them. Student's other behaviors, such as touching others inappropriately, leaving his work area without permission, and talking out of turn, were easily addressed through implementation of Student's behavior support plan and

through the interventions by Student's aide.

27. The District behaviorist tasked with addressing Student's behavior needs was Peter Ellis. Mr. Ellis had a bachelor's degree in communication disorders. He received his certification as a Board Certified Assistant Behavior Analyst in 2007. He had worked as a behavior therapist for a private agency providing behavior support, including applied behavior analysis, to children with autism. After receiving his certification, Mr. Ellis worked as a supervisor for the private agency. District hired him as an autism supervisor and behavior intervention supervisor in 2010, and he worked for District since that time. A District Board Certified Behavior Analyst supervised him.

28. Mr. Ellis was thoughtful and deliberate during his testimony. His demeanor projected quiet confidence. He testified with assurance and sincerity about Student's behavioral needs and how he and other District staff addressed them. Mr. Ellis's testimony was accorded significant weight.

29. During Student's transitional first month at Orangethorpe, Mr. Ellis consulted with several of Student's private service providers to obtain information about what behaviors they saw in their settings. He spoke with the behavior specialist at the Development Center to learn the methodologies that school used with Student. He spoke with the behavior supervisor from In Steps, Student's in-home private applied behavior analysis agency, to learn what services it provided to Student, what was happening with Student at home, and to collaborate on what District would do in school. Mr. Ellis spoke with Parents at this time to obtain information about Student and Student's outside services. Mr. Ellis went to Student's home to observe Student. He met with Mother and the in-home therapy supervisor to discuss Student's needs. At no point during these meetings with Parents and Student's private providers did anyone state or suggest that Student suffered from anxiety and that the anxiety needed to be addressed at school.

## September 3, 2015 Amendment IEP Team Meeting

30. District convened an amendment IEP team meeting on September 3, 2015, to review Student's transition to Orangethorpe and his progress. Parents provided District with private occupational therapy and speech and language assessments, which District agreed to review at the meeting.

31. The team reviewed Student's progress on his goals. Academically, Student was progressing on his goals. He was also further ahead than his typically developing peers. Importantly, Student had made progress on his behavior goals. Student demonstrated progress on talking less out of turn as he became more comfortable with his new classroom. He talked out of turn an average of four times a day. Student had learned some self-regulation. He sometimes independently requested a sensory object or a break when fidgeting. More often, he needed prompting to ask for them. Student also was progressing on his ability to work independently and stay on task. He continued to struggle with independently seeking adult assistance if he had a conflict with a peer.

32. The IEP team reviewed Student's academic goals. Based on Student's progress, and input and suggestions from Parents, District suggested discontinuing goals Student had met, revised other goals, and suggested new goals. Parents agreed to some, but not all of the suggested changes. District also recommended reducing Student's specialized academic instruction from 450 minutes a week to 180 minutes a week, divided between 120 minutes on a pull-out basis and 60 minutes weekly in Student's classroom, with an additional 60 minutes weekly of consultation between Ms. Chavez and Student's teachers and service providers. Parents agreed to the reduction in services.

33. At home, Student often left the area where he was receiving behavioral therapy. During speech therapy and occupational therapy sessions in school, he

occasionally got up from his seat and moved to another area of the therapy room. However, he never left the classroom. At school, he would at times leave the area where he was receiving instruction to go to another area of his class to do a more preferred activity. Sometimes he would run ahead of his classmates to get to the playground first or would run ahead of them back to the classroom. Student's teachers, aide, and service providers successfully redirected Student back to task or back to his group. Parents were concerned about this type of behavior. Student's IEP team later agreed to define this type of behavior as "elopement" any time Student moved more than five feet from where he was supposed to be.

34. Parents made several requests at the meeting. They requested that Student receive extended school year services during District's winter break, which lasted two weeks. They later asked that District provide extended services during District's Thanksgiving break, which lasted one week. District agreed to monitor Student's progress to determine if Student would regress so much during the break that he would be unable to recoup his skills after returning to school from the break.

35. At hearing, Mother testified that Parents required training, but she was never specific as to exactly what type of training she expected from District. During the two years Student attended school in District, Parents requested the IEP team to include parent training on how to review Student's progress and collaborate on Student's goals and educational strategies. District addressed their request by revising Student's IEPs to include monthly meetings between Parents and Student's District service providers and between Mr. Ellis and Student's in-home behaviorists.

36. Parents were fully aware of the IEP process, on how to monitor Student's progress, how to develop goals, and aware of how to request changes to Student's IEP.

37. The IEP team met for two hours, did not complete its review of Student's progress, and scheduled another three-hour meeting for September 14, 2015.

## September 14 and 16, 2015 Amendment IEP Team Meetings

38. Student's IEP team reconvened on September 14, 2015. The team consisted of Parents; Ms. Karcher; resource specialist teacher Jodi Chavez, who provided specialized academic instruction to Student; a District program specialist; Karen Khong, a District occupational therapist; Elizabeth Makino, District speech and language pathologist; and Mr. Ellis.

39. The IEP team reviewed Student's progress on his speech and language goals. Specifically, Ms. Makino discussed the goals with Parents. She proposed updating some goals by revising them, adding other goals, and discontinuing others. The changes made were based in substantial part on Parents' concerns and their suggestions. Parents had concerns that Student had regressed in speech and language skills. District agreed to monitor Student's progress.

40. Mr. Ellis reviewed Student's behavior goals. The IEP team updated goals, often based on Parents' suggestions. Mother volunteered in Student's classroom. Based on her observations, she voiced concerns that District was not implementing Student's behavior plan in class. Ms. Chavez and Mr. Ellis informed Parents that they had observed in the classroom and the plan was being implemented. Nonetheless, District agreed to continue to observe and monitor Student's behavior across the school day and Mr. Ellis agreed to continued collaboration with Student to check that the plan was implemented. District agreed to Parents' request for District to collect more data on an updated behavior goal. District also agreed to Mr. Ellis's suggestion that he provide one hour a week of supervision of Student's behavioral needs.

41. The team did not finish its review of Student's progress at the September 14 meeting. The team reconvened for part three of the IEP team meeting on September 16, 2015. Mother attended as did the District members who had attended the previous meeting. Additionally, the school principal was part of the team.

42. The IEP team reviewed Parents' private occupational therapy and speech therapy assessments. Ms. Makino addressed the private speech therapist's recommendations, many of which were already part of Student's IEP.

43. Parents did not request additional speech and language therapy for Student. However, Ms. Makino proposed changing Student's individual sessions to group sessions because many of Student's goals, such as his pragmatic language goals, were more appropriate to group sessions than to individual ones. Ms. Makino also felt that pull-out group sessions would be better than push-in sessions in the classroom because of distractions. Additionally, Student was more responsive and less distracted in group sessions than in individual ones. Further, she believed Student needed to practice and use his targeted speech and language skills with peers. She believed that doing so would help Student learn to generalize his skills across settings.

44. Parents never agreed to the proposed changes in the delivery of speech and language services. Mother was concerned that Student might mimic whatever behaviors the other children might have because group sessions would consist of Student and maybe two other children with special needs. There is no evidence that Mother's concerns were justified or that Student would not benefit from group speech therapy. Given his pragmatic language deficits, District's proposal to work on those skills in a group was appropriate.

#### October 7, 2015 Amendment IEP Team Meeting and Behavior Intervention Plan

45. District convened another amendment IEP team meeting on October 7, 2015, to discuss among other things, Student's progress on his behaviors and in speech therapy. In addition to Mother and District team members, the supervisor for Student's in-home behavior therapy attended the meeting.

46. The team added a social initiation goal for Student. The team also updated

the frequency of Student's behaviors and updated baseline data. Mr. Ellis and the home therapy supervisor discussed how data was collected at school. The team also updated Student's behavior intervention plan.

47. The team identified the same four behaviors that had been impeding Student's learning: 1) Talking out of turn (during instruction talking to peers, calling out, or answering without raising a hand); 2) Inappropriate touching of others (placing hands or feet on others without permission); 3) Elopement (walking or running more than five feet from an adult without permission); and 4) Physical aggression toward others (attempting to or making contact with another person by pushing, grabbing items, poking, hitting, or kicking). The need for a plan to address these behaviors was defined as "moderate."

48. During the collection of data by District staff, Student decreased his inappropriate touching of others, decreased his talking out, and decreased his aggression. He did not elope in the classroom. Although he eloped during individual therapy sessions, he never left a classroom area.

49. Student was more likely to engage in the four behaviors when he had to wait his turn during group instruction because his attention decreased at those times. He also engaged in touching and more physical aggression when he was seated close to peers, and when peers did not want to do or continue a play activity.

50. The behavior plan determined that Student engaged in these behaviors to get attention, to escape non-preferred tasks and unexpected demands, and to access or escape sensory input. The IEP team developed strategies for Student to replace the behaviors that met the same needs.

51. The behavior plan as well as the IEP itself included classroom accommodations to assist Student in the classroom. These included positioning Student's seat so he could not easily grab or hug another child; having his aide in close

proximity; providing attention or sensory input every two minutes; use of sensory materials or allowing Student to stand and/or bring something to manipulate to his table when he was fidgety; and providing him with manipulative items if his hands were fidgety. Student's aide and teachers would start with a high level of support and fade it out as necessary, while giving him exaggerated praise and attention for staying on task.

52. The speech therapist was responsible to provide the social skills curriculum to Student's aide so that the same social stories could be modeled in class. A District behavior specialist and Student's teachers were responsible for implementing and monitoring the behavior plan, along with Student's aide.

53. The behavior plan included instructions on how teachers, staff, and service providers were to handle problem behaviors that continued. Staff was also instructed to discuss with Student alternatives to the challenging behaviors and to problem solve additional solutions for Student to consider in the future.

54. The behavior plan developed functionally equivalent replacement behaviors as goals for Student to achieve. These consisted of Student communicating his needs by requesting a peer to play with him or to give him a turn, and Student communicating when he wanted to access another area in the classroom.

55. Parents did not consent to any of the offers from the September 3, 14, 16, and October 7, 2015 IEP team meetings until January 6, 2016. Parents consented to revision of some goals; only consented to some changes with deletions of language goals; declined to consent to others; and agreed to consent to deletion of four goals Student had met (catching a ball, comparing objects in a group, isolating coloring of pictures, and maintaining conversations initiated by adults and peers.)

#### Student's One-on-One Aide

56. Student was assigned the same one-on-one aide for kindergarten and first grade, Ms. Garcia. She did not testify at the hearing.



57. Ms. Garcia had a bachelor's degree. Prior to working for District, she worked as a behavior therapist for an agency that provided in-home applied behavior analysis. After being employed by District, Mr. Ellis trained her on using positive behavior reinforcements and feedback. Mr. Ellis frequently observed Student and Ms. Garcia in the classroom and never saw any improper or inappropriate interaction between her and Student or the other children in class. Mr. Ellis formally met on a monthly basis with Mother pursuant to Student's IEPs and sometimes met with her informally in Student's classroom. She never told him that Student did not like Ms. Garcia. Nor did any other parent or any District staff voice concerns to him about how Ms. Garcia interacted with Student.

58. Mother expressed some concerns to Mr. Ellis about how she thought Student's aide was performing when compared to how Student's previous aide interacted with Student when he was in preschool at the Development Center. Mother was also concerned that Ms. Garcia was using negative comments too frequently rather than focusing on positive feedback. Based on Mother's comments, Mr. Ellis specifically met with Ms. Garcia and reviewed again the positive feedback system he had taught her. That system directed that the aide start with positive feedback on what Student was doing well, and then address something that needed to be corrected, and finish with positive feedback and praise. Mr. Ellis thereafter continued observing Student and Ms. Garcia in the classroom and on the playground. He observed Ms. Garcia implementing his training.

January 11, 2016 Amendment IEP Team Meeting - Request for Extended School Year Services

59. District provided a prior written notice letter to Parents prior to the December 2015 winter break documenting its decision not to provide occupational and speech therapy services during Thanksgiving and the December 2015 winter break.

60. On January 11, 2016, District convened an amendment IEP team meeting to again discuss whether Student had any regression during the Thanksgiving and winter breaks. District reviewed data collected during occupational therapy and speech and language therapy sessions. Mr. Ellis attended the meeting. He and Ms. Garcia compiled data on Student's progress and behavior after he returned from the 2015 Thanksgiving break. Student regressed slightly in his talking out of turn and in aggressive behavior, but quickly returned to pre-break skills.

61. District also compiled data on Student in his speech and occupational therapy sessions. Student had some decreased self-regulation after Thanksgiving during his occupational therapy sessions. However, he was able to participate in the therapy and make progress on his occupational therapy goals. After receiving four sessions of occupational therapy subsequent to the Thanksgiving break, Student recouped any regression in his skills. The data collected by Ms. Makino likewise demonstrated that any regression Student demonstrated due to a one-week break in services was swiftly recouped after he returned to school.

#### January 29, 2016 Amendment IEP Team Meeting

62. District convened an amendment IEP team meeting on January 29, 2016, to continue the agenda from the January 11, 2016 meeting and to continue to review Student's progress. The team also met to discuss what Parents were consenting to regarding proposed IEP changes made at the previous amendment IEP team meetings held between September 3, 2015, and January 11, 2016. This meeting lasted over four hours.

63. Parents expressed concerns to the IEP team that Student required prompting in class, including physical prompting, and therefore was not meeting his

behavioral goal. Both Ms. Chavez, the resource teacher,<sup>6</sup> and Ms. Karcher, the general education teacher, observed that Student's level of prompting was the same as his non-disabled kindergarten aged peers. However, District agreed to collect data on Student's behavioral goal for four weeks and report the results to Parents.

64. The team reviewed Student's progress on his speech goals and agreed to discontinue one of them as Student had met the goal. In the classroom, Student was very verbally expressive, particularly when excited about a topic, and displayed self-advocacy skills when asking his teacher questions. Student was also able to engage in conversations with peers. The IEP team, including Parents, agreed to dismiss Student's goals to name opposites and his goal to describe familiar objects by function as Student had met or surpassed the goals.

65. Mr. Ellis took data on Student's classroom behaviors at Parents' request. He used the "A-B-C" format in collecting and analyzing the data. "A-B-C" refers to Antecedent-Behavior-Consequence. The analyst looks to see what is happening before a child engages in a targeting behavior, what the behavior is, and what the consequence of the behavior is. The analysis is designed to determine why the child may be engaging in the behavior.

66. Based on Mr. Ellis's data, Student engaged in his touching and aggressive behaviors on most occasions to get attention. Mr. Ellis presented the results as percentages of time. Parents requested actual numbers of times Student engaged in the behaviors, and Mr. Ellis complied with the request. Although Student's talking out of turn had marginally increased, he actually engaged in the behavior less often than did his non-disabled peers.

---

<sup>6</sup> Ms. Chavez was sometimes referred to as the "education specialist" and at times as the "resource specialist" in Student's IEPs. The terms are used interchangeably here.

67. Parents again asked to discuss the provision of extended school year services for Thanksgiving and winter breaks. District IEP team members reviewed Student's progress, noted Student's past ability to recoup skills rapidly after breaks, and noted that non-disabled children also experienced challenges when returning to class. The team agreed to re-visit Student's need for extended school year services at his upcoming annual/triennial IEP team meeting that would take place in spring 2016.

68. On February 2, 2016, Ms. Karcher administered an academic achievement test to Student. The scoring of each section of the test produced an approximate age level and approximate grade level based on the number of correct answers. Student was six years, one month old and had completed six months of kindergarten at the time he took this test. Student was above his grade level and above his age level on all but one of the subtests.

69. Parents never raised a concern that Student was demonstrating anxiety in school during the numerous IEP team meetings between April 2015 and February 2016. Parents never informed District during this time period that Student was continuing to demonstrate anxiety and maladaptive behaviors at home. Parents never informed District that they believed that Student's anxiety at home was affecting his performance at school. Parents never gave District any reason to suspect that Student had any behavioral needs suggesting a need for a mental health assessment or social-emotional assessment and/or mental health counseling services.

#### February 17, 2016 Meeting

70. Ms. Chavez met with Parents at their request on February 17, 2016, to review which IEP items Parents consented. She attached to Student's IEP lists of which items had been revised, which remained the same, and to which items Parents had not consented.

## Academic Progress Prior to March 2016

71. District administered benchmark assessments to all students during the school year. The areas assessed were in math concepts and language arts. Student's scores indicated he had a thorough understanding in most areas tested except in decoding and writing, in which he scored at the proficient level. His scores indicated Student was at or above grade level in all areas tested. On Student's report card for the first trimester of kindergarten, Student's grades indicated that he was at grade level in language and above grade level in areas of literature and reading of informational text; foundational reading skills; writing; and mathematics.

## District's March 15, 2016 Multidisciplinary Triennial Assessment

72. District conducted a multidisciplinary triennial assessment of Student in early 2016 in preparation for his triennial IEP. Parents' stated concerns at the time were Student's language abilities and his behavior. They did not tell District that they had concerns Student was anxious or depressed at school and at home.

73. The 82-page March 15, 2016 multidisciplinary assessment report, revised on April 14, 2016, was comprehensive. The assessment itself consisted of a psychoeducational assessment, a speech and language assessment, an occupational therapy assessment, and a health assessment. The assessments included reviews of Student's records; input from Student's teachers, aide, and Parents; observations of Student in class and during the testing process; and the administration of several testing instruments. District also conducted a separate functional behavior assessment of Student.

74. The assessment report included background history on Student, including his medical history, his educational history, and a thorough discussion of all assessments previously administered to Student. This included discussion of all of Student's privately obtained assessments. The assessment report also included an in-depth description of

how standardized tests were scored and how to interpret the scores. Finally, the report included a definition of assessment terms.

75. District's assessors were all highly trained and qualified to administer all testing instruments they selected. District's assessors chose assessment materials and used assessment procedures that were not racially, culturally, or sexually discriminatory. The assessments were done in English, which was Student's primary language. All tests were validated for the specific purposes for which they were used. The tests were administered according to the publishers' instructions. Each assessment consisted of several different standardized and sometimes non-standardized tests; observations of Student; interviews with Parents or obtaining their input through the use of ratings scales so that their input would be considered in the testing process; and information obtained from Student's teachers. District used a variety of measures and procedures to determine if Student continued to be eligible for special education, to determine what his unique needs were, and how to address those needs. All assessors used strategies such as token reward systems to optimize Student's willingness to participate in the assessment process.

76. No environmental, cultural, or economic factors affected the validity of the District's assessment. All tests and the test results were valid as applied to Student.

#### KAREN TOWERS'S PSYCHOLOGICAL ASSESSMENT

77. Karen Towers administered the psychological portion of the multidisciplinary assessment. Ms. Towers had been a general education teacher from 1992 to 2003 as a third and fourth grade teacher. She then obtained a master's degree in 2003 and has worked as a school psychologist since that time. In addition to her teaching credential and professions clear pupil personnel services credential, the latter of which qualified Ms. Towers as a school psychologist, she also had a clear, cross-cultural, language and academic development certificate. Ms. Towers also received

training in many areas directed toward advancing her knowledge of children with autism. Additionally, Ms. Towers was certified as a behavior intervention case manager. She had done over 1,300 assessments in her career, about a third of which were administered to children on the autism spectrum. Ms. Towers's testimony at hearing was clear and informative. She answered questions directly and thoughtfully and without hesitation. Her assessment was comprehensive and thorough. Based on her assessment and education, training, and experience, her testimony was given significant weight.

78. Ms. Towers conducted two observations of Student. She observed him in class and on the playground. She first observed Student in his classroom after the class had returned from the lunch break. Student transitioned comfortably between activities and between classrooms. During a journal writing assignment, Student's aide easily prompted him to wait his turn to talk, to remain focused on his work, and to stay on task. Student waited his turn when in line to talk to a parent volunteer. He interacted appropriately with peers.

79. Ms. Towers observed Student during a recess period playing a ball game with other children from his class, including several older students. Student navigated the group appropriately, followed the rules of the game, did not get upset when he was "out," waited patiently to be able to return to the game, and cheered on those who remained in the game. He did not shove, push, or inappropriately touch anyone during the observation. He did not need any prompting, direction, or other intervention from his aide, who was supervising the game. When the recess bell rang, Student appropriately transitioned back to class.

80. During Ms. Towers's second observation of Student on the playground, he promptly responded to his aide's directions. Later, during classroom instruction, she observed that Student and his classmates all required redirection from adults in the room to attend to the teachers. Student later successfully worked independently on a

math assignment.

81. Ms. Towers also observed Student during the formal assessment process. Student responded promptly to her redirection when walking with her from his classroom to the testing room. During the testing process, Student was cooperative, listened to directions, and appeared motivated to answer to the best of his ability. Ms. Towers utilized a token reward system to assist Student in sustaining his attention to the tasks. He responded well to the system and to non-verbal prompts from Ms. Towers to remain on task. He gave Ms. Towers his attention, including using behavior expectations he learned in class such as folding his hands on the table and making eye contact with Ms. Towers.

82. Ms. Towers administered several tests to determine Student's intellectual functioning and cognition, and to test his psychological processes, executive functions, adaptive behaviors, and his social, emotional, and behavioral needs. In her assessment report, Ms. Towers stated test results in standard scores or scaled scores, and in percentiles.

83. Ms. Towers generally did not note age equivalencies or grade equivalencies in her reports because they were not considered accurate or reliable. Student took issue with the lack of age and grade equivalencies in the assessment reports of Ms. Towers and other District assessors. However, Student's expert Dr. Chris Davidson also stated in her second assessment of Student, discussed below, that grade and age equivalencies were "impure," although she felt that they were useful information that she tended to provide in her own assessment reports.

84. Ms. Towers administered the Differential Abilities Scales - II to test Student's intellectual functioning and cognitive abilities. The test provides a composite score reflecting conceptual and reasoning abilities; cluster scores measuring more specific ability areas; and individual subtest scores representing a range of diverse



abilities. The test is meant to reliably profile a child's cognitive strengths and weaknesses.

85. Ms. Towers administered the Differential Abilities Scales to Student in five composite areas. On the verbal composite, Student obtained a standard score of 105, which was in the average range. On the nonverbal reasoning composite, Student's standard score was 115, which was in the above-average range. Student's score on the spatial composite was 114, in the above-average range. Student's score on the special nonverbal composite was 117, also in the above-average range. Student's overall composite score on this test was 114, in the above-average range. This test indicated that Student had high average intelligence, even when only using his special nonverbal composite score.

86. Student attended well during the test. He displayed great problem solving skills and did not have difficulty completing the test. His scores did not indicate any significant weaknesses although they did demonstrate that Student had strengths in using his reasoning skills.

87. Ms. Towers administered two assessments to test Student's psychological processes. The first was the Test of Auditory Processing Skills – Third Edition, which measures auditory processes as they relate to language development and understanding and the use of language in academic and everyday situations. For the test, the student listens to sentences and is asked questions about what he has heard. To answer the questions, the student must use auditory reasoning and inference and have figurative language skills.

88. The auditory processing test consisted of nine subtests, which resulted in scaled scores and percentile ranks; three composite scores that were scored as standard scores and percentiles; and one overall score. Student's standard score of 105 on the phonological composite index placed him in the average range. Student's score of 98 on

the memory composite index was in the average range. Student's score on the cohesion composite index was 90, the bottom of the average range. Student's overall composite score was 98, in the average range. Student scored higher than Ms. Towers had expected as this test is language dependent. Student never needed instructions restated. There was nothing in Student's scores, in his performance at school, or in his previous assessments to indicate that he had an auditory processing disorder that required intervention or further testing.

89. Ms. Towers administered the Test of Visual-Perceptual Skills – Third Edition, to test Student's visual-perceptual strengths and weaknesses. The test measures seven perceptual areas. Student scored in the average range in the areas of visual discrimination, spatial relationships, form consistency, sequential memory, and visual closure. His score in the figure-ground subtest was in the high range, well above-average. However, Student's score in visual memory was a scaled score of five, which was below average. His overall standard score on this test was a 99, in the 47th percentile, and thus in the average range.

90. Student's below average score in visual memory indicated that it was an area of weakness for him. Ms. Towers noted that in her report. However, she did not find that Student required any services or interventions to address the weakness because there was no evidence that the weakness impacted Student's classroom performance. Student was meeting or exceeding grade level academic standards, which indicated he might have been using his strengths in other areas to compensate for the weakness. He did better in other areas of visual memory and did not demonstrate memory deficits on other tests.

91. Ms. Khong assessed Student's visual processing during her occupational therapy assessment. One of the tests she administered was the Beery-Buktenica Developmental Test of Visual-Motor Integration – Sixth Edition. Visual perception

includes the ability to perceive, discriminate, and recall form and space. This assessment tested the extent to which a child can integrate visual and motor abilities, also known as “eye-hand coordination.” Students need these skills to copy from a board, complete puzzles, and recall visual information. Student’s visual-motor integration standard score was 106, in the average range. His visual perception score was 120, in the high range. The test demonstrated that visual perceptual skills were an area of strength for Student.

92. Executive functioning is the set of skills a person needs to accomplish tasks and to organize things. Ms. Towers administered the Behavior Rating Inventory of Executive Function to assess Student’s executive functioning skills. This assessment consists of rating scales filled out by a student’s teachers and parents. The Executive Function assessment has two composite scores resulting in one global executive composite that combines all scores. The assessment produces “T” scores, which have a mean of 50 and a standard deviation of 10. Scores above 65 are considered significant.

93. Ms. Karcher, Student’s father, and Student’s aide, Ms. Garcia, completed the Executive Function ratings scales. Ms. Keller did not answer all questions because she did not feel she had enough information on Student at the time to answer them because she was not Student’s primary teacher at the time and only saw him in a small group setting. Therefore, Ms. Towers did not score her responses.

94. Ms. Karcher and Father rated Student either at-risk or in the clinically significant range on the inhibit, shift, emotional control, initiate, and working memory scales. Father rated Student as clinically significant on the organization of materials scale while Ms. Karcher’s scores placed Student in the average range. Both she and Father rated Student in the average range on the plan/organize scale. Father’s and Ms. Karcher’s scores placed Student in the clinically significant range for the global executive composite score.

95. In contrast to Father and Ms. Karcher, Ms. Garcia scored him as average in

every area. Ms. Towers opined that the reason for the difference in scores was that the aide scored Student in comparison to the other children in the class rather than in a vacuum. However, because Ms. Garcia did not testify at hearing, the reasoning behind her responses is unknown.

96. Ms. Towers administered the Adaptive Behavior Assessment System – Second Edition to assess whether Student could address his daily living needs without assistance. The test focuses on independent behaviors and measures what a person can and cannot do. The test measures conceptual skills in the areas of communication; functional academics; and self-direction. It measures social skills in the areas of leisure and social adaptation. It measures practical skills in the areas of community use, home living, health and safety, and self-care. The test scores each area and then produces a general adaptive composite. The general adaptive composite is not valid if there is considerable scatter or divergence among the different skills tested. The sub-tests produce scaled scores. The composites of each area as well as the general ability composite produce standard scores. The assessment consists of rating scales. Ms. Karcher, Father, and Ms. Garcia completed the forms.

97. Father scored Student based on how he saw Student performing at home and in the community. He scored Student low or extremely low in all areas of practical skills. He scored Student as below average in all areas of conceptual skills. He scored Student as average in leisure skills, but below average in social skills. Ms. Karcher scored Student as average in all areas of practical skills at school. In the area of conceptual skills, her answers placed Student in the above average range for functional academics and the average range for communication and self-direction. She scored Student as below average in both leisure and social skills. In contrast, Ms. Garcia scored Student below average, borderline, or extremely low in all areas except functional academics.

98. Student's behaviors at school and whether they impacted his ability to

access his education was a significant area of concern, especially to Parents. Ms. Towers administered three behavior assessments to address these concerns. The first was the Behavior Assessment Scale for Children – Third Edition, which is a norm-referenced, standardized behavioral assessment system designed to diagnose and classify a variety of emotional and behavioral disorders in children and to aid in the design of treatment plans for them. It is administered by giving rating scales to responders that may include a child's teacher and parents. The assessment covers five domains for the teacher ratings: externalizing problems, internalizing problems, school problems, behavioral symptoms index and adaptive skills. The teacher ratings do not cover the subtests of activities of daily living at home. The parent ratings do not cover school problems. The test is scored using the "T" scores, which have a mean of 50, with a standard deviation of 10. Scores in the "clinically significant" range suggest a high level of maladjustment and the possible need for intervention in that area. Scores in the "at-risk" range suggest a significant problem that may not be severe enough to require formal treatment. At-risk scores may suggest a potential problem that warrants monitoring.

99. Father, Student's aide, Ms. Keller, Ms. Karcher, and resource teacher Jodi Chavez completed the rating scales for the Behavior Assessment Scale for Children. There was wide divergence in the scores. Ms. Karcher scored Student as clinically significant for the externalizing problems composite and in the behavior symptoms index composite. She scored him at-risk on the internalizing problems and adaptive skills composites. Her scores placed Student in the average range for school problems. In contrast, Ms. Keller scored Student as average in all composite areas except for adaptive skills, where she too scored Student at-risk. Ms. Chavez's scores also were distinct. She scored Student as average in all composite domains except for externalizing problems, where she scored Student at-risk. The composite domain scores for Ms. Garcia were all in the average range. Ms. Garcia scored Student average on all

domains.

100. Father, who scored Student based on what he observed at home and in the community, scored Student as clinically significant in the composite domains of externalizing problems and on the behavior symptoms index. He scored Student at-risk for adaptive skills and in the average range for internalizing problems.

101. The internalizing problems composite is derived from domains covering anxiety, depression and somatization. Somatization is when psychological concerns become physical symptoms, such as when a person is so anxious that he or she gets stomach aches. All five people who completed the rating scales scored Student as average in the areas of somatization and anxiety. In the area of depression, everyone but Ms. Karcher scored Student as average. Ms. Karcher scored Student as clinically significant in that area.

102. Ms. Towers attributed the difference between the ratings of Student's three teachers to the context in which they observed him. Ms. Karcher based her scores on her observations of Student during carpet time and when lining up for recess, when he was with a large group of children. Ms. Keller based her scores on observation of Student in small group settings.

103. Ms. Towers also administered the Conner's Rating Scale – Third Edition to assess Student's behavior. The test is used to assess for attention deficit disorders as well as executive functioning and other behaviors. It is based on rating scales. It is also scored using "T" scores that have a mean of 50. "T" scores of 45 to 55 mean a child is in the average range and is behaving typically when compared to peers. Scores above 55 indicate increasing degrees of atypical behavior. Therefore, the lower the score, the less problem the child is demonstrating in that area. Scores above 70 were defined as "markedly atypical" and indicated that the child had a significant problem in that area. Ms. Towers did not indicate in her report what scores below 45 signified.

104. The Conner's measures the areas of inattention; hyperactivity/impulsivity; learning problems; executive functioning; aggression; and peer relations. Ms. Karcher, Ms. Keller, Ms. Chavez, Father, and Ms. Garcia completed the rating scales.

105. Ms. Karcher scored Student as markedly atypical in the areas of hyperactivity/impulsivity, aggression, and peer relations. She scored all other areas as average. Ms. Keller scored Student as mildly atypical for inattention; markedly atypical for hyperactivity/impulsivity; and average in all other areas. Neither Ms. Chavez nor Ms. Garcia scored Student as more than mildly atypical in any areas. In contrast, based on Student's behavior outside of school, Father scored Student as average only in the area of aggression. His scores indicated Student was moderately atypical in the area of learning problems, and markedly atypical in the remaining four areas.

106. Ms. Towers explained that the differences between the scores of Student's teachers and aides was likely for the same reason as the differences that were noted in the scores on the Behavior Assessment Scales for Children. The raters generally observed Student in different contexts. His behaviors were more marked when he was rated while in a large group setting than when he was observed in a small group setting.

107. Ms. Towers administered the Social Responsiveness Scale, Second Edition, to also look at Student's behavior. The test specifically asks those completing the forms to consider the child's behavior over the six preceding months. The assessment assesses five areas: social awareness; social cognition; social communication; social motivation; and repetitive ritualistic behavior. The latter area looks for behaviors that might be characteristic of autism. The test also uses "T" scores. Scores of 59 or less are within the normal range. Scores of 60 and higher demonstrate an increasing concern in the area of reciprocal social behavior and increasing possibility that the child has autism. Father, Ms. Karcher, Ms. Keller, and Ms. Garcia completed the rating forms.

108. Although the composite score from Ms. Keller and Ms. Garcia found

Student's social interactions to be within the normal range and therefore not consistent with autism, both Father and Ms. Karcher's overall composite score on this test placed Student in the severe range and thus strongly indicative of autism. Ms. Towers did not comment on the significance of the difference in scores in her report or what the scores signified in the context of Student's education.

109. The Autism Diagnostic Observation Schedule – Second Edition is a semi-structured, standardized assessment of communication, social interaction, and play or imaginative use of materials for individuals who are or who may be on the autism spectrum. Ms. Towers administered Module 3 of the ADOS to Student as part of her assessment.

110. This test required Student to tell a story from a book that had pictures but no text. Student utilized complex speech to formulate sentences in a largely correct fashion. Student's intonation and speech volume were appropriate as was his rate of speech. Although Student did not repeat things or use stereotyped or idiosyncratic words or phrases, he did not demonstrate any interest outside of stating his own preferences. He never demonstrated any interest in Ms. Towers's feelings, thoughts, or experiences. Student did not sustain reciprocal conversation with her, preferring to follow his own train of thought. He was not able to extend a conversation outside of his range of interests or experiences. However, Student did not demonstrate any over-activity or aggression during the assessment. He was not aggressive or disruptive and did not show signs of anxiety. Overall, Student's score indicated he continued to have an autism spectrum disorder.

111. Ms. Towers also administered the Gilliam Autism Rating Scale – Third Edition to Student. This test assesses whether a person's behavioral problems may be indicative of autism and, if so, the level of support the person might need to address his or her autism. This test also uses rating scales. Ms. Karcher, Ms. Chavez, Father, and



Student's aide completed the forms. The responses of all raters indicated that Student's likelihood of autism ranged from problem to the high end of very likely. Ms. Karcher's composite rating of 108 was the highest indicator of Student being on the spectrum and requiring a substantial level of support. Ms. Chavez's composite score of 63 was the lowest of the raters and indicated that Student only needed minimal support. Ms. Towers did not comment on the differences between the scores, why they might be so different, or what, if anything, the differences meant in context of educating Student.

112. A comparison of Student's scores on the assessments in the areas of behavior indicated that Father was seeing many more behaviors at home than what Student's teacher and aide saw in school.

113. Ms. Towers's assessment report contained in-depth discussions of the results of each of the assessment, including the scores on all sub-tests and a discussion of how each person who completed rating scales rated Student. Her report met all legal requirements.

#### MS. CHAVEZ'S ACADEMIC ASSESSMENT

114. Jodi Chavez, Student's teacher for specialized academic instruction, administered the academic achievement portion of District's multidisciplinary assessment. Ms. Chavez was a resource specialist teacher for District for almost 10 years. Ms. Chavez had master's degrees in education and in educational leadership. She had a certificate in autism, was certified in nonviolent crisis intervention, and had been trained in two Lindamood-Bell reading programs. Lindamood-Bell is an agency that has developed several methodologies for addressing academic deficits in different areas of reading, language arts, and mathematics.

115. Ms. Chavez observed Student in his classroom during an activity where he was working with a peer partner. Student actively participated in the multi-step activity and worked with his partner to complete the assignment. Student remained on task and

repeatedly reminded his partner of the step they were on throughout the activity.

116. Ms. Chavez administered the Woodcock-Johnson IV Tests of Achievement, which is a standardized testing tool to assess Student's academic achievement. The standard battery consists of 12 subtests that provide cluster scores in the areas of broad reading, broad written language, and broad math. Ms. Chavez also administered supplementary cluster tests in the areas of reading, basic reading, written language, written expression, mathematics, and math calculation skills, and supplementary subtests in word attack and oral reading. Finally, she administered three special purpose clusters in the areas of academic skills, academic fluency, and academic applications. Ms. Chavez reported Student's standard scores and percentile ranking for all subtests of the Woodcock-Johnson.

117. Student's standard score in the broad reading cluster was 107, in the average range. That cluster is composed of letter/word identification, passage comprehension, and sentence reading fluency. Student's score of 93 in sentence reading fluency was his lowest score on any subtest of the Woodcock-Johnson and his only score below 100. Student's scores in broad written language and in broad math were both in the high average range. With the exception of Student's average score of 102 in academic fluency, Student's scores on all the supplementary subtests of the Woodcock-Johnson were either in the high average or superior range.

118. Ms. Chavez administered a second academic achievement test to Student, the Wide Range Achievement Test – Fourth Edition. It tested Student's achievement in word reading, where he scored above average, math computation, where he scored in the superior range, in spelling, where Student's score was above average, and in sentence completion, where Student's score of 92 was in the average range.

119. Student's scores on the Woodcock-Johnson and the Wide-Range Achievement Test demonstrated that his overall academic achievement was in the high

average range. Reading was the only area in which Student scored in the average range and therefore was a relative weakness for him. His scores were still average when compared to his peers.

#### MS. MAKINO'S SPEECH AND LANGUAGE ASSESSMENT

120. Speech and language pathologist Elizabeth Makino, who provided speech therapy to Student, assessed him in the area of speech and language. Ms. Makino obtained her master's degree in communicative disorders in 1997 and has worked at District since then. She has taken professional development courses relating to serving children with autism since 1999. Her professional development has focused on social skills courses, theory of mind, and, like Ms. Chavez, has included training in Lindamood-Bell methodologies. She was thorough and deliberate in her testimony, gave thought to answering questions, was not defensive in explaining her assessments or opinions about Student's needs, and demonstrated a deep understanding of Student and his speech and language related issues. Her testimony was persuasive and was given great weight.

121. Ms. Makino assessed Student over six days in February 2016. Each testing session lasted less than an hour. To keep Student engaged in the testing, Ms. Makino used a token reward system so that Student could work toward a prize or time to play a game. She also gave him breaks to move around the room and do push-ups against the wall. These were the same strategies Ms. Makino used during her therapy sessions with Student. Ms. Makino also observed Student on two occasions, once in class and once on the playground.

122. Ms. Makino administered 10 testing instruments to Student to assess his articulation; expressive language; receptive language; and his pragmatic language skills. She administered the Expressive and Receptive One Word Picture Vocabulary Tests. The Receptive test measured the ability to understand single word vocabulary, and the Expressive test measured the ability to use single word vocabulary. Student scored in the

average range on both tests.

123. The Comprehensive Assessment of Spoken Language was a testing battery that tested a student's oral language. Student received average scores in antonyms, paragraph comprehension, and in pragmatic judgement. Student received a low average score in syntax construction. His overall composite score was in the average range.

124. The Structured Photographic Expressive Language Test requires the student to produce a word, phrase or sentence describing a photograph after the testing examiner gives him a prompt to elicit the targeted word formation. Ms. Makino decided to give this test to tease out Student's needs in the area of syntax because of his low syntax score on the Comprehensive Assessment of Spoken Language. Student's score on the Structured Photographic test was in the low range. Student demonstrated poor attention and eye contact during the test and his voice was difficult to understand. His low score on this test, in conjunction with his low syntax score on the Comprehensive Assessment of Spoken Language indicated Student needed to develop more skills working on different grammatical markers and on morphological markers. The latter refers to the form and structure of language, such as the use of past tense and plurals.

125. The Goldman Fristoe Test of Articulation – 2, assesses a person's articulation of consonant sounds. The test has two components. The first addresses sounds-in-words. Student scored below average on this test. The second component addresses sounds in sentences. Student had difficulty with the "r" sound. Ms. Makino gave Student the sounds-in-sentence component twice because the first time he did not use many of the targeted words in repeated sentences. The test guidelines permit the retesting. Student's score was in the mid-average range.

126. The Stuttering Severity Instrument – 3, measures stuttering severity in children in conversation or when reading. However, since Student was just in

kindergarten at the time and not a reader yet, Ms. Makino only used conversational language samples to score Student. Student had a tendency to speak rapidly. Student would not stutter when he slowed down his speech during speech therapy sessions with Ms. Makino. He stuttered more when he really wanted to tell someone something, such as when he was on the playground. During this assessment, Student only stuttered twice in 120 syllables. Student's score was in the 24th percentile, which indicated he had a mild stuttering problem.

127. The Test of Natural Language measures a child's ability to answer literal and inferential comprehension questions. It is a good measure of how well the child uses narrative language. The test utilizes three narrative formats: no picture cues; sequenced picture cues; and single picture cues. The test has a narrative comprehension component where the student listens to a story and then has to answer questions about it presented in three narrative formats. The test also has an oral narration component where the student has to retell the story when presented with the three narrative components. Student was inattentive during the test even when Ms. Makino used re-directing strategies that were successful during her therapy sessions with him. Student's overall score on this test was below average.

128. The Social Language Development Test – Elementary is a standardized test that focuses on language-based skills of social interpretation and interaction with friends. It assesses the ability to make multiple interpretations, take mutual perspectives, make inferences, and interact with peers. The test has four subtests: making inferences; interpersonal negotiation; multiple interpretations; and supporting peers.

129. Student was inattentive the first time Ms. Makino attempted this test. Ms. Makino stopped the test and decided to give it another day. However, the test does not allow for repetition of verbal stimuli, so Student was penalized on the test for his lack of attention, which was reflected in some of his lower scores on the test. Student's scores

on this test indicated he had difficulties identifying different interpretations of what people might be thinking.

130. Ms. Makino also administered a non-standardized testing instrument called the Assessment of Social and Communication Skills for Children with Autism. She used the portions of the test that assessed verbal and nonverbal communication behaviors. The test looks at social behavior, nonverbal social interaction, play, group skills, socio-emotional skills, and basic conversational skills. The test is a checklist that was completed by Ms. Makino, Ms. Karcher, and Ms. Keller. Based on the results of this test, Student demonstrated social skills deficits in keeping on the topic of a conversation; playing cooperatively with a partner or in groups in unstructured settings; ending conversations with a routine script; providing nonverbal and verbal feedback in a conversation; achieving appropriate proximity when communicating with people; modulating his voice for different situations; and watching for confirmation from the person with whom he was talking before continuing with a message.

131. Ms. Makino also administered the Double Interview, Thinking About You Thinking About Me test. In this informal test, the test examiner first interviews the student, looking for appropriate responses to questions, the ability of the student to maintain eye contact, the student's body language, tone and voice inflections, and facial expressions. On this portion of the test, if Student did not understand a question, he gave responses that were not on topic. He did not respond at all to some questions. He did not ask verbally or nonverbally for clarification of any questions. Student fidgeted and could not stay seated during the interview. He only made eye contact with Ms. Makino once during her interview of him.

132. In the second portion of this test, the student interviews the test examiner, based on pictures of the examiner's family and interests. In this part of the test, the examiner looks for the student's ability to ask about people in the photographs, the

ability to think about others, the ability to organize thoughts, and the ability to ask general and then specific questions to find out about the examiner's interests. Student did not ask questions about the interests of the people in the pictures. His questions were all focused on himself. His comments and questions were unorganized and unfocused.

133. Based on the results of all of the tests, Ms. Makino determined that Student had average receptive and expressive language skills. While he had average ability to understand grammar rules and word forms (syntax and morphology) in some areas, he had deficits in several other areas. Student also displayed deficits in pragmatic and social communication. He had some minor articulation and fluency of voice difficulties and had difficulty at times modulating his voice.

134. Ms. Makino commented on Student's behavior for every test, in relation to the testing process and how that behavior might have impacted Student's test scores. Where appropriate, her comments addressed the relationship of what she observed to Student's academic and social functioning.

#### MULTIDISCIPLINARY ASSESSMENT REPORT

135. The multidisciplinary report included a section discussing the relationship between Student's behaviors and his academic and social functioning. The report analyzed possible special education eligibility classifications that might apply to Student to determine if he continued to qualify for special education and related services. Based on the testing, the multidisciplinary team of assessors recommended that Student continue to be found eligible based on having characteristics of autism. Student demonstrated deficits in verbal and nonverbal communication skills, demonstrated impaired social interactions with others, demonstrated difficulty adapting to change, engaged in repetitive activities, and demonstrated restricted interests. The team also recommended Student continue to be found eligible under speech and language

impaired based on the results of Ms. Makino's testing.

136. In its report, the multidisciplinary assessment team also analyzed whether Student qualified for special education under the category of specific learning disability. The team found that Student did not demonstrate a severe discrepancy between his intellectual ability and his academic achievement. Further, even if there was a discrepancy, Student was demonstrating adequate achievement for his age and based on grade-level standards in the areas of oral expression, listening comprehension, written expression, reading skills, reading fluency, reading comprehension, mathematics calculation, and mathematics problem solving. Student's cognition was in the average to high average range. His academic achievement was also in the average to above average range. He was achieving at or above grade-level standards. The multidisciplinary assessment team therefore did not recommend finding Student additionally eligible as having a specific learning disability.

137. District assessors recognized that Student's impulsivity interfered with his ability to work independently to be fully available for learning. They recognized that some of his speech and language deficits in morphology and syntax could interfere with his reading comprehension, verbal expression, and written expression. They found that his pragmatic language deficits might interfere with his understanding of classroom language and being able to interpret nonverbal communication and social situations. In recognition of the deficits, the multidisciplinary assessment report recommended that visuals, role-modeling, verbal cues, verbal praise, and the provision of a peer buddy, be provided to Student during the school day. The team recommended several classroom interventions, replacement behavior training, and accommodations to address the deficits identified in the multidisciplinary assessment.

Mr. Ellis's March 24, 2016 Functional Behavior Assessment

138. District behaviorist Peter Ellis completed a functional behavior assessment



as part of Student's triennial IEP. A functional behavior assessment is an evaluation based on data collected regarding a child's behavior. Particular behaviors are the focus of the assessment. These are referred to as the "target" behaviors. Data is collected over a period of time regarding when and how often the behaviors occur. The assessor looks at the data to try to determine the antecedents or things that trigger the behaviors. The assessor also tries to determine what is called the function of the behaviors; that is, why the child engages in the behaviors. The assessor then outlines a plan to try to eliminate the target behaviors.

139. Mr. Ellis developed data sheet forms to analyze the function of Student's behavior. The behaviors that the assessment analyzed were talking out of turn; inappropriate touching; elopement; and aggression. The first column of the data sheet indicated the activity in which Student was engaged, such as lining up after recess or doing a math lesson. The second column indicated the time the activity started and ended. The third through sixth columns indicated each of the five behaviors being analyzed. The seventh column indicated if Student made requests of peers. The eighth column indicated if Student complied. The last column indicated if Student needed prompts and, if so, whether the prompts were through touch, gestures, modeling, partial verbal prompting, or full verbal prompting. Ms. Garcia, Mr. Ellis, and another District aide collected data by observing Student over a period of 17 days for the behavior assessment.

140. Mr. Ellis also reviewed Student's educational history and his behavior intervention history. He reviewed Student's classroom environment. He reviewed Student's present levels of functioning in the areas of language/communication; social skills; cognition; academics; motor skills; and self-care skills. Mr. Ellis reviewed Student's records. He either interviewed or received written input for the assessment from Mother; Ms. Karcher; Ms. Keller; Ms. Makino; Ms. Chavez; Ms. Garcia; Ms. Khong; Ms. Chavez's

aide; and two of Student's in-home behavior supervisors.

141. Mr. Ellis observed Student during speech therapy with Ms. Makino; during occupational therapy at District; during his specialized academic instruction with Ms. Chavez; during recess at school; during lunchtime at school; at various times in his classroom; and during a community-based outing with Student's in-home behavior therapist. Student had an aide with him at all times. Mr. Ellis did not believe removing the aide to conduct observations was appropriate, because Student always had an aide at school. Removing the aide would have created a false and artificial environment and would not have been helpful to the assessment.

142. Student's IEP team determined how each of Student's inappropriate behaviors was defined. Inappropriate touching consisted of purposeful, unwelcome, and unsolicited non-forceful contact with another person within a socially inappropriate context using any part of Student's body. Pulling on other people's clothing was considered to also be inappropriate touching. Student engaged in inappropriate touching by leaning on peers; pulling on their clothing; putting out his foot as peers walked by; poking peers with his fingers; and grabbing people with his hands. Student primarily engaged in this behavior with peers. The behavior would generally start out with Student touching the clothing of peers, and then escalate to leaning on the peers or poking them with his fingers. Student sometimes would lie down on them if the children were seated on the ground, and sometimes would wrap his arms around them or hang on to them when standing, such as when in line.

143. Student would stop the behavior when prompted to by an adult; he did not often respond to peers' requests that he stop. Student engaged in inappropriate touching most often when standing in line; while sitting and engaged in a non-preferred activity; when not engaged in something that occupied his hands; when there was an unexpected change in activity and peers were close by; when returning from the

playground; and while receiving oral instruction. Generally, Student engaged in the conduct when peers incidentally touched him while they were in line; when peers stood within a foot of Student while they were in line; when Student looked at an adult but did not establish eye contact; when Student smiled or laughed in excess of what was warranted by the current social context; and when Student was rocking back and forth while sitting on the carpet in his classroom. Student engaged in inappropriate touching 12 times during the 17-day observation period.

144. Mr. Ellis observed that the consequences of Student's behavior was that he received verbal redirection or a visual cue card prompt or physical touch prompt from an adult; verbal or physical protests from peers; or peers sought adult assistance to get Student to stop his behavior. He hypothesized that the function (or reason) of Student's inappropriate touching behavior while waiting in line was to either gain attention or to put more space between him and his peers. In a group instruction setting, Mr. Ellis hypothesized that Student engaged in inappropriate touching to gain attention from peers and adults. Mr. Ellis also believed that Student sought to gain attention when inappropriately touching peers when there was an unexpected change in schedule or routine. Mr. Ellis did not see any situation where the need for sensory input was the impetus for Student's inappropriate touching.

145. To test his hypotheses about Student's desire for attention as the function of his touching behavior, Mr. Ellis observed Student when his aide was present and engaging in her normal activities of remaining close to Student, priming him for what to expect next, providing visual cues of behavioral expectations, and reinforcing Student's positive behaviors. Mr. Ellis did not observe Student engaging in any inappropriate touching during this observation.

146. Mr. Ellis then had Ms. Garcia withdraw her usual supports. She moved from Student's immediate proximity. She did not make eye contact with him. As Ms. Garcia

continued to ignore him, Student's behaviors increased. He pulled on the shirt of a child seated in front of him, then tapped his head on the shoulder of another peer at his side and then alternated that with the peer in front of him. Student then leaned on the peer next to him, alternating leaning on the peer with tapping his head on the other peer. One of the peers verbally tried to stop Student's behavior. When that did not work, the peer tried pulling Student back from the other peer. Student did not stop the behavior until prompted to by his teacher. Mr. Ellis determined that gaining adult attention probably was the reinforcer for Student's behaviors.

147. Physical aggression was Student's forceful contact with another person using his head, hand, arm, foot, or leg in a manner that was inappropriate in the context of the situation. Student's physical aggression usually took the form of hitting a peer with an open hand or pushing a peer with one or two hands. The pushing behavior occurred more often than the hitting. Student generally did the behavior once and then stopped. When previously asked why he engaged in the behavior, Student told adults it was because a peer had done something to upset him, such as breaking a rule in a playground game. In the 17 days that data was collected on Student's behaviors, he engaged in aggression four times. On three times, Student engaged in a single push toward a peer. Once, Student pushed a peer in response to the peer pushing him. The pushing occurred twice in class when the children were seated on the carpet for group instruction, and twice during recess while the children played a ball game. Several other children engaged in similar pushing behavior during these games. An adult always quickly intervened to stop the behaviors of all children, including Student. Student engaged in the conduct when outside most often when peers violated game rules or the peer initiated aggression toward Student. There was no clear antecedent for the pushing behavior in class, other than Student saying he was "upset" by something that he would not or could not identify.

148. As a consequence of Student's aggression, peers would move away from him and adults prompted him to stop the behavior or ask why Student had engaged it. Mr. Ellis hypothesized that Student wanted to avoid peers who broke rules, or, when he responded to other children's aggression, Student was trying to escape from it. Mr. Ellis did not verify his hypotheses about Student's aggressive behavior. Verifying a hypothesis means the assessor tests what he or she believes is causing the behaviors by deliberately creating situations where the behaviors might occur. For example, if the assessor thinks that the child is throwing papers to gain attention, the assessor might deliberately put papers close to a child and then not respond to him if the child begins throwing the papers. Mr. Ellis opined in his report and during hearing testimony that he believed that it would be disruptive to the educational environment to have done so.

149. For purposes of the behavior assessment, elopement was walking or running more than five feet from an adult without permission under circumstances when doing so was not appropriate or when Student did not have actual or implied permission to leave. Elopement occurred when Student began walking ahead of his group. Elopement rarely occurred at school and was not a concern at the time Mr. Ellis assessed Student. Student sometimes eloped when transitioning to familiar locations with an adult who was not generally a part of the routing, or when the adult leading the group stopped for a moment. Student was always easily redirected when he did elope. As a consequence of Student's eloping, he received attention from adults; he was reminded of behavior expectations; he was brought back to the point from where he had eloped; and the adult prompted Student to stay with him or her. Student only eloped once during the 17 day assessment observation period. Mr. Ellis hypothesized that Student engaged in the elopement behavior to access the destination location sooner. Mr. Ellis did not do anything to verify his hypotheses about Student's elopement.

150. At hearing, Dr. Davidson and Brianna Cooper, who had been one of Student's in-home behavior supervisors and who testified at the hearing, criticized Mr. Ellis's assessment because he did not verify his hypotheses regarding Student's aggressive and elopement behaviors. Both said that best practices was to have tested the hypotheses because failing to do so meant there was no concrete determination of what was the reason for the behaviors. Although Mr. Ellis's explanation for failing to test the various hypotheses he made during the functional behavioral assessment was that he did not want to disrupt the educational environment, he did not opine that it would have been dangerous to have done the verification process.

151. The fourth behavior Mr. Ellis analyzed was Student's talking out of turn. This was defined as Student talking during instruction without raising his hand and being called on to talk unless the teacher had asked for response from Student without requiring the children to raise their hands. Student generally spoke out of turn when he had a comment to share. Student was generally able to raise his hand and wait his turn to be called on and did not get upset when someone else was chosen to answer the question.

152. Although Student spoke out of turn about four times a day during the observation period, his behavior was the same as his peers. Most of the children called out answers without waiting to be called on. The teachers accepted the behavior as normal for the classroom and Student did not stand out as engaging in the behavior more than did his peers. To test this, Mr. Ellis collected nine data comparison samples, comparing Student's talking out with that of a peer. Student engaged in the talking out behavior less than did the peers. Student's behavior was the norm for the classroom. Mr. Ellis therefore suggested that talking out did not constitute an area of need for Student that needed intervention.

153. Based upon the data he collected, Mr. Ellis discussed the relationship of

Student's observed behavior to Student's academic and social functioning. Mr. Ellis recommended that Student's behavior be addressed by having a predictable daily schedule; that Student have a sensory diet including manipulatives and fidget items when returning to the classroom from an outside activity and that he be given sensory breaks during classroom instruction; and that waiting time between activities be minimized for Student. He also recommended that Student be taught using visually rich and tactile learning formats; that Student should have space between him and peers during large group instruction and waiting times; that staff review behavior expectations with Student during transition times; that Student get adult attention on a fixed schedule; and that Student be taught self-management strategies.

154. Mr. Ellis recommended that Student's teachers, aide, and service providers use teaching and reinforcement strategies with Student. He recommended role-playing to teach Student new skills; that staff members should prompt Student with visual cues; that staff teach and reinforce replacement behaviors; and that a token economy be used as a positive reinforcement for appropriate behavior. Mr. Ellis recommended that Student should be given an opportunity twice a day to count his tokens and exchange them for a reward that had been predetermined to be something Student would be interested in earning. Mr. Ellis also proposed reactive strategies for staff to use if Student engaged in the inappropriate behaviors.

155. Mr. Ellis summarized his findings and recommendations in a report included in the triennial assessment report. The IEP team considered his report and recommendations at Student's spring 2016 triennial IEP meetings.

March 24, 2016 Triennial/ Annual IEP

MARCH 24, 2016 IEP TEAM MEETING

156. Student's IEP team first convened to develop his joint annual/triennial IEP on March 24, 2016. District provided Parents with draft copies of all District triennial

assessments more than a week before the initial meeting. Student's IEP team met four times over a period of two months, for a total of approximately 12 hours, to develop the IEP.

157. On March 24, 2016, the IEP team consisted of Mother; Ms. Chavez; Ms. Towers; Ms. Makino; Mr. Ellis; Ms. Karcher; Dr. Erlinda Soltero-Ruiz, the Orangethorpe Principal; a District program specialist; Ms. Khong; and two Board Certified Behavior Analysts who were supervisors from Student's in-home behavior program. District agreed to Mother's request to review Mr. Ellis's assessment early in the meeting as the in-home behavior supervisors could only remain for two hours.

158. Ms. Chavez reviewed the results of her academic testing and answered all questions Mother had about the difference in Student's test scores.

159. Ms. Makino reviewed her speech and language assessment and answered all of Mother's questions about terms used in the report, the results of the different testing instruments Ms. Makino utilized in her assessment, and the fact that Student's test results conformed to what his abilities were during speech therapy sessions. Ms. Makino gave her opinion that certain scores of Student's were more depressed than others on some of the tests because of the different difficulty of the tests and the different environments where the testing occurred. She also reviewed her test protocols with Mother and answered all questions Mother had.

160. Mr. Ellis reviewed the results of his functional behavior assessment. He agreed to correct some mistakes in background information in the report. He discussed how Student's aide had been introduced to him as being a "classroom helper" and how the aide functioned in the context of the class. Mr. Ellis reviewed his observations of Student's behavior and had a discussion with one of Student's in-home behavior supervisors as to how Student presented at home. The in-home behavior supervisor agreed that the function of Student's inappropriate touching behavior was to gain



attention. Mr. Ellis reviewed Student's aggressive behaviors and agreed to Mother's request to review the data to see if there was a correlation between Student's inappropriate touching behaviors and his aggressive behaviors.

161. Mr. Ellis also reviewed Student's elopement behaviors. Mother was concerned because Student had run ahead of his class during two field trips off campus. Ms. Karcher was not concerned about the behavior during the field trips because running ahead was something many of the children engaged in. They, like Student, just needed to be reminded to rejoin the group.

162. Mr. Ellis and Student's private behavior supervisor discussed different strategies for addressing Student's behaviors based on strategies used with Student in his home. Mother agreed that Mr. Ellis's report provided nice strategies for addressing Student's behaviors.

163. Ms. Khong reviewed her portion of the multidisciplinary assessment report and answered Mother's questions. The team agreed to reconvene on a future date. District provided Parents with a draft of proposed goals on March 30, 2016, in preparation for the next meeting.

#### APRIL 4, 2016 IEP TEAM MEETING

164. Student's IEP team met for a second time on April 4, 2016. Mother and Father attended this meeting as did one of their private in-home behavior supervisors. All District personnel who attended the first IEP team meeting attended the second.

165. Ms. Towers reviewed her assessment, answered Parents' questions about the test results and her report discussion, and explained where Student had made growth. She answered all of Parents' questions about areas where Student's scores were scattered, and explained how she looked for patterns across the test results to determine Student's areas of need. Ms. Towers explained that where there was a difference in Student's scores, for example in the area of attention where deficits were

noted more at home than at school, the differences indicated that Student had skills in the area but environment might be contributing to the lower scores. Ms. Towers reported that the results of her assessment showed that Student's primary areas of need were in the areas of executive functioning and reciprocal social interactions.

166. Ms. Karcher spoke about Student's academic progress. He was at grade level in every area. Mr. Ellis identified Student's behavior needs. Student had a need in the area of self-regulation. He engaged in behaviors as a means of seeking attention. Ms. Makino summarized Student's speech and language needs in the areas of pragmatics and social interactions; syntax and morphology; fluency; and voice. Ms. Khong reviewed Student's needs as identified in her assessment.

167. Ms. Chavez reviewed Student's progress on his academic goals. Student met one of four academic goals. He did not have enough opportunities to work on the fifth goal to fulfill the annual requirements. He was on track to meet other academic goals. Ms. Makino reviewed Student's progress on his speech and language goals. He met four of the nine speech goals. Each District teacher or service provider answered any question Parents had about Student's progress on his goals and how the new proposed goals related to the prior goals.

168. Student's IEP team discussed Student's proposed goals. Based on input from Parents and their private in-home behavior supervisor, District agreed to add language to goals, including additional baseline data. District team members agreed to collect data to determine if a goal with the objective of Student learning to resolve conflicts with peers verbally before seeking out adult assistance needed to be developed. District also agreed to collect more data to determine Student's level of independence. The IEP team meeting ended without full resolution of Student's new IEP.

#### APRIL 14, 2016 IEP TEAM MEETING

169. Student's IEP team reconvened for a third meeting on April 14, 2016.

Mother and Father attended this meeting as did one of their private in-home behavior supervisors. All District personnel who attended the first and second IEP team meetings attended the third meeting.

170. Ms. Makino reviewed the eight speech and language goals she proposed for Student, including short-term benchmarks and the annual goal for each. Parents asked many questions about the proposed goals, which Ms. Makino answered. In response to Parents' request, Ms. Makino provided them strategies they could use at home to work on the goals. She discussed suggestions made by Student's private speech and language providers and how they did or did not apply to a school setting. Ms. Makino agreed to Parents' request to add additional strategies to some of the goals. She modified levels of accuracy needed for Student to meet goals based on Parents' suggestions. Ms. Makino also provided Parents with materials from a stuttering foundation.

171. The entire IEP team discussed how Student used speech during the course of the school day. Ms. Makino, Mr. Ellis, and Ms. Tower discussed their observations of Student and answered Parents' questions about Student's present levels of speech.

172. Ms. Khong reviewed her proposed occupational therapy goals for Student and answered Parents' questions about the wording of the goals and what needs the goals would address.

173. Mr. Ellis reviewed the edits to his functional behavior assessment that he made based on requests from Parents. Mr. Ellis then reviewed the proposed behavior intervention plan he had developed based on the results of the behavior assessment. The results of the behavior assessment showed Student's minor elopement behavior was not interfering with his learning and thus the behavior plan did not need to address it. Mr. Ellis offered to go on a field trip with Student's class when the field trips resumed the following year to observe any elopement behaviors that might still be present

during the trips. In response to Parents' request, Mr. Ellis reviewed the differences between his proposed behavior plan and Student's present plan. He agreed to modifications of the plan to match language in his assessment.

174. Based on his functional behavior assessment, Mr. Ellis identified two behaviors that impeded Student's learning: 1) Inappropriate touching of others 2) Physical aggression toward others. The behavior plan described what the behaviors looked like. It described the frequency, intensity, and duration of the behaviors based on the data collected over the 17-day observation period of Mr. Ellis's functional behavior assessment. The plan described what Mr. Ellis had determined supported Student in using the behaviors.

175. The behavior plan listed environmental changes, structures and supports that District staff would implement to attempt to remove Student's need to engage in the behaviors. Student would have a predictable daily schedule. He would have a sensory diet; staff would give him five minutes to work with sensory items when returning from an outdoor activity before Student had to transition to the in-classroom work. Staff would minimize the time Student had to stand in line or wait for activities to begin. Staff would use visually rich and tactile learning formats, such as pictures and objects, during instruction. Staff would have Student keep at least two feet from peers during large group instruction and waiting times. Staff would prime and front-load behavioral expectations before transitions to new activities. Staff would provide attention to Student at fixed intervals. Finally, staff would train Student to utilize self-management techniques.

176. The behavior plan stated the reasons, as described in Mr. Ellis's functional behavior assessment, why Student was engaging in the behaviors. The behavior plan listed things for Student to do instead of the maladaptive behaviors, such as Student raising his hand to request a break if needed and using words instead of pushing peers.

The behavior plan stated strategies to help Student learn to replace the behaviors that met the same needs. For example, Student's teachers, aide and service providers would use role-play to teach Student new skills involving social interactions and would prompt him with visual cues. Additionally, staff would use a token economy with Student. Staff would give Student an opportunity twice a day to count his tokens so that he could see how well he was doing.

177. If Student continued to engage in the targeted behaviors for purposes of gaining adult attention, staff would prompt him to switch to the replacement behaviors without looking directly at Student or speaking to him. If Student was engaging in a behavior for purposes of avoidance or escape, staff would state the behavior expectation without using extra language or explanations of why Student needed to use replacement behaviors. If the behaviors continued, the behavior plan directed staff to block Student if he tried to inappropriately touch a peer, interrupt avoidance and escape behaviors, and would withhold attention and eye contact where appropriate.

178. The behavior plan included three behavior goals to address Student's maladaptive behaviors. The first goal was for Student to raise his hand or exchange a cue card to request a sensory break. The second goal was for Student to seek out adult assistance to resolve conflicts. The third goal was for Student to self-report inappropriate touching and replacement behaviors.

179. The behavior plan also included a provision for the District behaviorist (who was always Mr. Ellis) to communicate with Student's private in-home behavior team at least monthly or more if needed, to continue collaboration and coordination of Student's behavior needs.

180. The behavior plan addressed all of Student's maladaptive behaviors at school that were known to District at the time. Mr. Ellis continued to meet and collaborate with Student's in-home behavior team. As discussed below, District modified

the behavior plan as needed. None of Student's witnesses critiqued the behavior plan during their testimony or opined that it failed to address Student's behaviors at school.

181. Parents wanted more time to review the proposed behavior plan. Mr. Ellis agreed to provide further written clarification to them to address their questions and concerns.

182. Student's IEP team, with input, suggestions, and modifications from Parents and Parents' in-home behavior supervisors, developed goals in all areas of Student's needs. The team developed eight speech and language goals. Six speech and language goals addressed pragmatics. The first pragmatic goal sought to teach Student to check in visually, use proper body orientation, ask appropriate questions, and give appropriate verbal and non-verbal feedback, when conversing with peers. The second pragmatic goal sought to teach Student to ask questions of peers to learn to describe the peer. The third pragmatic goal sought to teach Student, while role-laying in speech therapy sessions, to make appropriate comments and be seated with appropriate body orientation. The fourth pragmatic goal sought to teach Student to identify whether conflicts existed by looking at pictures. The fifth and sixth pragmatic goals also addressed Student's deficits in syntax and morphology. The goals were directed at improving Student's grammar, use of words, and ability to tell stories. A seventh speech goal sought to improve Student's spoken fluency. The eighth speech goal addressed Student's deficits in modulating the sound of his voice.

183. Four occupational therapy goals addressed Student's deficits in the areas of fine motor skills, motor coordination, and sensory processing.

184. The team developed a goal to address Student's executive functioning deficits. Another goal sought to teach Student to resolve conflicts without using aggression. A third goal addressed Student's deficit in self-regulation by seeking to teach Student to ask for breaks. These three classroom goals failed to memorialize the

discussions the IEP team had on how to address the issues and behaviors described. As discussed below, Parents brought that to District's attention in September 2016 and District re-wrote the goals.

185. The goals were clear and measurable. Each goal stated whether it enabled Student to work toward progress in the general education curriculum and/or toward state standards. The goals stated if each addressed needs Student had resulting from his disability apart from Student being able to access the general education curriculum and state standards. Each goal stated the location where the goal would be addressed, whether in the classroom, during therapy sessions, on the playground, or in a variety of settings. Each goal stated which District staff member or members were responsible for implementing the goal. For example, the District education specialist and the District behavior specialist were designated to implement Student's goal in executive functioning. The goals all described how Student's progress would be measured and how long he needed to perform a skill before he met the goal. Additionally, where appropriate, the goals stated whether Student would be prompted or would have to perform the targeted skill independently before it was determined he had met the goal.

186. The IEP team, with the discussion led by the District program specialist, discussed possible placements for Student. The team discussed a general education placement without supports; a general education placement with only supplemental aids and services; and a special day class placement serving children with mild to moderate disabilities. The team, including Parents, determined that none of those placements would meet Student's needs. Finally, the team discussed a general education placement with supplemental aids and services with additional related services. The team, including Parents, believed the general education setting to be the appropriate placement for Student.

187. The team also discussed what type of general education classroom would

meet Student's needs. District team members voiced concern about Student remaining in the multi-age classroom. With four grade levels of students, Student was not always able to engage in conversations with his age group peers. The structure of the class and emphasis on independent learning meant a teacher was not always available to Student. Parent volunteers could not be informed about Student's IEP needs because of privacy concerns so they could not directly address his goals. Also, because of noise levels in the classroom, all of the children's voices tended to be louder, which did not help address Student's need to learn to modulate the tone and level of his voice. Ms. Karcher felt that multiple teachers in the classroom also created issues with Student accessing his education.

188. Parents felt that the older students in the classroom prompted Student and helped decrease his dependence on his aide. However, they decided they would observe a regular general education first grade classroom at their neighborhood school. In spite of considering a change in Student's school, Father indicated that he was pleased with Student's progress to date.

189. Other than discussing whether the multi-age classroom would or would not continue to meet Student's needs, Parents never suggested another type of placement to District and never indicated that they believed a general education placement was not Student's least restrictive environment.

#### MAY 18, 2016 IEP TEAM MEETING

190. Student's IEP team reconvened for a fourth meeting on May 18, 2016. Both parents attended the meeting along with one of Student's in-home behavior supervisors. All District team members from the previous three meetings attended.

191. Mr. Ellis made revisions to his proposed behavior plan and sent them to Parents before the meeting. Parents and their in-home behavior supervisor still had concerns about Student's elopement behavior because he continued to engage in it at



home and in the community. Student had also eloped during a field trip when Mother was present. However, he did not engage in the behaviors at school and had not eloped during field trips when Mother was not present. District therefore did not believe that elopement needed to be addressed through a behavior plan. Parents and their in-home behavior supervisor had other concerns and suggestions, which District addressed by making changes to the proposed behavior plan. Based on input from Parents, District agreed to collect data when Student started first grade for the 2016-2017 school year to determine if a new conversation goal needed to be developed.

192. Although Parents observed the classroom at their home school, they preferred to retain Student in the multi-age classroom at Orangethorpe. Ms. Chavez reviewed new academic benchmarks for Student. He was meeting them all. District therefore did not oppose keeping Student in the multi-age classroom because Student did benefit socially and academically from having older peers.

#### DISTRICT'S 2016 FAPE OFFER

193. District made its offer of a FAPE to Student at the May 18, 2016 IEP team meeting. In the area of speech and language therapy, District proposed: one, 30-minute individual session a week outside of Student's classroom; three, 30-minute group sessions a week, with a total of four children in the group; one, 45-minute consultation a month between the speech therapist and educational staff; and two, 10-minute sessions a month for collaboration and training with Parents either by phone or at the school site.

194. District's proposal for speech included a decrease in Student's individual speech sessions and a corresponding increase in group sessions. Ms. Makino suggested the change because most of Student's speech goals were in the area of pragmatics. Ms. Makino believed that pragmatic goals needed to be addressed in group sessions to be effective. Parents ultimately disagreed with the proposal because they believed Student

would start modeling inappropriate behavior of his group peers. Parents did not want Student to have more therapy with other disabled children. District's reasons for the increase in group sessions were valid based upon the need to work on Student's pragmatic language skills. Working on increasing Student's ability to converse with peers, learn to read their body language, and learn to read their verbal and non-verbal cues, could not be accomplished effectively during individual speech therapy sessions. Parents did not ask District to increase the amount of Student's speech and language therapy.

195. Marissa Caccavale testified as an expert witness on behalf of Student. She was the only speech and language expert Student presented at hearing. Ms. Caccavale was employed as a speech and language pathologist at the Buena Park Speech and Language Development Center, where she had worked since 2013. She had a master's degree in communication sciences and disorders. She collaborated frequently with Ms. Makino regarding Student's speech and language needs throughout the two school years Student attended Orangethorpe. Ms. Makino initiated contact with her frequently, including prior to assessing Student in March 2016.

196. Ms. Caccavale first provided speech therapy to Student when he was a preschool student at the Development Center for the 2014-2015 school year. After Student left the Development Center and returned to public school, Parents' medical insurance contracted with Ms. Caccavale to provide Student with speech therapy. Ms. Caccavale provided year-round services to Student, paid for by the insurance other than a co-pay.

197. Although Student initially received an hour and a half of individual speech services a week and a half hour of group services when enrolled at the Development Center as a student, Ms. Caccavale changed that to an hour a week of individual services and an hour a week of group services. The group services focused on social skills. All of

the children in the group were children with disabilities. There is no evidence that Student picked up any bad habits from the children in the group. The private services Ms. Caccavale provided Student were based on a medical model rather than an educational model. Parents withdrew Student from Ms. Caccavale's group therapy when he began attending Irvine's Child Development School.

198. Ms. Caccavale presented as an intelligent and knowledgeable witness. She stated that the insurance company required her to assess Student in a vacuum, without reference to any other speech services Student might be receiving. Therefore, when she recommended Student needed two hours total speech therapy sessions a week to make progress, her recommendation was not made *in addition* to the services Student received from District but *irrespective* of those services.

199. District offered Student the following types of occupational therapy as a related service: 60 minutes per week of individual occupational therapy at a District occupational therapy clinic; 30 minutes a week of collaborative therapy pushed into Student's classroom; 60 minutes a month of consultation by the occupational therapist; and two, 15-minute sessions a month of collaboration with Parents either by phone or at the school site.

200. Student did not call Ms. Khong or any other District occupational therapist as a witness. Dr. Jerry Lindquist, Student's private occupational therapy provider did testify. Dr. Lindquist had a doctorate in psychology and a master's degree in occupational therapy. He had worked at the Buena Park Speech and Language Development Center since 1980. He first provided services to Student when Student was enrolled there. After Student left the Development Center, Dr. Lindquist began providing Student one hour a week of occupational therapy services funded by Parents' medical insurance.

201. Dr. Lindquist assumed all of Student's occupational therapy goals were

appropriate. When asked at hearing about the goals in Student's March 24, 2016 IEP, Dr. Lindquist was equivocal about whether he would have written the goals differently. He did not opine, however, that District should have developed additional or different goals for Student.

202. Dr. Lindquist never worked at a public school. He provided Student with private occupational therapy services based on a medical model rather than an educational model. Parents' insurance funded year-round occupational therapy services for Student based on the medical model. However, Dr. Lindquist did not offer any opinions that the amount of occupational therapy services District provided Student through its IEPs was insufficient.

203. District continued to offer Student a one-to-one aide as supplementary classroom assistance and agreed the aide would be available to meet Student 10 minutes before class started and for 10 minutes after the school day ended. District proposed, and Parents agreed, to discontinue having Student's aide accompany him to therapy sessions provided outside of the general education classroom.

204. The District IEP team members discussed providing Student with 60 minutes a month of collaboration between District's behavior specialist, Parents, and Student's outside service providers, to be provided in Student's home; one, 60-minute session a week of consultation by the behavior specialist to include consultation between him and Student's in-home behavior providers, Student's teacher, his aide, and his service providers; and 60 minutes a week of supervision of Student's school behavior program by the District behavior specialist.

205. District offered multiple supplementary aids, services and supports to assist Student in the general education classroom. These included providing Student with cues and visuals for voice skills, social skills, body orientation, and differentiating questions and comments; incentives to increase compliance; sequenced story cards and

pictures; verbal rehearsals, verbal models; video models; audio and video recordings of Student for him to review; visual, auditory and tactile supports and rehearsals for body orientation and proximity; a fluency "tool box," strategies addressing fluency; sensory tools and strategies for occupational therapy and during other times of his school day; modeling; simple verbal cues; verbal praise; a peer body; close accommodation to the teacher during instruction; front loading of behavior expectations; a token economy; planned purposeful reinforcement of appropriate behavior; and visual imagery clues prior to transitions in activities at school.

206. Parents never stated or suggested to the IEP team that Student required applied behavior analysis services to access his education. Parents never requested District fund in-home applied behavior analysis services for Student prior to filing for due process.

207. The final IEP document contained in-depth descriptions of Student's present levels of performance in every area of need. It contained a review of his District testing results. It contained progress reports on his past goals and separate pages for each of his new, proposed goals. It contained District's offer of FAPE, memorializing the IEP team's discussions over the four meetings held to develop Student's triennial IEP. Although the IEP did not initially contain all of the concerns Parents wanted listed, District added those concerns when Parents brought the omissions to District's attention.

#### EXTENDED SCHOOL YEAR SERVICES

208. District's triennial IEP offered Student one, 30-minute session a week of individual speech and language therapy during the summer extended school year to work on Student's voice and fluency goals, with the services to be provided at school. District agreed to permit Parents to observe and join in the sessions to provide Parents training on how to work on the goals. District also offered Student one, 60-minute

session of in-home behavior consultation during the extended school year with District's behaviorist.

209. District also offered one, 60-minute session of weekly occupational therapy during the 2016 extended school year. District did not indicate in the IEP whether the occupational therapy would be an individual service or a group service or exactly where the service would take place.

210. District provided the 60 minutes of in-home behavior consultation to Student on June 15, 2016. Student received all sessions of occupational therapy offered for the extended school year. He also received all offered sessions of speech and language therapy.

211. District did not offer Student any specialized academic instruction during the summer extended school year. Student was at or above grade level in all academic areas and thus did not require extended school year instruction in academics. Parents did not request additional services and did not object to the lack of specialized academic instruction during the summer break.

212. The IEP offer erroneously included a carry-over statement from the 2015 IEP regarding extended school year in a non-public school. Parents raised no concerns at the IEP team meeting that they were confused by that statement.

## SUMMER 2016

213. Parents took Student's triennial IEP home to review it. Mother wrote an email to District on June 3, 2016, giving consent to the proposed extended school year services. She did not express any confusion as to what type of occupational therapy services District had offered or where they would take place. Parents did not request any additional summer services in this email. Student received the occupational therapy, speech language therapy, and behavior intervention services as provided by the IEP.

214. Parents decided to privately fund summer services for Student. They did

not inform District they intended to enroll Student in any summer programs and did not request District to fund the services before enrolling Student in them. Parents first enrolled Student in two, one-week programs at the Muckenthaler Cultural Center. The total cost for the two programs was \$390.

215. Student did not do well at the camps. He did not have an aide accompany him because Parents' insurance would not cover all the hours. His behavior was disruptive and the administrators at both camps either asked Student to leave the camp before the end of the session or suggested that Student not re-enroll in further camp sessions.

216. Parents also enrolled Student in a summer program at the Reid Day School, operated by Dr. Lisa Reid. Dr. Reid received her doctorate degree in education, with an emphasis in educational psychology, in 2012. Prior to receiving her doctorate, she had been a certified teacher, primarily of general education middle school children. After receiving her doctorate, Dr. Reid specialized in the education of what is known as "twice-exceptional" children. These children are intellectually gifted but also have some type of disability.

217. Dr. Reid's summer school was an enrichment program that ran more like a camp than a structured school program. Dr. Reid's summer program was designed for twice-exceptional children. Dr. Reid defined Student as twice-exceptional and admitted him to her two-week summer program in summer 2016. Parents had decided to consider other educational programs for Student for the upcoming 2016-2017 school year and Dr. Reid's school was one they thought might be appropriate for Student. Having Student attend the summer program at the school was a trial run to see if Student "fit in" to the program.

218. Parents did not provide an aide to accompany Student to Dr. Reid's summer program. The summer program had a total of seven children, with either two or

three adults present at all times. The adults all had some type of education background. In spite of the small student to adult ratio, Student did not do well in the program. Student's behaviors were too extreme for the make-up of the summer camp and too extreme for the school program. Dr. Reid told Parents that she would not be able to accept Student as a pupil for the fall semester.

219. Dr. Reid believed that Student was not absorbing all the information presented during class. She believed that Student might have a central auditory processing disorder. A central auditory processing disorder is a medical issue that can only be diagnosed by a trained audiologist with a doctorate in audiology. She referred Parents to Dr. Bea Braun, an educational audiologist with a doctorate in audiology with whom Dr. Reid had previously worked.

#### Dr. Braun's Central Auditory Processing Assessment

220. Upon Dr. Reid's advice, Parents contracted with Dr. Braun for a central auditory processing assessment, which Dr. Braun administered on August 5, 2016. As part of Dr. Braun's assessment, Mother completed an Auditory Processing Questionnaire. Her responses indicated that Student might have a processing disorder. Dr. Braun also administered several tests to Student. Student's hearing was in normal limits. On the specific tests for an auditory processing disorder, Student's results were normal on some of the tests and below normal on others.

221. Based on the test results, Dr. Braun diagnosed Student with a central auditory processing disorder. Her report contained generalized statements about difficulties a child *might have* in class due to a central auditory processing disorder. Dr. Braun did not contact any District staff to on how Student was accessing his education and if he demonstrated any deficits that might be due to an auditory processing disorder. Dr. Braun also failed to discuss how Student's other diagnosed autism and speech and language disabilities might impact the diagnosis of central auditory



processing disorder.

222. Dr. Braun did not testify at hearing and no other witness explained what each of her tests meant and how the results of each test should be interpreted. Dr. Braun made several suggestions in her assessment report for classroom strategies and accommodations to address the processing deficit she found. District implemented the vast majority of all her classroom recommendations. Dr. Braun also recommended specific computer programs, exercises, and home strategies to use with Student. She recommended that District follow a reading methodology called visualizing and verbalizing, which was developed by a private educational agency called Lindamood-Bell. However, Dr. Braun did not observe Student at school and there is no indication in her assessment that she reviewed Student's IEPs to determine whether her recommendations were already being implemented. For these reasons, her assessment was not given much weight.

223. Parents followed Dr. Braun's recommendations and purchased through her a 12-week computerized program called "CAPDOTS." Parents paid \$950 for Dr. Braun's assessment and \$395 for the CAPDOTS program.

224. Parents did not request District to fund the central auditory processing assessment before they hired Dr. Braun. Parents had not previously asked District for a central auditory processing assessment. District had no reason to believe that Student required testing to determine if he had a central auditory processing disorder. Dr. Davidson's 2014 assessment did not yield any information that Student had a central auditory processing disorder and so she did not recommend that Parents obtain a specialized assessment for it. Likewise, District's March 2014 multidisciplinary assessment had not produced any results indicating Student had any sort of processing disorder. Additionally, Student was progressing well academically at school with the supports provided in his IEP. There was no indication that he was not getting all

information imparted to him at school

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

225. Katherine Purnick became the District program coordinator responsible for Student's program in July 2016. Ms. Purnick received a master's degree in educational psychology in 2010. She was a school psychologist for the six years prior to 2016. Ms. Purnick was professional, thoughtful, and deliberate during her testimony. She answered all questions from Student without becoming defensive. Her testimony was clear and instructive. Her testimony regarding District's efforts to meet Student's needs was given significant weight.

226. District's 2016-2017 school year began on August 8, 2016. District personnel contacted Parents several times over the summer break inquiring whether they were going to consent to all or part of Student's triennial IEP. District sent further communications regarding the IEP during the first two weeks of the school year. Ms. Purnick sent a prior written notice letter to Parents on August 22, 2016, because District did not have consent to any portion of the IEP. The letter reviewed District's IEP offer including options considered, why certain options were rejected, and why District believed its offer provided Student with a FAPE. Ms. Purnick offered to meet with Parents about any concerns they might have regarding Student's education or the proposed IEP.

227. On September 5, 2016, Parents wrote a letter to Ms. Purnick in response to her August 22, 2016 letter. They continued to have concerns about their perception of Student's lack of progress, which they felt had not been documented in the triennial IEP. Student had not met nine of his prior goals. Parents also expressed concern that the 14 new goals proposed in the triennial IEP did not fully address all of Student's areas of need.

228. Parents consented to all but three of the proposed goals. They felt that the

self-management goal actually addressed two areas of need and requested that another goal be developed for the occurrence of inappropriate behaviors. They believed that the IEP team had determined that the goal for Student to seek adult help in resolving conflicts would be changed to have Student instead learn to resolve the conflicts himself first with peers after Mr. Ellis had an opportunity to collect data at the beginning of the school year and rewrite the goal. Parents also believed that a goal for Student to ask for sensory breaks as a replacement for inappropriate touching was not appropriate since Mr. Ellis's assessment had determined that Student's inappropriate touching was to gain attention and not because of any sensory needs. Mr. Ellis had also agreed to collect data to revise the goal. Parents requested that District revise Student's behavior plan to incorporate any new data collected by Mr. Ellis since the start of the school year.

229. Parents accepted the supplementary aides, services, program accommodations, and supports in the IEP. They accepted the related services offered except for speech and language. Parents continued to believe Student needed individual services and that the one time a week of group services needed to be provided in Student's classroom with non-disabled peers.

230. Parents requested information on Student's progress on his unmet goals and whether he demonstrated any regression during the first four weeks of school. Parents also made a records request for all service logs and provider notes "from August 8 to the present." District provided the service logs and provider notes to Parents on September 13, 2016. Ms. Purnick spoke with Mother on September 14, 2016, to clarify the records she wanted. Ms. Purnick provided the additional requested records on September 19, 2016.

231. Student demonstrated some regression in behavior the first month of school. He cried more than usual and was not as attentive. Ms. Keller was Student's primary teacher for first grade. Mr. Ellis observed Student in the classroom. He surmised

that Student's behavior occurred more often when Student was in a group where Mother was the parent volunteer. Mr. Ellis had Ms. Keller place Student in another group when it was Mother's volunteer day. Student's behavior improved with the change. After a month or so, Mr. Ellis felt that Student could be returned to Mother's group. Student successfully made the transition back to Mother's group without again increasing his maladaptive behaviors.

#### September 28, 2016 Amendment IEP Team Meeting

232. District convened an amendment IEP team meeting on September 28, 2016, to address some of Parents' concerns with the proposed triennial IEP. Parents agreed that the meeting did not have to include a full IEP team because a full amendment IEP team meeting was scheduled for October 3, 2016, at Parents' request, to discuss Dr. Braun's assessment. Only Mother and Ms. Purnick attended the September 28 meeting.

233. Ms. Purnick acknowledged all the concerns expressed in Parents' September 5, 2016 letter. She added to the present levels of performance page Parents' concerns about Student's lack of progress. Ms. Purnick corrected information about extended school year, updated transportation information, and removed the word "draft" from Student's speech and language goals. She informed Mother that Student had recently met three of the previously unmet nine goals. In response to Parents' concerns, Ms. Purnick proposed discussing at the October 3 meeting any regression Student might have demonstrated following the summer break. After reviewing Student's records Mother determined that Student had not demonstrated regression and that regression was therefore not a concern at that time. Mother said that regression did not have to be addressed at the next amendment IEP team meeting.

234. Mother consented to all the changes Ms. Purnick made to the triennial IEP. Ms. Purnick provided Mother with a copy of the updated IEP.

## October 3, 2016 Amendment IEP Team Meeting

235. Mr. Ellis discussed Student's behavior goals with Mother in late September 2016. He also met with Student's in-home behavior supervisors on September 30, 2016, to meet Ms. Cooper, who had just become the new supervisor, and to get their input about Student's behavior needs. Based on those two meetings, Mr. Ellis proposed new classroom goals for Student. Mr. Ellis's objective was to create behavior charts that were like the ones Ms. Cooper was using at home so that Student's home behavior plan and school behavior plan would be compatible. He emailed the proposed goals to Mother on September 30, 2016, indicating that the baselines would be updated.

236. The first proposed goal addressed Student's need in the area of Executive Functioning and Self-Monitoring. It sought to decrease Student's inappropriate touching of others and to get Student to be able to identify when he had inappropriately touched others. The second goal addressed conflict resolution. It sought to teach Student to resolve conflicts with peers without resorting to physical aggression. The third goal addressed Student's social and self-regulation. It sought to teach Student to get the attention of adults without inappropriately touching peers to get attention.

237. District convened an amendment IEP team meeting for Student on October 3, 2016. The IEP team consisted of Parents; Ms. Cooper; District school psychologist Joann Akrawi; Ms. Khong; Mr. Ellis; Ms. Chavez; a District audiologist; and Ms. Keller. Ms. Purnick could not attend the meeting. Dr. Soltero-Ruiz, the school Principal, attended in her place. Dr. Braun attended telephonically.

238. Dr. Braun reviewed her assessment results and her findings that Student had a central auditory processing disorder. District updated Student's present levels of performance to include Dr. Braun's assessment results.

239. Ms. Keller reviewed Student's academic and behavioral progress. Student was reading at a higher level than his same-aged typical peers. His writing included new

subject matter. Children in the multi-aged classroom had to make their own routines and schedules and Student was able to do so; if he needed help, he asked his teachers. Student was easily able to re-assimilate to the class schedule when he came back from receiving pull-out therapy services. Student worked well with groups and got along well with peers. He listened and participated during circle time and was less likely than the previous year to bother peers. Ms. Makino noted that Student was using more descriptive language, which was one of his pragmatic speech goals.

240. Although Dr. Braun believed that Student's auditory processing deficit could cause him to rely more on other children in the class, Ms. Keller did not see that behavior by Student. Student worked independently and could initiate tasks without relying on peers. Ms. Chavez saw the same indications of independence when she observed Student in class. Dr. Braun acknowledged that because Student was intellectually bright, the auditory processing deficit might not become apparent until third grade. Mother asked District to document Student's central auditory processing disorder in his IEP. Although District agreed to include Dr. Braun's testing results, the District team members did not see any negative effect of the deficit in the classroom.

241. Ms. Akrawi briefly reviewed the results of Student's triennial assessment to explain that Student did not qualify as a student with a specific learning disability in spite of Dr. Braun's diagnosis of a central auditory processing disorder because Student was accessing his education at or above grade level.

242. The IEP team agreed to continue the meeting to discuss additional issues. The IEP team eventually reconvened on November 17, 2016.

#### Student's Re-enrollment at Pediatric Minds

243. In the fall of 2016, Student continued to have challenging behaviors at home and in his private speech and language and occupational therapy sessions. In all those environments, he demonstrated an increase in oppositional and defiant behavior.

Student had bouts of uncontrollable crying and anxiety that led to his running away from the therapists at times and hiding. Student regressed at home and in private therapy in his ability to cope with unexpected situations and managing his frustration appropriately. Student shut down and became withdrawn and engaged in crying fits where he was unable to cope and soothe himself. He was eloping when upset. Student also demonstrated anxiety about future events. He became agitated and angry if he was unable to engage in an activity or complete an activity. Parents also witnessed Student destroying papers and other types of property when upset. In speech therapy with Ms. Caccavale, Student had started making more statements such as "I'm going to get you fired," and "I'm going to call the cops." He threatened to break things and to run away. These behaviors interfered with Student's ability to access his private therapy sessions. Parents could not address or control the behaviors at home. Parents therefore decided to re-enroll Student in the Early Childhood Treatment program at Pediatric Minds.

244. Student did not engage in uncontrollable crying at school. He did not have tantrums at school. He did not destroy property at school. He did not run away and hide. He demonstrated no outward signs of anxiety. He was never defiant or oppositional. The few behaviors he had at school were adequately addressed by his behavior intervention plan, his aide, and the other supports provided in his IEPs. Student's behaviors at school did not impede his ability to access his education or his related services at school.

245. Parents decided to re-enroll Student at Pediatric Minds. Student attended the program from November 8, 2016, to January 10, 2017. Parents did not discuss with District their decision to re-enroll Student in the program. They did not discuss the extent of Student's increase in behaviors outside of school until Mother informed District, in an email on November 10, 2016, to all District IEP team members, of Student's enrollment at Pediatric Minds. Parents did not ask District to fund the

program.

246. The Pediatric Minds program operated as it had when Student first attended when he was three years old. It was a three hour a day, five days a week program that ran every weekday afternoon. On November 9, 2016, Dr. Hannauer wrote a letter to District asking it to excuse Student from school for medical necessity. District declined to count Student's absences as excused.

247. Pediatric Minds requested Student's teachers to fill out information forms and ratings concerning Student's behaviors at school. Pediatric Minds received some information from the teachers. It did not ask Student's teachers for input for all the tests. Pediatric Minds did not ask to observe Student prior to his enrollment in the program in November 2016, or during the time he attended the program. Pediatric Minds did not request to observe Student until early April 2017, about two months after Student left its program.

248. Pediatric Minds developed goals for Student to decrease the following: self-injurious behaviors; physical and verbal aggression toward others; destruction of property; poor frustration tolerance; severe emotional meltdowns; uncontrollable crying; anxiety and impulsivity.

249. Student's treatment included one-on-one intensive cognitive-behavioral intervention; play and art therapy; group therapy; psychotherapy; and family interventions to help Parents strategies to use at home and in the community. He also received speech and language therapy and occupational therapy. There were eight children in his group, aged two to six years old.

250. Student's behaviors when he first started the Pediatric Minds program were so extreme that for the first few weeks he received only one-on-one therapy. Dr. Hannauer also prescribed medication to treat his mood lability. Student was eventually able to receive group interventions.



## Testimony of Dr. Hannauer

251. Dr. Hannauer testified at hearing about Student's needs and his treatment at Pediatric Minds. Dr. Hannauer has no background in education. Student's treatment at Pediatric Minds included the administration of several assessments. The test results were similar to those obtained by District. For example, Pediatric Minds cognitive testing indicated Student's full scale I.Q. was 102 and that his non-verbal index was 117. On Pediatric Minds' academic achievement testing, Student's scores were average to above average. One difference was that Student scored lower on subtests involving processing speed. Dr. Hannauer did not believe this was indicative of a disability. Rather, she attributed it to either Student's general anxiety or test-taking anxiety.

252. Dr. Hannauer explained that research over the last 10 years demonstrated that anxiety is often co-morbid with autism in about 40 percent of children who are considered to be "high-functioning." The anxiety is not part of the autism but is a result of it. The higher functioning the child is, the more the child realizes his or her differences, which adds to the child's anxiety. The anxiety worsens maladaptive behaviors. For Student, his anxiety was exacerbating his social-emotional symptoms.

253. Dr. Hannauer opined that the only treatment for anxiety is cognitive behavioral therapy, which has been shown to improve anxiety 16-fold in children on the autism spectrum. Dr. Hannauer explained that traditional applied behavior analysis will not extinguish anxiety because it only addresses behavior. Cognitive behavior therapy, on the other hand, has both a behavior and a cognitive component. It works on restructuring of cognitive perception. In conjunction with behavior intervention, it changes the framework of the perceptions in the child's brain. Therefore discrete trial training, which is traditionally a part of applied behavioral analysis, can worsen distress and anxiety. Cognitive behavior therapy and play therapy therefore were more effective than directive-type therapies such as discrete trial training, where children were asked to

do repetitive tasks.

254. Dr. Hannauer's opinions that cognitive behavioral therapy is the only method of addressing anxiety in children, particularly those on the autism spectrum, was corroborated by Dr. Sabrina Schuck, the Director of the University of California, Irvine's Child Development School.

255. Dr. Hannauer opined that District's multi-age classroom was not appropriate for Student. She opined that no District program was appropriate for him. She opined that he was too intellectually advanced for any type of special day class, but that a typical general education classroom had too many students in it for Student to make progress. She opined that Student required a classroom of approximately five children who had at least average intelligence. She also opined, based on Student's behaviors outside of school, that he would require some type of support and assistance throughout his educational career, including needing some sort of support to attend college. Dr. Hannauer came to her conclusions without having observed Student in his District classroom. She had never done an observation of any District classroom and was not personally familiar with any of them. For these reasons, Dr. Hannauer's opinions regarding what type of classroom was appropriate for Student were not given much weight.

#### Student's First Trimester Report Card for First Grade

256. District issued Student a first trimester report card sometime prior to its winter break in 2016. Student was at or above grade level in all areas. Student received effort grades of satisfactory or outstanding in all academic areas.

257. Ms. Keller completed the report card. Student understood the class routines. Writing in a journal was a part of the class curriculum. Student had branched out on his ideas for writing and was writing on a variety of subjects. Student was conscientious about checking his assignments to see what he was supposed to be doing

when he returned to class from a break. Student also was becoming more independent with his ability to solve math problems. Student was at or above grade level in all academic areas.

#### November 17, 2016 Amendment IEP Team Meeting

258. Ms. Makino considered the input from Dr. Braun regarding recommendations to address Student's central auditory processing disorder. She proposed modifying some of Student's speech goals to address Dr. Braun's concerns. Ms. Makino also created a chart describing each of Student's speech goals. The chart indicated whether the goal was best addressed in individual or in group therapy; whether it was best addressed in Student's classroom or in a separate classroom; and what the rationale for each recommendation was. District provided the proposed modifications and the charts to Parents by email on October 28, 2016. In this email, District also included the proposed new classroom goals Mr. Ellis had already provided to Parents.

259. District implemented or agreed to implement almost all of Dr. Braun's recommendations. District included a chart in the October 26, 2016 email addressing each of Dr. Braun's recommendations. The chart indicated which of Dr. Braun's recommendations were already included in Student's IEP. It also indicated which recommendations were new but to which the District agreed to add to the supplemental supports portion of Student's IEP.

260. Although the continued amendment IEP team meeting was originally scheduled for October 31, 2016, Parents wanted more time to review the new documents they received from District. District agreed to convene the meeting on November 17, 2016, from 10:30 a.m. to 12:00 p.m., which was one of Parents' two requested dates. Parents wanted the November 17, 2016 meeting to go for as long as necessary to resolve all outstanding issues regarding Student's IEP. District would not

commit to meeting after 12:00 p.m. because of the disruption to staff schedules and the unavailability of other staff members. District spent more than 24 hours in IEP meetings for Student since he had begun attending school in the District in August 2015.

261. On November 15, 2016, Parents wrote to District voicing their opinion that District needed to include central auditory processing as an area of need for Student and that goals needed to be developed for him to address the deficit.

262. Student's IEP team reconvened on November 17, 2016. All team members who had been present at the October 3, 2016 meeting, with the exception of Ms. Cooper, attended this meeting. Parents requested District to pay for the CAPDOTS program they had purchased for Student; District declined to do so without having evidence that the program had been effective.

263. The IEP team discussed Parents' concerns about Student's behavior outside of school. Parents stated they had noted emotional lability, rigidity, and lack of self-regulation in Student since the previous summer. Student had demonstrated wild mood swings at home and was sometimes inconsolable. He would throw himself on the ground crying, would yell and elope. He had difficulty coping with transitions and was defiant. He was anxious, demonstrated by Student being tense, frustrated, and stuttering. Student's teachers and school service providers did not see any behaviors approaching the intensity of what Student was demonstrating at home. Whatever behaviors he had demonstrated at school, such as a few occasions of emotionality in class, had been easily redirected and Student had easily calmed down.

264. The District IEP team members believed that Student was doing well in the multi-aged classroom based on Student's academic and emotional progress at school. Student was at or above grade level academically.

265. District revised Student's IEP to include information about the results of Dr. Braun's assessment. It also revised the last section of the Present Levels of Performance

page to add areas in which District had written goals for Student based on his demonstrated needs. District modified four communication goals in line with Parents' requests. It modified the three classroom goals pursuant to Parents' request and Mother's conversations with Mr. Ellis. It renamed occupational therapy goals in line with Parents' request. It updated part four of Student's behavior intervention plan to reflect the modification of the classroom goals. District also added new strategies and supports based on Dr. Braun's recommendations and more clearly indicated that the listed supports were for Student. Since Ms. Makino was trained in the Lindamood-Bell visualizing and verbalizing methodology recommended by Dr. Braun, District added those strategies to Student's program for Ms. Makino to implement. Finally, District revised the frequency, duration, and location information of services for purposes of clarification.

266. Although District did not see increased behavioral or emotional problems at school, it offered to conduct a social/emotional development assessment to address Parents' concerns. The assessment plan was a form document that had "Social/Emotional" checked off as the area of evaluation. The description of the assessment stated: "These assessments will indicate how your child feels about him/herself, gets along with others, takes care of personal needs at home, school and in the community." "School Psychologist" was listed as the examiner title. Parents consented to the assessment in a letter dated December 7, 2016.

#### Pediatric Minds Discharge Meeting

267. Pediatric Minds scheduled a discharge review meeting for Student on January 9, 2017. District staff members were invited to the meeting. Mr. Ellis attended along with Ms. Purnick and another District program specialist. Student's teachers did not attend.

268. The Pediatric Minds staff reviewed assessments they had administered to

Student and reviewed the behaviors they were addressing in their program. The behaviors Pediatric Minds staff described were behaviors District had never seen at school. This meeting was the first time the scope of Student's behaviors outside of school was described to any District staff. They were stunned by the type and intensity of behaviors since they had not seen them at school and since Parents had never discussed them in detail at IEP team meetings or in their meetings with Student's District service providers. The descriptions of Student's behaviors by Pediatric Minds appeared to Ms. Purnick and Mr. Ellis, based on their personal knowledge of Student, to be for two distinct children.

269. Pediatric Minds recommended that Student needed a small, structured learning environment, but that a special day classroom was too restrictive. In spite of recommending a classroom with a low student to teacher ratio, Pediatric Minds recommended that Student would need an aide even in that type of setting. Neither Dr. Hannauer nor any other Pediatric Minds staff member had observed Student at school or had ever observed any District classroom at the time they made this recommendation. There is no evidence that any of the staff at Pediatric Minds who prepared the discharge summary report had an educational background, particularly in the area of special education. For these reasons, their opinions as to the proper educational placement for Student were not given any weight.

270. Pediatric Minds recommended that Student continue to receive in-home applied behavior analysis therapy. This recommendation was not supported by any evidence that the therapy benefitted Student. To the contrary, even after receiving several years of in-home behavior therapy, Student's behavior had increased substantially at home and during his private therapy sessions to the extent that Parents felt it necessary to re-enroll Student in Pediatric Minds.

271. Pediatric Minds also recommended that Student receive one hour a week

of outpatient therapy from a professional knowledgeable about the co-morbidity of autism and anxiety. They also recommended Student receive social skills therapy; that Parents participate in a behavioral training to focus on the strategies they could learn to address Student's behaviors; and that Student continue to receive speech and language therapy and occupational therapy.

272. Parents followed the recommendation for therapy and took Student to see Dr. Paul DePompo, who provided cognitive behavior therapy based counseling from January 19, 2017, through May 4, 2017. Parents' total out of pocket cost was \$385.

#### Student's Written Threat to Bomb the School

273. Student finished attending the Pediatric Minds program on January 10, 2017. He returned to attending school full-time at Orangethorpe immediately afterward.

274. Student's behavior at school declined when he returned to full-time attendance. Sometime in January 2017 after discontinuing his participation at Pediatric Minds, Student, for unknown reasons, wrote in his journal that he wanted to bomb the school. Dr. Soltero-Ruiz, the school principal, spoke with Student and concluded that Student did not intend to cause harm to the school or anyone in it. Student did not make a similar threat or statement during the remainder of the 2016-2017 school year.

#### Joann Akrawi's March 13, 2017 Social/Emotional Assessment

275. District school psychologist Joann Akrawi assessed Student's social/emotional needs. She received her master's degree in school psychology in 2003. She worked as a behavior specialist for a private applied behavior analysis agency for four years. She worked as a school psychologist for a public school continually after that. Ms. Akrawi worked for District from 2015 to 2017.

276. Based on Parents' designation of concerns, Ms. Akrawi's assessment looked at Student's emotional lability, rigidity, and anxiety. The assessment consisted of

interviews with Parents, Mr. Ellis, Ms. Chavez, Ms. Keller, Ms. Makino, and Ms. Khong; observations of Student; review of Student's records; and the administration of five testing instruments. The purpose of the assessment was not to conduct a full psychoeducational assessment but rather to address the concerns Parents raised and to determine if Student's behaviors had changed to the extent that additional intervention was needed at school.

277. Parents told Ms. Akrawi that Student's the intensity and frequency of his behaviors at home and in private therapy sessions had increased. He cried more and took longer to calm down without adult intervention. The triggers for his behaviors were less predictable. He was using more disrespectful language. He argued more with Parents and was constantly trying to negotiate with them. Student had become more self-aware, and was making more negative comments about himself such as "I don't like being me." Previous successful strategies to stop these behaviors from occurring were no longer successful. Parents could only reference two incidents at school of Student's emotional state being so intense. One was during speech therapy and one was in his general education classroom. Parents acknowledged that writing in a journal, something Pediatric Minds had also implemented, was an effective coping strategy for Student to process his feelings. Parents expressed concern about Student eloping outside of the school setting.

278. Mr. Ellis, Ms. Keller, Ms. Chavez, Ms. Makino, and Ms. Khong did not observe anxious behaviors by Student that impeded his access to learning. Student sometimes stuttered but it would stop when he was prompted to slow down his talking.

279. In his first grade classroom, Student did not demonstrate rigidity. He liked to follow the class routine, and while he used the written classroom schedule to know what the school day would be like, he demonstrated an ability to be flexible. There were times when Student became upset if he could not finish an activity. He cried at times,



spoke loudly, or moved away from the adult providing instruction, but was easily redirected. None of his behaviors interfered with Student's learning or access to his education.

280. Student's overall ability to regulate his emotions had improved since he was in kindergarten. His resistance to adult direction, when it occurred, was perhaps once a week, only lasting a few seconds to a few minutes. Student was skilled at calming himself down and rejoining activities. He would take a few deep breaths and rejoin the activity. His behaviors did not impede his ability to finish his work. In speech therapy, Student had only engaged in unregulated behavior three or four times during the school year to date where he did not want to rejoin the group therapy session. Student was likewise able to calm himself down the two times he became dysregulated in occupational therapy sessions. None of Student's teachers or service providers had ever seen Student be "inconsolable" at school.

281. Ms. Akrawi observed Student four times. For the first observation, she observed Student initially on the playground. Student's aide easily redirected him when he wanted to leave a snack area early. Student played appropriately with peers and followed school routines when transitioning back to the classroom. Once in the classroom, Student worked on math assignment in a group where Mother was the parent volunteer. He followed her instructions and redirection without difficulty. Mother also had to redirect other children in the group to keep them on task. Student engaged with his teacher in trying to explain how he had answered a math problem. His aide also assisted him by redirection, praise, and questions on what Student needed to do next. The aide prepared Student for the time limit for the activity they were doing by letting him know how much time there was left to complete it. If Student went off task, his aide moved closer to redirect him back to the activity. The aide praised him several times during the observation. Student's behavior during the observation was typical when

compared to the other children in the class.

282. During the second observation, Student first participated in a group instruction with a parent volunteer about salads. Student volunteered answers to most of the questions asked by the parent volunteer leading the instruction. Student cleaned his area when directed to do so and transitioned smoothly to a small group science activity lead by a peer. The other children in the group were much less attentive than Student during the activity. Student wanted to use an iPad during the activity and asked to have a turn from the peer then using it. When the third peer wanted a turn, Student agreed and just asked to let him finish his turn. Student then transitioned with his peers to a large group instruction activity on the carpet. A peer presented an award she had received. Although other children were inattentive, Student remained quiet during the presentation. At one point, a peer started crying; Student did not become distracted. His aide praised him for following the instruction.

283. For the third observation, Ms. Akrawi first observed Student during the lunch recess. Student sat with peers to eat lunch. He engaged with them. His aide was at the end of the table and did not need to redirect him. The children then lined up to go back to class. Student did not need redirection from his aide during the transition to the classroom. Student sat down quietly on the outer side of the group of children on the carpet. The teacher advised Student and other children to finish cleaning up materials from their prior activity; Student did so without complaint. When finished, he returned quietly and sat down. Student's aide gave him a visual called a "quiet card" to remind him to be quiet while the teacher read to the class. Student was on-task during the entire activity. Student's aide then took him to his speech therapy. Student spoke with her about his plans for the upcoming weekend.

284. Ms. Akrawi observed Student during a large group science instruction on the carpet during her fourth observation. Student transitioned to the activity quietly. He

participated in the activity at the teacher's request. His aide gave him a quiet card when he returned. Student made one comment to his aide but complied with her reminder to look at the card he was holding. Three other children in the group spoke out of turn during the activity as well. The class then separated into small groups. Ms. Keller, the teacher, directed Student to one group but there was no parent volunteer at the table so she directed him to another table. Student did not show signs of distress by the change. The children were writing stories during this activity. Student remained on task. When Ms. Keller asked Student to tell his story, he first spoke too rapidly but slowed down when directed. When telling the story, Student was animated, used hand gestures, used inflection in his voice, and engaged in eye contact. Student then went back to add to his story. His aide gave him a warning of time left to complete the activity. Student complied with all directions given to him during the activity, participated appropriately, and adjusted well to changes.

285. Student did not engage in any of the targeted behaviors of Ms. Akrawi's assessment during any of her observations of him. He was appropriately engaged, alert, followed directions and prompts, interacted appropriately with adults and peers, and transitioned easily.

286. In her assessment, Ms. Akrawi reviewed Student's progress on his behavior. She looked at four periods in assessing his behaviors: immediately before participating in the Pediatric Minds program; during his participation in the program; during the first two weeks back to full-time school attendance after the program; and then during the first two weeks of February. Student's talking out in class was not happening any more than what his peers were doing. His inappropriate touching of others decreased from 1.4 times a day before attending Pediatric Minds to 0.4 times a day by the February reporting period.

287. District staff determined that elopement was not an issue for Student at

school. To make that determination, District staff, under Ms. Akrawi's direction, took data on Student's classmates for the last two weeks of February 2017. They used the definition of elopement that Pediatric Minds used during Student's attendance there. The data showed that Student's peers eloped as much or more than he did. When elopement did occur, for example on a field trip, Student did not go anywhere that put him in danger, was not aggressive or emotional, and quickly returned to the group.

288. Ms. Akrawi reviewed Student's aggressive behaviors where he poked, pushed, hit, or grabbed at a peer. Student did not engage in any aggressive behavior for the data period reviewed immediately prior to attending Pediatric Minds. He averaged 0.2 incidents of aggression during the data reviewed while he attended the program. After returning from the program, his aggression slightly increased at first, then decreased to 0.1 times a day. Ms. Akrawi then had data collected on Student's peers. The data indicated that Student's frequency of aggression was consistently lower than that of his peers. The little aggression that Student had did not impede his access to his education or impede that of his peers.

289. Ms. Akrawi also directed the collection on data of Student engaging in the replacement behavior of initiating peer requests using verbal communication with peers to get information, a tangible item, or have an action completed. Student's rate of request was about the same during the period immediately before he attended Pediatric Minds and during the first two weeks of February, a month after his return to full-time school attendance. Student also engaged in frequent conversations with peers that did not involve making requests of them.

290. Ms. Akrawi directed the collection of data on Student's acts of non-compliance at school. Student did not refuse to comply any more than did his typically developing peers. Ms. Akrawi directed the collection of data on whether Student had tantrums or cried in school. Student had one tantrum at school. His peers also engaged

in occasional tantrums. Although Student occasionally cried, it was within or below the rate of his typically developing peers. Neither behavior interfered with his access to his education or the access of his peers to their education.

291. As part of her assessment, Ms. Akrawi administered the Behavior Assessment System for Children, Third Edition. Ms. Keller and Father completed the assessment rating scales. The areas of behavior covered are hyperactivity, aggression, and conduct problems, under the composite area of externalizing problems; anxiety, depression, and somatization, under the composite of internalizing problems; attention problems, learning problems, school problems, atypicality, and withdrawal, under the composite of behavior symptoms index; and adaptability, social skills, leadership, study skills, functional communication, and activity of daily living, under the composite of adaptive skills. Father's ratings did not include study skills, learning problems, or school problems. The teacher ratings Ms. Keller filled out did not include activity of daily living.

292. Ms. Keller scored Student at-risk in the sub-sections of anxiety, adaptability, and social skills. Her anxiety rating was based on her finding that Student "sometimes" worried and was fearful. She scored him clinically significant in the subsection of withdrawal. Her scores placed Student in the average range of all other sub-sections. All of Ms. Keller's composite scores were in the average range.

293. Father, however, rated Student as clinically significant for hyperactivity; at-risk for attention problems, atypicality, adaptability, and functional communication. He scored Student as low risk in anxiety and somatization. He scored Student as average in all other areas. Overall, Father scored Student as average in the composite areas of externalizing and internalizing problems and adaptive skills, but at-risk in the composite of the behavior symptom index.

294. Father and Ms. Keller also completed the Conner's Comprehensive Behavior Rating Scales, another testing instrument consisting of rating scales that

measures behavioral, emotional, social, and academic concerns in children. It assessed the areas of emotional distress; upsetting thoughts/physical symptoms; separation fears; social anxiety; worrying; defiant/aggressive behavior; academic difficulties; language; math; hyperactivity/impulsivity; social problems; perfectionist and compulsive behaviors; violence potential indicator; and physical symptoms.

295. Average scores on the Conner's meant there was a typical level of concern in the area rated. Very elevated was the highest rating and indicated that there were many more concerns than typically seen in a child. Ms. Keller rated Student as high average for concern in the area of hyperactivity and impulsivity. She rated him as very elevated for social problems. She rated him average in every other area of her ratings. Father, on the other hand, rated Student as very elevated for concerns in emotional distress; academic difficulties; language; hyperactivity/impulsivity; social problems; and perfectionistic and impulsive behaviors. Father rated Student as high average of concern for worrying. He rated Student average in all other areas he rated.

296. Ms. Akrawi also administered the Gilliam Autism Rating Scale – 3. Father and Ms. Keller completed these rating scales. Both their ratings indicated that Student's behaviors were indicative of autism. Ms. Akrawi compared the scores on this administration of the Gilliam to the scores obtained on the same test the prior year on District's multidisciplinary assessment. Ms. Keller's scores indicated a reduction in all scores compared to Ms. Karcher's scores the previous year. Father's scores showed a reduction in four of six subscales. The reduced scores indicated that Student's positive and acceptable behavior both at school and at home had actually increased.

297. Father and Ms. Keller also completed rating scales in the Emotional and Behavior Problem Scale. This instrument assesses the presence of emotional or behavioral characteristics in the school and home setting that might indicate a child qualified for special education under the eligibility category of emotional disturbance.

Father's scores indicated he saw atypical or markedly atypical behavior in Student at home in the areas of social aggression/conduct disorder; learning/comprehension disorder; avoidance/unresponsiveness; aggressive/self-destructive; learning; interpersonal relations; inappropriate behavior; and physical symptoms/fears. Ms. Keller found Student to be average in all areas, with no evidence of atypical behavior at school.

298. Ms. Akrawi also administered the Scale for Assessing Emotional Disturbance – Second Edition. Mother and Ms. Keller completed the rating scales. This test assesses for emotional disturbance. The five areas Ms. Akrawi assessed were inability to learn; relationship problems; inappropriate behavior; unhappiness or depression; and physical symptoms or fears. None of Ms. Keller's scores were indicative of an emotional disturbance. Mother's score for Student in relationship problems showed an indication of a possible emotional disturbance.

299. Overall, Ms. Akrawi found that Student did not demonstrate signs of an emotional disturbance at school. She also found that he did not demonstrate eligibility under other health impaired based on an attention deficit disorder. She found he continued to demonstrate autistic-like characteristics and have a speech and language impairment.

300. Ms. Akrawi completed her initial assessment report on March 13, 2017. She concluded that while Student demonstrated increased maladaptive behavior at home, the same was not demonstrated at school. Student stuttered when speaking rapidly, but controlled it when he slowed his speech. He regulated his behavior when prompted. He could remove himself from situations that upset him and return within times ranging from seconds to five minutes. He used writing in his journal as an effective strategy for behavior regulation and was willing to talk about his feelings with staff. He cried at times when upset, but his crying occurred at the same frequency as his typically developing peers. Student's behavior at school never escalated to the intensity

Parents saw at home or in Student's private therapy sessions.

301. Student could follow class and school routines, participate in whole group and small group instruction, work independently and with adult guidance. He could comply with directions, accept redirection, and to interact appropriately with peers and staff. Student could transition between activities, independently remain on task, and accept unexpected changes. His behavior was the same or better than that of his peers. Ms. Akrawi concluded that Student did not appear to be exhibiting behaviors that were occurring at such a frequency or intensity as to significantly impact his academic and social functioning.

302. Ms. Akrawi detailed her results in a comprehensive assessment report, initially dated March 13, 2017. However, after Ms. Akrawi completed her initial assessment report, District staff reported to her that some of Student's behaviors had increased. In the six school days between March 13, 2017, and March 20, 2017, Student demonstrated an increase in the intensity of his crying. He began to use coercive statements when upset. Ms. Akrawi added the information to her assessment report on March 23, 2017. She recommended that further data be collected on Student's behaviors to determine if the changes in behaviors were an anomaly or were new, established patterns of behavior.

#### Dr. Braun's Re-Assessment

303. Dr. Braun re-assessed Student for a central auditory processing disorder on February 24, 2017. Student's scores improved in most areas to the extent that Student's results were normal range for all but two tests. At a later IEP meeting at which her re-assessment was discussed by Student's IEP team, Dr. Braun acknowledged that people sometimes "grow out of" central auditory processing disorders. Dr. Braun concluded that all of her previous recommendations should still be implemented.



## March 20, 2017 Annual IEP Team Meeting

304. District convened Student's annual IEP team meeting on March 20, 2017. The IEP team consisted of Parents; two of their advocates; a supervisor from Student's in-home behavior program; Ms. Purnick and another District program coordinator; Ms. Makino; Dr. Soltero-Ruiz; Mr. Ellis; Ms. Khong; Ms. Keller; Ms. Akrawi; and Ms. Chavez. The team met for five hours.

305. Parents informed District before the meeting that they had concerns about Student's needs in the areas of speech and language; gross and fine motor skills; elopement; social/emotional needs; behavior; and balance. At the IEP team meeting, Parents added concerns about Student's sensory processing skills; anxiety; rigidity; emotional lability; perspective taking; theory of mind; and Student's ability to properly dress himself. The latter area had never been brought up by Parents as a concern. District noted all of Parents' concerns on the IEP document.

306. The IEP team reviewed Ms. Akrawi's assessment. Student's behaviors had decreased or were commensurate with that of his typical peers. Student had moved away from his group a few times during field trips, which met the definition of "eloping" for purposes of his IEP, but it was often with a peer. Student did not move so far from the group that he put himself in danger and promptly returned when told to do so. Student's rate of elopement had decreased over the course of the school year. Student had met four of his five classroom behavior goals. Although he had not met fully his goal of raising his hand before talking, Student's failure to do so mirrored the behavior of the entire class. Therefore, his talking out of turn was not an area of need.

307. At school, Student's socialization skills were also comparable to his peers. He did not stand out from his classmates. He did not require prompting to respond to peers or to interact with them. When Student had started kindergarten in the multi-age classroom, he had engaged in more parallel play. By the time of the March 20, 2017 IEP

team meeting, he had learned to seek out friends with whom to play.

308. The team reviewed Ms. Akrawi's supplement to her assessment that noted an increase in Student's crying and use of coercive statements. The IEP team agreed that District would collect more data on the behaviors.

309. Prior to the IEP team meeting, Parents provided District with copies of several assessments by Student's private assessors: the Pediatric Minds discharge summary report, which included a speech and language assessment administered by Pediatric Minds; a private speech and language assessment; and a private occupational therapy assessment. District IEP team members reviewed the assessments prior to the IEP team meeting. Ms. Purnick assured Parents at the meeting that all IEP team members had reviewed the reports. She asked Parents if there was any particular portion of the reports that they wanted to note or to draw District's attention. Neither Parents nor their advocates asked to discuss particulars about the reports. District staff reiterated that the reports would be considered in developing Student's new annual IEP.

310. The IEP team reviewed Student's progress on his goals. District agreed to Parents' request that the team discuss progress on all goals before discussing the development of new goals. Student met two of his three occupational therapy goals and had almost met the third. Student had made gains in the areas of gross and fine motor development. He did not request and did not require movement breaks.

311. Ms. Chavez reviewed Student's present levels of academic performance and his progress on his academic and classroom goals. Student participated in the STAR reading program, which focused on students comprehending the books read. Student's teachers had administered a reading comprehension assessment to the class. Student scored 100 percent on the reading comprehension assessment. As of these IEP meetings, Student was reading at a first grade, seventh month reading level. Student read more words per minute than the average first grader. He could comprehend higher

than a beginning second grade level. He read first grade sight words with 98 percent accuracy and second grade sight words with 89 percent accuracy. Student was at grade level in math. Student had average to high average academic skills

312. Student's conflicts with peers decreased. When he did have conflicts, Student had learned to express his opinion and then move on without engaging in negative reaction to the conflict. His talking out declined and was not any different than his peers.

313. The IEP team discussed Dr. Braun's assessments. Ms. Keller did not see any impact of Student's processing disorder on his ability to access his learning or peer socialization. Student participated in class. He asked clarifying questions if necessary. In speech therapy sessions, Ms. Makino did not note any difference in Student's understanding between visually presented and verbally presented information.

314. Ms. Chavez reviewed Student's present vocational levels. Parents disagreed that Student was following class routines, participating in small and large group instruction, working independently with adult guidance, complying with directions, transitioning well, and accepting redirection. District noted Parents' disagreement in the IEP document, but retained the statement because it comported with what Student's teachers and service providers had observed of him throughout the school year. Student did not stand out from his peers in any area with which Parents disagreed.

315. The IEP team reviewed Student's adaptive living skills. Parents expressed concern because Student had a toileting accident at school. Ms. Chavez explained that it had happened because Student had just waited too long to use the bathroom. It was the only time this had occurred. Student used the bathroom independently and always re-adjusted his clothing himself before returning to class.

316. Ms. Makino reviewed Student's speech and language progress. Student

used words properly and meaningfully in sentences. He still had deficits in syntax and morphology. He still had pragmatic deficits and needed to continue working on making eye contact and participating in reciprocal conversations. Student still made some articulation errors, but his spoken language was still highly intelligible. He continued to have some deficits in voice modulation and fluency, but those deficits had decreased. Student met six of his eight speech and language goals. He had not met his goal of demonstrating fluency strategies during conversational tasks with 80 percent accuracy. Student's fluency ranged from 40 to 75 percent accuracy. He also did not meet his goal in voice modulation and control. There were six skills he was supposed to master to help with voice control. By the time of the IEP team meeting, he had mastered five of the six. However, Student's use of a loud voice was only in class, where all students were loud because of the nature of the classroom structure. Student used a quiet voice in speech therapy sessions.

317. Mr. Ellis reviewed Student's present social/emotional/behavioral levels. Student made progress in all areas. He rarely became upset when things did not go his way. He was generally flexible and adaptable. Student accepted corrective feedback and did not have meltdowns at school. Student did not demonstrate any perfectionist tendencies at school that interfered with his education.

318. All of Student's present levels of performance at school were fully noted in the final IEP document. District declined to include in Student's present levels of performance any behaviors or lack of abilities seen solely outside of the school setting.

319. Parents and their advocates fully participated in the IEP meeting. They gave input and suggestions, asked questions, and added information. Mr. Ellis agreed to look into data collection to ensure it was valid to address Parents' concerns about how the data was compiled. There is no persuasive evidence that their questions were not answered or that they were cut-off from asking further questions or presenting

additional information during the course of the five-hour IEP team meeting. The team agreed to reconvene on April 10, 2017.

#### Events Between The IEP Team Meetings

##### LINDAMOOD-BELL LEARNING ABILITY EVALUATION SUMMARY

320. Dr. Braun recommended Student receive reading instruction using the visualizing and verbalizing methodology developed by the Lindamood-Bell educational agency. Lindamood-Bell assessed Student on March 27, 2017. Lindamood-Bell administered the Peabody Picture Vocabulary Test –IV. Student had a standard score of 96, which was in the 39th percentile.

321. Lindamood-Bell also administered the Detroit Tests of Learning Aptitude. It used the fourth edition for the word opposites subtest, and the second edition for the oral directions subtest. It did not identify which edition it used for the verbal absurdities subtest. Student's standard score on word opposites was eight, which placed him in the 25th percentile, with an age equivalent of six years, three months. On verbal absurdities, Student had a "mental age" of seven years, six months. No other scores were provided. On oral directions, Student had a standard score of four, which placed him in the second percentile. No other scores were provided.

322. Lindamood-Bell administered the word attack subtest of the Woodcock Reading Mastery Test-III. Student had a standard score of 104, in the 61st percentile. On the Slosson Oral Reading Test – R3, Student had a standard score of 114, in the 81st percentile. Student was also administered the Wide Range Achievement Test – 4. In word reading, his standard score was 105, in the 63rd percentile. In spelling, his standard score was 106, in the 66th percentile. In math computation, Student's standard score was 109, in the 73rd percentile.

323. Lindamood-Bell also gave Student the Gray Oral Reading Test. Student's paragraph reading was at second grade level. No other scores were provided. He could

read and recall passages up to the level of third grade. On the reading rate subtest, Student had a standard score of 12, in the 75th percentile. He had a standard score of 8, in the 25th percentile on the reading accuracy subtest. He had a standard score of 10, in the 50th percentile in reading fluency. Student had a standard score of 6, in the 9th percentile for reading comprehension.

324. Lindamood-Bell administered a proprietary assessment it had developed called the Auditory Conceptualization Test – 3. Since no one from the agency testified, it is unknown of what this test consisted. Student had a standard score of 99, in the 47th percentile. Student also took something called the Symbol Imagery Test. He scored a 98, in the 45th percentile. Lindamood-Bell also administered an informal test of writing in three areas as well as two math tests. Student scored in the second percentile on Lindamood-Bell’s math computation assessment, which inexplicably differed significantly from District’s assessment scores and Dr. Davidson’s assessment scores placing him in the average range in math.

325. In their assessment reports, District assessors and Dr. Davidson explained that standard scores range from a low of 69 and below to a high of 131 and above. The Lindamood-Bell scores on the Gray Oral Reading Test inexplicably did not conform to that scoring standard. The Lindamood-Bell assessment also inexplicably used different editions of the Detroit. No one from Lindamood-Bell testified regarding its assessment. Dr. Davidson testified about Student’s need for Lindamood-Bell intervention and the validity and efficacy of the Lindamood-Bell methodologies. However, when asked to explain the issues with the reporting of the results of the Detroit, she was unable to give a coherent reason for the discrepancies. For these reasons, the Lindamood-Bell assessments were unreliable and were not accorded any weight.

326. Lindamood-Bell recommended that Student attend its program 20 hours a week for four to six weeks to address what it saw as Student’s deficits. Parents followed

the recommendation, in which Dr. Davidson later concurred, and enrolled Student in the visualizing and verbalizing program for four weeks in July 2017. The total cost of the program was \$9,150.

#### MR. ELLIS'S SUPPLEMENTAL SOCIAL/EMOTIONAL ASSESSMENT DATA

327. Mr. Ellis had Student's aide take additional data on Student's behaviors at school. He did so based on the discussion at the March 20, 2017 IEP team meeting of Student's behaviors while at Pediatric Minds and Parents' concerns about Student's elopement, aggression, non-compliance, and tantrums while there. Mr. Ellis wrote a report memorializing the data. Student's aide collected data on one of Student's non-disabled peers to compare the behaviors to determine if Student's behaviors were not typical when compared to his typically developing peers. Although Student's rate of talking out of turn increased during April 2017, it continued to be at a rate similar to his peers and was not a concern in the classroom. Student's inappropriate touching of others happened an average of 1.25 times a day. However, it generally occurred with the same group of school friends, who engaged in the same type of touching. Therefore, it was not an area of concern.

328. Student's level of elopement had historically been lower than that of his peers, with elopement defined as moving away from the group he was supposed to be with. During April 2017, Student only had three instances of elopement when he ran from class to the playground or vice-versa without walking with his group. His level of elopement was less than that of his peers and not a concern in school. Student's level of aggression occurred only four times in April 2017. His level of aggression was lower than that of his peers. His form of aggression, pushing at a peer, did not result in injury to the peer or to Student. Student's level of non-compliance decreased in April 2017. Even at the higher levels in the prior months, Student's level of non-compliance was lower than that of his peers.

329. Student averaged 0.65 instances of crying over the April 2017 data collection period. His instances of crying were less than that of his peers. Student had few instances of crying. His crying was less frequent than his peers. Student's tantrums were defined as Student engaging in at least two of his maladaptive behaviors. Student's frequency of tantrums, with the exception of one day when he had a substitute aide, was commensurate with that of his peers. It was not a concern at school.

#### REQUEST FOR RECORDS

330. Through their attorney, Parents made a request for all of Student's records in January 2017. District provided two boxes of records. Mother made a written request for additional records on March 21, 2017. She wanted behavioral data collected by Mr. Ellis or Ms. Garcia as well as any reports, charts, or summaries of the data. Mother also asked for a team meeting to review the data. Mr. Ellis wrote back on March 23, 2017, saying that he was compiling the records. Mother picked the records up from District on April 3, 2017, after District staff returned from spring break. The next day, Mother wrote to District informing it that she had received incomplete and illegible records. She did not specify to which documents she referred. District asked that she identify the documents or bring in the illegible ones and they would provide new copies. Given the amount of records involved and not knowing which of the many pages were not legible, District did not want to just re-copy everything and run the risk that the second copy would also be illegible. Parents never indicated to District which documents they were not able to read. On April 5, 2017, District provided Parents with a copy of the draft Supplemental Social-Emotional Report, revised proposed goals, and the revised present levels of performance.

331. Parents never indicated with any specificity at hearing which records were not legible. They never gave any substantial reason for not taking the asserted illegible records to District so that District could identify which records needed to be re-copied.



#### PARENTS' REQUEST FOR OBSERVATION BY DR. HANNAUER

332. In her April 4, 2017 letter to District, Mother requested that District permit Dr. Hannauer to observe Student in his classroom at Orangethorpe. District denied the request. District informed Parents that it would reconsider the request after a placement offer had been made at Student's next IEP team meeting. District did not believe that it was necessary for Dr. Hannauer to observe Student's present placement at that time, particularly because no one from Pediatric Minds had asked to observe Student while he attended the program at Pediatric Minds or immediately after he left. In addition to her participation as a parent volunteer and Father's participation at school during reading times in the morning, Mother observed Student at school a total of nine times over the course of the 2016-2017 school year. Student's in-home behavior supervisors observed Student six times over the same period. Ms. Cooper was not one of the supervisors who observed Student. Ms. Cooper did not observe Student at any time. All of District's assessors had ample opportunity to observe Student throughout the course of the school year and as part of their assessments.

333. Parents did not renew their request for Dr. Hannauer's observation at any time during the remainder of the 2016-2017 school year. They did not ask to have Dr. Hannauer observe the multi-age classroom in preparation for the hearing.

#### STUDENT'S PARTICIPATION IN SOCIAL SKILLS CLASS

334. The University of California, Irvine's Child Development School provided extra-curricular social skills classes for children that were available to the public. Parents enrolled Student in one of the classes that lasted for eight weeks between March and May 2017. Mary Gonzalez, a bachelor's degree level behaviorist employed by the Child Development School, led the class.

335. The purpose of the class was for the participants to improve relationships through improving adaptive skills. The class worked on the areas of good

sportsmanship; following directions; taking turns; accepting things; assertiveness to learn to use words to deal with social situations; ignoring minor annoyances; and problem-solving. The class used positive behavior reinforcement as behavioral management techniques. Cognitive behavioral therapy was not used as a methodology in this class. Children were not accepted to the program if they were very aggressive, did not speak English, or were not verbal.

336. Dr. Lilian Swords supervised the class although she was not there every day. Dr. Swords, who testified at hearing, received her doctor's degree in psychology in 1980. She had worked at the Child Development School since 2000.

337. Student had difficulty following rules, staying on task, and ignoring other children when they were being disruptive when he first started the class. However, he was not aggressive, did not have any self-injurious behaviors, and did not elope. Student understood the curriculum and followed directions. He showed improvement with sitting calmly in his chair and raising his hand to ask questions.

338. In spite of Student's improvement, Dr. Swords recommended that he continue to receive social skills interventions. She also recommended that he enroll in the Child Development School's day treatment program when a space was available. Dr. Swords never observed Student in his District classroom. She did not have any knowledge of his IEPs or his in-home behavior program. She did not know what District was doing to address any of Student's behavior issues or how he behaved at school. During her testimony, Dr. Swords was clear in stating that her recommendation for enrollment at the Child Development School was not based on Student's educational needs. For these reasons, her recommendation that Student needed to attend the Child Development School to make educational progress was not persuasive.

May 4, 2017 IEP Team Meeting

339. The IEP team rescheduled the April 10, 2017 continued IEP team meeting

at Parent's request. The team reconvened on May 4, 2017, a date mutually agreeable to District and Parents. District allocated three hours for the meeting. Ms. Purnick could not attend the meeting, but the other District program coordinator attended. Ms. Khong was not available, and another District occupational therapist attended in her place. Dr. Soltero-Ruiz also was not available to attend. An audiologist from the Special Education Local Plan Area to which District belonged attended the meeting. All other District team members from the prior meeting attended this one. Parents attended with an advocate and one of their in-home behavior supervisors. Dr. Braun attended by telephone.

340. District asked for parent concerns. District staff noted the concerns in the IEP document as Parents expressed them throughout the meeting.

341. Mr. Ellis discussed his supplemental social/emotional assessment report. Parents did not have any questions or comments about the report. Mr. Ellis also discussed the new goals he was proposing for Student. His first goal sought to increase Student's ability to accept contributions from others. The third goal sought to increase Student's ability to self-identify the appropriate level of a problem he was having with a peer and modulate his response according to the level of the problem. Parents had few questions or comments about these two goals.

342. However, Parents expressed significant concerns about Mr. Ellis's second proposed goal that addressed the need for Student to increase his calming strategies. Student's behaviors at school had increased since January 2017. In her supplement to her assessment, Ms. Akrawi noted that Student had averaged 12.8 rude or inappropriate comments per day during the five-day data collection period. He told people they were "bad;" told people he "hated" them when someone upset him; booed at someone receiving recognition at an award presentation where he did not receive an award; told people he was going to "send them to jail;" made fist pounding gestures; threatened to "be bad;" and had in January 2017 made the threat to bomb the school, a comment he

never repeated. Mr. Ellis's goal proposed having Student reduce these types of comments from almost 13 a day to six a day over a one-year period.

343. Parents were concerned because they did not believe the goal ambitious enough. They pointed to Student's comment about wanting to bomb the school as support that the goal should have been for Student to reduce the comments to zero per day. However, Student's comment about wanting to bomb the school was the only time he ever made a comment of that type at school. His comments did not otherwise contain or suggest acts of violence. Student's commenting behavior was new and District had no evidence of how long it might take to address the behavior. Having an objective of cutting the behavior by half was not lacking in ambition given the circumstances.

344. The IEP team discussed Dr. Braun's updated central auditory processing assessment. Dr. Braun acknowledged that Student's scores on the new assessment were in the normal range in all but two areas. She attributed Student's gains to his use for 10 weeks of the CAPDOTS program. District staff members agreed that they would continue to add Dr. Braun's recommended accommodations to Student's IEP. Ms. Makino had started using one of the applications Dr. Braun recommended during her therapy sessions with Student.

345. Ms. Chavez and Ms. Keller noted that Student's classroom academic assessments for May 2, 2017, placed Student in the first to second grade range in reading comprehension, the area in which there was more concern based on an auditory processing deficit. Student did not struggle in class with reading comprehension; he was in Ms. Keller's highest group of first grade readers. Student's advocate pointed to Student's reading comprehension score on Lindamood-Bell's administration of the Gray Oral Reading Test to support Parents' concern that Student's reading comprehension was low. However, Student's scores in reading comprehension on District's March 2016

multidisciplinary assessment had been in the average range or higher. His classroom performance was at grade level as had been his in-class assessments. District did not believe Student's reading comprehension was a deficit.

346. Parents requested that all Dr. Braun's recommended accommodations be continued in Student's IEP and that District fund the recommended Lindamood-Bell program. District agreed to continue the classroom accommodations but declined to fund the Lindamood-Bell program.

347. Ms. Makino reviewed the six speech goals she proposed. She had incorporated previous suggestions from Parents in the goals. She modified the goals during the IEP meeting to incorporate other suggestions from Parents. Student's advocate wanted to add two additional goals. Ms. Makino did not think it necessary because the areas suggested were already covered in the other goals. Student did not present any evidence that District's speech goals were inappropriate or insufficient. Ms. Caccavale was the only speech expert other than Ms. Makino whose testimony Student offered at hearing. Neither speech pathologist critiqued District's speech goals or opined that they were insufficient.

348. District staff reviewed proposed supports and accommodations for Student throughout his school day and in therapy sessions. District agreed to the accommodations Dr. Braun suggested. District again included a specific provision for Ms. Makino to implement Lindamood-Bell verbalizing and visualizing strategies during speech therapy sessions. Mother suggested additional accommodations of permitting Student to work standing up and not using the loss of recess as a disciplinary measure. District agreed to the requests. District modified language addressing supports based on suggestions from Student's advocate.

349. The IEP team reviewed the different type of placements to meet Student's needs. The majority of the discussion focused on what type of general education

classroom would meet Student's needs. Based on Pediatric Minds' recommendation for a small, structured classroom, Mr. Ellis suggested that Student enroll in the typical general education classroom at his home school. The typical general education classrooms had about 32 students rather than the approximately 55 to 65 in the multi-age classroom. However, the multi-age classroom was a general education classroom and Parents had the right to retain Student there. District could not prevent Student's enrollment in the class. To do so would have been discriminatory.

350. None of the IEP team members disagreed that Student could make progress in a general education classroom. Neither Parents nor District believed Student required a more restrictive placement to meet his needs. Parents did not contend at this IEP team meeting that Student required a non-public school placement to access his education and did not request one at the meeting.

351. The IEP team discussed whether Student required extended school year services. Although District provided the services the previous summer, it declined to offer them for summer 2017. District based its decision on Student's lack of regression in behavior, occupational therapy and speech and language therapy after he returned to school for the first grade in the 2016-2017 school year. However, Student's behavior had regressed somewhat the first month of school. District had to remove Student from Mother's group that first month. Additionally, Student received District-provided occupational therapy and speech therapy during summer 2016. The provision of the summer services most likely contributed to his lack of regression. District did not discuss or consider the fact that Student had not met two of his speech goals when it concluded Student did not require extended school year services in speech therapy.

information on Student's present abilities in the area each goal addressed. The baseline information was obtained from assessments, observations, and input from District staff and Parents. The goals clearly described the goal's objectives and how Student's progress would be measured on each. The goals delineated whether each was designed to enable Student to access the general education curriculum and/or if it addressed other educational needs. Finally, the goals identified who was responsible for implementing the goal.

353. District offered extensive supplementary aids, services, and other supports to assist Student in accessing his education in a general education classroom. It continued to offer Student a one-to-one aide during the entire class day with the exception of physical education and when he received therapies. It offered collaboration services five times a year, each session 30-minutes, between all of Student's teachers and service providers and Parents.

354. District offered Student occupational therapy services at the rate of one, 30-minute individual session a week pushed-in to Student's classroom, and one, 30-minute a week of individual therapy outside of the classroom.

355. District offered Student two, 30-minute sessions a week of small group speech and language therapy outside of Student's classroom. It also offered Student one, 30-minute session a week of individual therapy outside of Student's classroom. Ms. Makino wanted the services outside of the classroom to work on Student's skills in a quiet place with a controlled environment. Working on speech in Student's classroom, as had been done since Student enrolled at District pursuant to his previous IEP, was distracting and involved more children in the group than Ms. Makino believed was appropriate. Although Ms. Makino explained why the location of her services should change, she did not concretely explain why District proposed reducing Student's group speech and language therapy from his present rate of a three, 30-minute sessions a

week to two, 30-minute sessions a week.

356. Finally, District offered Student two, 30-minute sessions a week of counseling and guidance. One session would be individual services for teaching skills. The other session would be provided in a small group setting for the purpose of generalization of the skills. District offered the counseling services in lieu of a behavior intervention plan. District IEP team members believed that Student's behaviors were no longer severe enough to require a behavior plan based upon the data demonstrating his behaviors were commensurate with those of his peers. Student did not elicit testimony from any witness about the offered counseling services. None of Student's witnesses criticized the service, either as to type, amount, or frequency offered.

357. The IEP document contained an extensive and in-depth discussion of Student's present levels of performance, including recent updates. It described Student's specific needs. It identified Parents' concern. It included all proposed goals. It included assessment data and what statewide assessments Student would take. It contained a clear delineation of District's offer of FAPE, including a clear statement of all accommodations, supports, and services District proposed to assist Student in accessing his education; and the start and end date, frequency, duration, and location for all programming and services.

358. At hearing, neither party asked questions of any District IEP team member exploring whether they had discussions about Student's IEP, including placement, prior to the IEP team meetings. Student offered no testimonial or documentary evidence that District had preconceived notions about any portion of Student's IEP that it was unwilling to discuss at the IEP team meetings. Student also offered no evidence that District presented any portion of Student's IEP as a "take it or leave it" document.

359. At the end of the IEP team meeting, Parents informed District that since it was not offering extended school year services, they intended to enroll Student in the



Lindamood-Bell program and would request reimbursement from District.

#### DISAGREEMENT WITH DISTRICT'S ASSESSMENTS

360. On May 8, 2017, Parents, through their attorney, wrote District stating their disagreement with District's March 2016 multidisciplinary assessment, the March 2016 functional behavior assessment, and the March 2017 social/emotional assessment. Parents requested District fund independent educational evaluations in those areas. District declined to fund the independent assessments. It filed for due process on June 6, 2017, to defend the validity of its assessments.

#### SUMMER 2017

##### Student's Summer Programs

361. Parents enrolled Student in a one-week science camp for summer 2017. The cost of the camp was \$349.

362. Parents also enrolled Student in the Lindamood-Bell program. Student attended four hours a day, five days a week, for four weeks. At the end of the session, on August 4, 2017, Lindamood-Bell administered the same assessments it used on March 27, 2017, four months earlier. District witnesses credibly opined that four months is too soon to administer the same testing instruments and that a different type of assessment that tests the same area should be used when testing within a year's time. Re-testing too soon can result in the student potentially knowing what is on the test; re-testing too soon after the initial test increases the likelihood of getting higher false scores the second time. Dr. Davidson disagreed, claiming she had spoken with the publishers of some tests who informed her that re-testing did not result in faulty results. However, Dr. Davidson did not identify whether she had spoken to the publishers of each of the tests Lindamood-Bell administered. For this reason, her rejection of the theory of "practice effect" was not persuasive.

363. Student's scores improved on Peabody Picture Vocabulary Test; all subtests of the Detroit; on the reading, passage recall, accuracy, and comprehension portions of the Gray Oral Reading Tests; and on the math story problems subtest. Dr. Davidson testified that these gains proved that Student required the Lindamood-Bell intervention and benefitted from it. Dr. Davidson ignored the fact that Student's scores remained stagnant in the areas of reading rate and fluency on the Gray Oral; the symbol imagery test; and math computation. She also ignored the fact that Student's scores had actually *decreased* on the word attack subset; the Slosson Oral Reading Test; all subtests of the Wide Range Achievement Test; and on Lindamood-Bell's proprietary Auditory Conceptualization Test. Dr. Davidson's emphasis on the need for the Lindamood-Bell program was therefore not persuasive.

#### Enrollment at the Prentice School

364. Parents enrolled Student in a Nero-Bio-Feedback and Interactive Metronome summer program at the Prentice School. Parents paid a total of \$2,250 for the program. Student attended the Prentice School in the afternoons after attending the Lindamood-Bell program in the mornings.

#### PARENT TRAINING PROGRAMS

365. Mother took a two-day course called Social Thinking in January/February 2017. Parents paid \$368.90 for the course. Parents also took an Introduction to Parenting Techniques course through Irvine's Child Development School. The course focused on teaching parents to address their child's behavior problems in the home and in the community. Parents had previously taken a parenting course through Irvine's Child Development School; had received parent-training from their in-home behavior providers; had received parent-training from the University of California, Los Angeles's partial hospitalization program when Student was enrolled there when he was four; and

had participated in consultation and collaboration with Student's service providers and Mr. Ellis while Student was enrolled at Orangethorpe.

#### DR. DAVIDSON'S SECOND ASSESSMENT

366. Parents contracted with Dr. Davidson in May 2017 to reassess Student in psychoeducation. Dr. Davidson assessed Student over a six-month period from May 2017 to November 2017. Her assessment results were memorialized in a comprehensive 216-page report generated after the complaint was filed. Dr. Davidson's assessment was not provided to District during the time frame covered by this case, but it is appropriate to consider it for the purpose of determining the reasonableness of District's offers of FAPE.

367. Dr. Davidson observed Student at Orangethorpe on May 22, 2017, during the last week of the school year. She tried to interact with Student and his aide by asking them questions. District witnesses opined that it was not best practice for observers to interject themselves into the observation. Dr. Davidson observed a peer attempting to interact with Student. The peer could not understand everything Student said and became frustrated. Dr. Davidson believed Student's aide should have interjected herself more into the situation to direct the conversation between the children. Dr. Davidson later observed Student at the Child Development School on November 13, 2017, after he had attended school there for almost three months. Dr. Davidson opined that Student received more support at the Child Development School with behavior checks, writing, and receiving more accurate verbal praise. She therefore felt that the Child Development School could address Student's deficits and that the Orangethorpe classroom could not. She did not note signs of anxiety in Student during either of her observations.

368. Dr. Davidson administered several testing instruments to Student on July 10 and 11 2017. To assess his intellectual functioning, Dr. Davidson administered the

Kaufman Brief Intelligence Test – Second Edition. Dr. Davidson used the Woodcock-Johnson Tests of Achievement-Fourth Edition to test Student's academic achievement. Dr. Davidson also assessed Student's attention, behaviors, language needs, executive functioning, and probability of being on the autism spectrum. Generally, her assessment results were commensurate with those District obtained in its March 2016 multidisciplinary assessment and with those obtained by Pediatric Minds.

369. Dr. Davidson opined that Student should attend a school such as the Child Development School. However, in testimony and in her assessment report, she conflated Student's needs at home with his educational needs, which decreased the persuasiveness of her opinions. Additionally, Dr. Davidson failed to address the issue of whether a private school would be the least restrictive environment for Student. Her observation notes for both classrooms she observed are very complete. She noted everything said and everything done during the observations. However, her determination as to why Student should leave a general education public school classroom and attend a private school was based primarily on the fact that Student's behavior aides at Child Development School were better than Student's aide at Orangethorpe. This too diminished the persuasiveness of Dr. Davidson's placement recommendation.

370. The persuasiveness of Dr. Davidson's opinions was also undermined for other reasons. She did not inquire into what extent Student received or did not receive applied behavior analysis support during summer programs when referencing them in her assessment report. Dr. Davidson criticized District's teachers for failing to fully fill out rating scale assessments that Pediatric Minds asked them to complete but also did not ask Student's then-current teacher at the Child Development School to fill out some of the rating scales for her assessment. When questioned about her own assessment, her response was that she could not expect the teachers to fill out all the surveys, directly

contradicting her criticism of District's teachers. Further, Dr. Davidson's strong opinion that District's behavior assessments were flawed because District used Student's aide to collect data was not supported by any other professional who testified at hearing including all of Student's private providers and assessors who were asked about the issue.

371. Dr. Davidson presented during her testimony as somewhat evasive and inconsistent. She made statements about the Child Development School program which she later acknowledged were based on assumptions rather than on facts actually known to her. When challenged on a statement, her responses were at times evasive. Her demeanor and tone of voice at hearing sometimes bordered on flippant. Her responses, rather than being thought-out and deliberated, were quick and always twisted to support Student's position. Finally, her conclusions glossed over the progress Student made at Orangethorpe. For all these reasons, her opinions were not given much weight in comparison to District's witnesses.

#### STUDENT'S ATTENDANCE AT IRVINE'S CHILD DEVELOPMENT SCHOOL

372. Parents enrolled Student at the Child Development School for the 2017-2018 school year. The total cost was \$27,250, which included an intake fee, a registration fee, and tuition for the school year. Parents paid the tuition monthly.

373. Dr. Sabrina Schuck was an Assistant Professor in the Pediatric Department of the Medical School at the University of California, Irvine and also the Director of Irvine's Child Development Center, under which its Child Development School operated. In addition to teaching and overseeing the school, she supervised a group of psychiatrists. Dr. Schuck had a doctorate in education, with an emphasis in special education and educational psychology, in 2008. She is a research psychologist with 30 years of research experience, primarily in the areas of reading and attention deficits. Her discussion of the Child Development School and Student's positive progress there was

corroborated by the other witnesses from that school who testified at hearing, such as Therese Nguyen, Student's second grade teacher at the school. Dr. Schuck was a knowledgeable and informative witness. It was apparent that she gave a great deal of thought to responding to questions at hearing. She was forthright and deliberative. She did not attempt to couch her answers to support any particular position. For these reasons, Dr. Schuck's testimony was given great consideration.

374. The Child Development School runs a unique, hybrid school-based behavioral health program. The school teaches to common core and state standards. The teachers had California teaching credentials but were not credentialed special education teachers. All of the children admitted to the program have some type of functional impairment, such as attention deficit or anxiety disorder that impeded them from reaching their educational potential. Only a portion of the children were diagnosed as being on the autism spectrum. All were of at least average intelligence. Only a portion had IEPs at their previous school.

375. Student's second grade class had 15 children with one general education teacher and two trained behaviorists present at all times. The behavioral interventions were imbedded in the class. There were some applied behavior analysis principles used, such as a token economy and positive praise. Students earned behavior tokens and what they earned was reviewed every half hour and then fully counted at the end of the school day. The positive praise system required that a child receive five positive comments or instances of praise or positive feedback for every negative directive or comment. The children also received almost two hours a day of social skills training. The training was based on strategies developed through several research studies.

376. The remainder of the behavior program was based on cognitive behavioral therapy principles. Dr. Schuck explained that in the last five years there have been changes in how autism is diagnosed. For example, attention deficit hyperactivity

disorder is now recognized as sometimes being co-morbid with autism. Likewise, newer research has demonstrated that many autistic children have co-morbid anxiety.

Cognitive behavioral therapy teaches direct strategies for managing one's thoughts. It targets thoughts, actions, and behaviors. It is researched-based and peer-reviewed and it is considered the best therapy for managing anxiety and depression. Dr. Schuck's testimony on the efficacy of cognitive behavioral therapy for autistic children with co-morbid anxiety corroborated Dr. Hannauer's testimony of the subject.

377. When Student started attending the Child Development School, he perseverated on problems and what he felt were injustices and slights. The school behavioral and psychological staff worked on calming his mind so he could access language from others. The school used cognitive behavioral therapy to teach Student to recognize and put aside negative thoughts and on compartmentalizing frustrations more efficiently.

378. As of the hearing, Student had shown progress but still required intervention. He was progressing academically and had average grades. According to Ms. Nguyen, his second grade teacher at the Child Development School, Student's weakness remained in reading comprehension although he still received average grades in that area.

379. Dr. Schuck believed that Student was properly placed at the Child Development School for the 2017-2018 school year. She opined that Student had severe anxiety and required a placement such as the Child Development School to address that anxiety. However, neither she nor any staff member from the Child Development School observed Student at Orangethorpe or spoke with his teachers or service providers.

380. Dr. Chelsea O'Haire was another psychologist from the Child Development School who testified as an expert for Student at the hearing. She also opined that Student required placement at a school such as the Child Development School.

However, Dr. O'Haire incorrectly believed that Student had been enrolled in a special day class at District. Overall, the Child Development School staff all had very little knowledge about Student's behaviors while he attended school in District. Dr. O'Haire's opinions were based on Parents' information about Student's behavior at home and in the community. She recalled the discharge report from Pediatric Minds but was not familiar with the results of District's assessments or how Student behaved at school. She did not personally review Student's IEPs.

381. In response to questions from the ALJ, Dr. Schuck acknowledged that in certain situations a child's behavior at school could be very different from his or her behavior at home. She believed that even if that were true in Student's case he would benefit from continued enrollment at the Child Development School for another two to three years as a prophylactic measure. Dr. Schuck believed that if Student was not demonstrating the behaviors at school that were occurring at home, he was still at-risk for them becoming explosive at school in the future.

382. Although knowledgeable in their fields, neither Dr. Schuck nor Dr. O'Haire had any specific knowledge about Student's progress at Orangethorpe or about his behavioral needs at school. Their opinions were based on information about behaviors that occurred in environments other than in school. Because Dr. Schuck and Dr. O'Haire did not base their recommendation that Student required placement at the Child Development School on his educational needs at school, their opinions were ultimately not given much weight.



## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>7</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>8</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

3. In general, an IEP is a written statement for each child with a disability that

---

<sup>7</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>8</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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

4. In 1982, the United States Supreme Court rendered the seminal and guiding decision in special education law. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034; 73 L.Ed.2d 690] (*Rowley*)). In the decision, the Supreme Court noted that the predecessor statute of the IDEA did not contain any substantive standard prescribing the level of education that a handicapped child must receive. (*Id.* at p. 189.) Instead, the Court determined that, in the Act, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Id.* at p. 192.) If a school district acts in compliance with the procedures set forth in the IDEA, especially as regards the development of the child's IEP, then the assumption is that the child's program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that an educational agency must provide the disabled child with a "basic floor of opportunity." (*Id.* at p. 200.) The Court further noted that an appropriate education under the Act does not mean a "potential-maximizing education." (*Id.* at p. 197, fn. 21.) Stated otherwise, the educational agency must offer a program that "confers some educational benefit upon the handicapped child." (*Id.* at p. 200.)

5. The Supreme Court clarified its ruling in *Rowley* in the recent case of *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_ [137 S.Ct. 988, 996] (*Endrew F.*). The Court clarified that "for children receiving instruction in the

regular classroom, [the IDEA's guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" Put another way, "[f]or a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" (*Id.* at 999 (citing *Rowley*, *supra*, 458 U.S. at pp. 203-04).) The Court went on to say that the *Rowley* opinion did not "need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level." (*Id.* at 1000.) For a case in which the student cannot be reasonably expected to "progress[] smoothly through the regular curriculum," the child's educational program must be "appropriately ambitious in light of [the child's] circumstances . . . ." (*Ibid.*) The IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at 1001.) Importantly, "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (*Ibid.*)

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof for all

of his issues, and District had the burden of proof for its issues.

7. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.) (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947. (*Mercer Island*).)

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

## ISSUES 1(A) AND 2(A): FAILURE TO CONSIDER PARENTS' CONCERNS

### Parties' Contentions

9. Student contends that District failed to take into consideration all of Parents' concerns in the development of Student's various IEPs at issue in this case.

Student also contends that District failed to offer any evidence that Parents' concerns were given the legal weight the law requires. District argued that Parents fully participated in Student's IEP process. District contends that it addressed all their concerns although District did not always agree with or adopt all of Parents' suggestions or requests.

#### Legal Authority

10. Special education law places a premium on parental participation in the IEP process. States that accept federal funding must ensure, inter alia, that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting. (34 C.F.R. § 300.322(a); Ed. Code, §§ 56341.5, subd. (a), 56342.5.) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

11. Under these guidelines, an educational agency must permit a child's parents "meaningful participation" in the IEP process. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132 (*Vashon Island*).) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the IEP. (*Id.* at p. 1133; *Cerra v. Pawling Central School Dist.* (2nd Cir. 2005) 427 F.3d 186, 192 (*Cerra*).) Parents have an adequate opportunity to participate in the IEP process when they are "present" at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include a visit by the parent to

the proposed placement. (*J.W.*, *supra*, 626 F.3d at p. 461.) An adequate opportunity to participate can include participation at the IEP meeting by outside experts retained by the parents, and the incorporation of suggestions made by such experts into the IEP offer. (*D.S. v. Bayonne Board of Educ.* (3rd Cir. 2010) 602 F.3d 553, 565; see also *W.T. v. Board of Educ. of the School Dist. of New York City* (S.D.N.Y. 2010) 716 F.Supp.2d 270, 288 [reports from child's private school].) An adequate opportunity to participate can occur when parents engage in a discussion of the goals contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y. 2010) 682 F.Supp.2d 387, 394.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036; *S.H. v. Tustin Unified Sch. Dist.* (C.D. Cal. Apr. 7, 2015, SACV 14-00413-CJC(ANx)) 2015 WL 13339447, \*6.)

#### Analysis

12. This issue was raised by Student in his complaint. Therefore, contrary to Student's argument that District failed to provide evidence to show that Parents' concerns were addressed, Student had the burden to show that Parents' rights were infringed. Student failed to meet his burden on this issue. Under the authority cited above, and based on the factual findings of this Decision, Parents were given far more than adequate opportunity to participate in Student's IEP process.

13. Student contends that District's actions were a façade to mask District's unyielding refusal to address Parents' concerns. The weight of the evidence is to the contrary. The written and testimonial evidence in this case is replete with the efforts District made to include Parents in the IEP process, to address their concerns, and to incorporate Parents' suggestions when District believed it appropriate. District

addressed Parents' concerns at every IEP team meeting convened regarding Student's education and through the course of each school year.

14. Evidence of District's efforts to address Parents' concerns began prior to the period covered by this case when District modified Student's May 2015 IEP based on concerns raised in a letter Mother sent to District. During Student's first month at Orangethorpe Elementary School for the 2015-2016 school year, Mr. Ellis consulted with Student's behavior specialist at the Development Center, Student's prior school of attendance. He also spoke with Student's in-home behavior providers. Additionally, Mr. Ellis spoke with Parents to understand their concerns and what was happening with Student in the home. Mr. Ellis observed Student at home. His discussions and observations were specifically directed at understanding the concerns Parents and Student's private providers had about Student. Mr. Ellis continued these communications throughout Student's time at District with the intent of determining Parents' concerns.

15. During fall 2015, Parents were concerned that Student would regress during school breaks. They asked District to provide services to Student during all such breaks, including the one-week Thanksgiving break. District addressed the concerns by holding IEP team meetings to discuss the issue and by taking data on Student when he returned to school after a break. District did not agree that Student required services during Thanksgiving and winter breaks based on the progress Student made. District's disagreement and denial of services does not mean that it did not consider Parents' concerns.

16. Student's IEP team reconvened on January 29, 2016. Parents expressed concerns about the level of prompting Student needed in class. District addressed the concern by agreeing to collect data on the prompting. Parents wanted behavior data based on actual times Student did something, rather than in percentages. Mr. Ellis

agreed to provide the data as requested by Parents.

17. As part of all assessments District administered, District noted Parents' concerns and obtained their input either through direct discussions or through Parents' direct participation in the assessment through their responses on rating scales. In response to Parents' concerns about Student's behaviors at school, District administered additional assessments in the form of Mr. Ellis's functional behavior assessment and Ms. Akrawi's social/emotional assessment. When Parents raised additional concerns, Mr. Ellis supplemented his assessment as did Ms. Akrawi the following year when she assessed Student.

18. During the March 24, 2016 IEP team meeting, Mr. Ellis corrected informational errors in his functional behavior assessment that Parents brought to his attention. He agreed to review the data collected to see if there was a correlation between Student's touching behaviors and his behaviors of aggression. Mr. Ellis also discussed with Student's in-home behaviorist different strategies District could use at school with him.

19. Parents and Student's in-home behaviorist raised concerns and made suggestions about Student's goals. District incorporated language they suggested in District's proposed goals. Based on the concerns of Parents and Student's in-home behaviorist, District agreed to collect more data on Student's behavior and level of independence.

20. At the April 14, 2016 and May 18, 2016 IEP team meetings, District staff answered all of Parents' questions. Ms. Makino agreed to Parents' request that she provide them with speech strategies to use with Student at home. Ms. Makino modified levels of accuracy on goals as requested by Parents. Mr. Ellis agreed as well to modifications in his proposed behavior plan. He also agreed to provide written clarification to Parents to address their questions and concerns. District later agreed to



collect data the following school year to determine if Student required additional goals. Parents fully participated at these meetings in the discussion about Student's placement and where he should go to school the following year.

21. During the 2016-2017 school year, Parents likewise fully participated in Student's IEP process. District continued to address Parent's concerns. District maintained communication with Parents over the summer of 2016 to determine if Parents were going to consent to Student's May 18, 2016 IEP. At the beginning of the school year, Ms. Purnick offered to meet with Parents to discuss any concerns they had about Student's IEP or any aspect of his education.

22. To address Parents' concerns, District convened several amendment IEP team meetings. On September 28, 2016, Ms. Purnick met with Mother. Pursuant to Mother's request, Ms. Purnick added information to the present levels of performance page of Student's IEP. She corrected other information. She offered to discuss at Student's next IEP team meeting whether Student had regressed over the summer. Mother declined the offer, acknowledging that Student did not demonstrate any regression.

23. District convened another amendment IEP team meeting on October 3, 2016. Prior to the meeting, Mr. Ellis met with Mother to discuss her concerns about Student's behavior goals. Mr. Ellis also met with Student's in-home behaviors to get their input on Student's behavior needs. Based on that input, Mr. Ellis proposed two new behavior goals for Student.

24. The main purpose of the October 3, 2016 IEP team meeting was to review Dr. Braun's central auditory processing disorder assessment. The IEP team met again on November 17, 2016, to continue the discussion. To address Parents' concerns about Dr. Braun's assessment report recommendations, District created a chart delineating which of the recommendations was already part of Student's IEP. Based on Parents' requests

and the results of Dr. Braun's assessment, District incorporated the majority of Dr. Braun's remaining recommended accommodations and supplementary services into Student's IEP. Although District declined to fund the Lindamood-Bell program and CAPDOTS program Dr. Braun recommended, District agreed to incorporate Lindamood-Bell methodologies into Student's speech therapy sessions, because Ms. Makino was trained in the methodologies.

25. District added several recommended accommodations and supplemental supports from Dr. Braun's assessment to Student's IEP. It also modified several goals in line with Parents' requests. District also addressed Parents' concerns at the meeting about Student's behaviors outside of school. The IEP team had a lengthy discussion about the behaviors and Parents' decision to re-enroll Student in the Pediatric Minds program. District addressed the concerns but explained that District did not see similar behaviors at school.

26. Parents requested that District participate in a discharge meeting with Pediatric Minds' staff after Student discontinued attending the Program. Mr. Ellis, Ms. Purnick, and another District program coordinator attended the meeting and discussed concerns about Student's behavior.

27. District conducted its social/emotional assessment of Student in the first few months of 2017. It incorporated information from Parents through interviews and rating scales they filled out. Ms. Akrawi addressed Parents' concerns in her assessment report. She amended her report when Student's teachers and service providers noted increases in some of Student's behaviors.

28. District also addressed Parents' concerns throughout the IEP team meetings to develop Student's annual IEP in spring 2017. District discussed Dr. Braun's second assessment. It incorporated the vast majority of her recommended accommodations into the proposed annual IEP based on her finding that in spite of

Student's normal results on the most of her tests, he still showed deficits in two areas. District noted Parents' concerns in the IEP document. They discussed all concerns during the course of all the IEP team meetings. District agreed to collect more data on Student's behaviors in response to their concerns.

29. Throughout the two school years covered by this Decision, District maintained open communication with Parents through emails, telephone calls, and in-person discussions. District provided draft proposals to Parents as they requested, provided written clarification of issues, and provided them with proposed modifications to goals, behavior plans, and the IEPs. Parents and their advocates fully participated at all IEP team meetings. They made suggestions, many of which were incorporated into Student's goals or in other parts of the IEP, such as in accommodations and supplementary services. They asked questions, and District made every attempt to answer the questions. If the District staff member did not know the answer to a question, he or she agreed to research the issue and provide a response at a later date. When Mother wrote to District with a concern, District responded.

30. Student argued that although all the above did occur, District only gave "lip service" to Parents. Student supports his argument on his claim that District did not provide the services Parents requested, such as Lindamood-Bell, and did not include in Student's present levels the behaviors he demonstrated at home or in other environments such as Pediatric Minds. These factors do not support a finding that District failed to address Parents' concerns or impeded their ability to participate in Student's educational process.

31. Student argued that the IEP team meeting notes do not accurately reflect the context, demeanor, or tenure of the IEP team meetings and thus do not accurately give a picture of the extent to which Parents concerns were ignored and their participation in the IEP process curtailed. The IEP meeting notes relate almost moment

by moment what happened and what was discussed at each of the IEP team meetings. Where Parents did not believe the IEP was accurate, for example when they believed District did not accurately state their concerns and brought that to District's attention, District added to the IEP document to reflect the concerns. When Parents wanted District to add to Student's present levels to reflect Dr. Braun's assessment findings, District did so. Student offered no persuasive evidence that the IEP notes were not accurate for any of the IEP's at issue in this case. On the contrary, those notes reflect vigorous discussion between the parties and consideration of Parents' concerns and suggestions.<sup>9</sup>

32. In sum, Student did not meet his burden of showing that District's failure to address Student's concerns at the level he contends was required, denied him a FAPE, impeded his access to his education, or impeded Parents' participation in the IEP process. Parents of a child with a disability do not have a veto power over a District's decisions to provide or refuse to provide a program or service. (*Vashon Island, supra*, 337 F.3d at p. 1131.) Likewise, just because the team does not adopt the placement or services suggested by Parents or preferred by them, does not mean that the parents have not had an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Educ.* (D.Hawaii 2006) 483 F.Supp.2d 1042, 1051.) A school district is not required to acquiesce to every parental demand. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires."]; *A.V. v. Lemon Grove Sch. Dist.* (S.D. Cal. Feb. 24 2017, 3:16-cv-0803-CAB-(BLM)) 2017 WL 733424, \*7.)

33. Here, District addressed Parents' concerns either at the IEP team meetings;

---

<sup>9</sup> Parents tape recorded most if not all of the IEP team meetings. Student did not offer the recordings or transcriptions of the recordings into evidence at the hearing.

through direct communication between District staff, in particular Mr. Ellis, and Parents and their private service providers; or through correspondence. District gave Parents an opportunity to meaningfully participate in the process, and Parents actively participated. District did not deny Student a FAPE in connection with Issues 1(a) and 2(a).

#### ISSUES 1(B)(I) THROUGH (V) AND 2(B)(I) THROUGH (V): REQUIRED CONTENTS OF THE IEP DOCUMENTS

##### Parties' Contentions

34. Student contends that the IEP documents developed by District during the two school years at issue failed to include the following: a full statement of Student's present levels of performance in all areas; a statement of annual goals in all areas of need; a statement of the special education and related services to be provided based upon peer-reviewed research; a clear and concise statement of the frequency and duration of services; and a clear description of the placement offered. District responds that its IEPs included all necessary components.

##### General Legal Authority

35. The United States Supreme Court has stated that the IEP is the "centerpiece" in the law for the educational delivery system for disabled children. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686].) An IEP is a written statement for each child with a disability that is developed, reviewed and revised in a meeting, and that must contain certain prescribed information. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) Concerning the required content of an IEP document, the IDEA specifically provides that an educational agency need not include information that is not explicitly required by the Act. (20 U.S.C. § 1414(d)(1)(A)(ii)(I); 34 C.F.R. § 300.320(d)(1); Ed. Code, § 56345, subd. (i); see also 71 Fed.Reg. 46661 (Aug. 14, 2006).)

36. In terms of content, an IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1)(A).) An IEP must contain a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs resulting from the disability to enable the child to be involved in and make progress in the general education curriculum, and that meet each of the child's other educational needs resulting from the disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) An IEP must contain a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on such progress will be provided. (20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).)

37. An IEP must also contain a statement of the special education and related services and the supplementary aids and services, based on peer-reviewed research to the extent practicable, that the educational agency offers to provide to or on behalf of the child with a disability, and a statement of the program modifications and supports for school personnel that will be provided to enable the child to advance appropriately towards attaining the annual goals, to be involved and make progress in the general education curriculum, and to be educated and participate with other children with disabilities and nondisabled children. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).)

38. Regarding the statement of special education and related services, the educational agency must provide the parents of a disabled child with a "formal, written offer." (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) However, the IEP offer need not set forth teaching methodologies, strategies or interventions.

(*Mercer Island, supra*, 592 F.3d at p. 952; see also 71 Fed.Reg. 46665 (Aug. 14, 2006) [“there is nothing in the Act that requires an IEP to include specific instructional methodologies.”]). In the same vein, an IEP need not specify administrative matters such as class profiles, teachers and service providers. (*Cerra, supra*, 427 F.3d at p. 194; 71 Fed.Reg. 46667 (Aug. 14, 2006).) Further, a rigid adherence to the laundry list of items required in an IEP document is not paramount. (*Target Range, supra*, 960 F.2d at p. 1484.) Instead, a court or administrative tribunal must view an IEP through considerations of fairness and practicality. (*Roland M. v. Concord School Committee* (1st Cir. 1999) 910 F.2d 983, 994.)

## Analysis

### PRESENT LEVELS OF PERFORMANCE

39. Student contends that District’s IEPs failed to contain complete descriptions of Student’s present levels of performance. A review of the two annual IEPs at issue in this case, for March 24, 2016, and March 20, 2017, dispel that contention. The IEPs contain pages describing Student’s present levels of performance in the areas of academics; functional skills; communication development, including semantics, syntax and morphology, articulation, pragmatics, voice, and fluency; social/emotional development and behavior, including a description of the four behaviors Parents considered of concern; vocational; adaptive and daily living skills; and health. The descriptions in all these areas included results of assessments and Student’s progress in each area. District added to the present levels at Parents’ request and added to them when it had new information about Student in each area based on new or updated assessments and progress reports. It added Dr. Braun’s central auditory processing assessment results after she presented her assessment results to District and the IEP team discussed them.

40. District did not add to the present levels information regarding Student’s

behavior at home or at his private therapy providers and did not specifically add the assessment results of those private providers although the assessments were reviewed by District IEP team members. Student argued that District erred in failing to do so. Student, however, did not provide any authority in support of his contention that a Student's performance outside of school must be included in an IEP document. An IEP is an educational plan to be implemented at school. Unless a direct correlation exists between a student's needs in school and his behavior outside of school, for example where a student has school avoidance anxiety and therefore is not attending school, all of the student's behaviors at home are not required elements of his IEP. The present levels of performance in Student's annual IEPs met all legal requirements. Student has not meet his burden on this issue.

#### Statement of Goals

41. In his closing brief, Student conflates his argument that his IEPs did not include appropriate statements of measurable annual goals, with his arguments that the goals developed were not appropriately ambitious to meet his needs. He then further confuses the issue by arguing that District did not take into consideration Parents' wishes for goals or the recommendations of their private providers.

42. To the extent Student argued that District disregarded Parents' concerns regarding the goals, the argument was addressed above. Student did not persuasively demonstrate that Parents' concerns were not considered. Student also argued that District disregarded suggestions for goals by his private service providers, using as an example one occasion where District failed to add a goal suggested by Ms. Cooper, one of Student's in-home behavior supervisors. District was not required to adopt a goal simply because Ms. Cooper suggested it. As discussed above, many examples exist where District adopted goals for Student, modified others, or deleted goals, based on suggestions or concerns voiced by Parents or their private providers.



43. To the extent Student argued that the IEP document failed to contain a statement of measurable annual goals, that contention is belied by the IEP documents. Each annual IEP contained a statement of each goal developed by the IEP team to address each of Student's areas of needs. The goals were clear and measurable. Each goal indicated Student's present performance in the area of need addressed, stated the goal, why the goal was needed, and who would implement it. Although not legally required, each goal had short-term objectives. To the extent Student argued his goals did not fully meet his needs that argument is addressed below with regard to issues 8(a) and 9(a). Student has not met his burden on this issue.

Statement of Special Education and Related Services Based Upon Peer-Reviewed Research

44. Student contends that his IEPs failed to contain the requisite statement of special education and related services he would receive that were based on peer-reviewed research. District contends Student's IEPs contained all components necessary to provide Student with a FAPE.

45. Title 34 Code of Federal Regulations, part 300.320(a)(4) states IEPs shall include a statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable*. (Emphasis added.) The language "to the extent practicable" regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable or unnecessary to provide such a program. The United States Department of Education's comments and discussions regarding "peer-reviewed research" state that "We decline to require all IEP Team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods, as we believe such requirements are unnecessary and would

be overly burdensome.” (71 Fed.Reg. 46663 (August 14, 2006).) The language “to the extent practicable” regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable to provide such a program. Courts have determined that the most important issue is whether the proposed instructional method meets the student’s needs and whether the student may make adequate educational progress. (*Joshua A. v. Rocklin Unified School District* (E.D. Cal., March 31, 2008, CV 07-01057 LEW KJM.) 2008 WL 906243, \*3, aff’d (9th Cir. 2009) 319 Fed.Appx. 692, 695; 20 U.S.C. § 1414(d)(1)(IV); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(4).)

46. Student is correct that his IEPs do not specify particular methodologies based on peer-reviewed research. However, Student put on no evidence that he required anything other than the curriculum used in his general education classroom. He put on no evidence that critiqued the curriculum used and no documentary and testimonial evidence that he required another curriculum or instructional method to receive a FAPE. To the contrary, the evidence demonstrated that Student made substantial academic progress in the general education curriculum. Notably, the Child Development School where Student attended school during the 2017-2018 school year similarly utilized a general education curriculum taught to state standards. Student has failed to demonstrate that he required a scientifically researched, peer-reviewed curriculum in any academic area to receive a FAPE. District therefore was not required to identify a methodology in Student’s IEPs. Student has not met his burden of proof as to this issue.

Clear, Concise Statement of the Frequency and Duration of Services and the Placement Offered

47. Student makes several contentions that his IEPs did not contain clear, concise statements of the offers of FAPE, and therefore violated the dictates of *Union*,

*supra*. First, he contends that the IEPs failed to give specifics about the placements offered because they did not specify class size and student to teacher ratio. Student offered no authority for this proposition. The fact that Dr. Hannauer recommended a different type of placement is not a basis for a requirement that District list the exact number of children who would be in Student's general education classroom. Student's annual IEPs contained specific descriptions of District's offer of FAPE. Each annual IEP listed his placement as a general education classroom on a District campus. Each annual IEP listed the specific related services Student would receive, breaking each down into individual, group, consultative, or collaborative services. The time allotted for each program or service was also specified as was the frequency and duration of the service. If the IEP team proposed a change during an amendment IEP team meeting, that change was fully memorialized in an amended IEP document.

48. Student contended that the IEPs were not clear and concise because they did not specify *which* type of general education class Student would attend. However, the IEPs in fact did so specify. They specified a general education classroom at Student's home school. Parents were aware that the offer was a general education classroom. They were aware that they had the option to file a request for an intra-district transfer and request that Student be placed in the multi-age classroom. Parents chose to exercise those options for Student in kindergarten and first grade. Parents were fully aware of what Student's placement was and that it was they, not District, who had to request the transfer. There is no evidence that Parents were confused about District's offers of placement, that they were unaware that the multi-age classroom was a parent option classroom, or were confused at any point as to where Student was supposed to be attending school.

49. Although District felt that a traditional general education classroom was the optimal environment for Student, the evidence demonstrated that the multi-age

classroom met all of Student's needs and provided him a FAPE in the least restrictive environment. Student has failed to meet his burden as to these issues.

ISSUES 1(C), 1(D), 2(C), AND 2(D): FAILING TO ENSURE PARENTS WERE MEMBERS OF IEP TEAMS MAKING DECISIONS REGARDING STUDENT'S IEPs /  
PREDETERMINING AND/OR UNILATERALLY DETERMINING STUDENT'S IEPs OUTSIDE THE IEP PROCESS

Parties' Contentions

50. Student contends, and District denies, that District predetermined its offers of FAPE and did not engage in discussions about Student's programming and services with an open mind. Student contends that District's course of conduct is exemplified by District's refusal to consider modifying Student's speech and language goals and by its refusal to develop a behavior intervention plan for Student at the May 2017 IEP. Student contends that District failed to discuss programming or services other than those it proposed at each IEP team meeting.

Legal Authority

51. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840; *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31]; see also, *Vashon Island, supra*, 337 F.at p. 1131 ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful

parental participation, then simply presents the IEP to the parent for ratification.” (citing *Target Range, supra*, 960 F.2d at p.1484)].)

#### Analysis

52. The evidence did not establish that District predetermined any portion of Student’s placement, programming, or services during the two years at issue in this case. District maintained constant communication with Parents and Parents’ private providers. Mr. Ellis and Student’s District service providers either met with Mother in person and by telephone each month to discuss her concerns. Mr. Ellis and Ms. Makino met with in-home service providers regularly and when a specific issue arose for discussion. District participated at the meeting Pediatric Minds had to discuss Student’s discharge from its program. District provided draft IEPs, including draft goals, to Parents so that they could review them and discuss them if they wanted with their private providers. District convened amendment IEP team meetings to discuss Parents’ concerns, to discuss private assessments, and to discuss possible changes to goals and/or services. District agreed to collect data any time Parent believed that District had insufficient information to address Student’s needs. District made modifications and changes to the IEPs suggested by Parents and their private providers and assessors.

53. Student contends that District predetermined his placement because District did not suggest different placement options for the March 2016 and May 2017 annual IEPs. District in both IEPs offered Student placement in a general education classroom with supports. Student provided no persuasive authority that a school district must offer a variety of placement options if the entire team, including Parents, agrees that the present placement is appropriate and is meeting the student’s needs. (See *R. V. v. Simi Valley Sch. Dist.* (C.D. Cal., Apr. 10, 2018, ) 2008 WL 11335016, \*7.)

54. Here, Parents did not at any time suggest that Student required a different type of placement. District fully informed Parents of Student’s need through discussions

at the IEP team meetings such that they had no reason not to understand what the continuum of placements options were or had reason to believe that District withheld placement options at the meetings that deprived them of meaningful participation. Parents did not suggest alternative placements. Parents never expressed dissatisfaction with continuing Student in the multi-age classroom at Orangethorpe. The only discussion for the March 2016 annual IEP was whether Student should remain in the program or should move to a traditional general education classroom. Since the multi-age classroom was open to all general education students, Parents had the option of requesting a transfer for Student to attend it. After observing Student at Orangethorpe, District agreed that he was making progress in the multi-age program. District was therefore open to discussion about Student's continued attendance there.

55. The extent of District's willingness to discuss Student's needs and make modifications to his program is exemplified by its response to Dr. Braun's central auditory processing disorder assessment. There was a comprehensive discussion about her assessment during the October 3, 2016 and November 17, 2016 IEP team meetings. Based upon her report and recommendations, District added numerous accommodations and supplementary aides to Student's IEP and agreed to have Ms. Makino incorporate Lindamood-Bell methodologies into her speech therapy sessions with Student. Later, after Dr. Braun re-assessed Student, District incorporated additional recommended accommodations and supplementary aids in his IEP.

56. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 503 F.Supp.2d 1206, 1216.) Here, District held lengthy and numerous IEP team meetings; met with Parents and their private providers; listened to

Parents' many concerns; made changes and modifications if District agreed with Parents, and declined to do so where District did not. There is no persuasive evidence that District predetermined Student's IEPs. Student has failed to meet his burden of proof as to these issues. (See *K.K. v. Alta Loma School Dist.* (C.D. Cal. Jan. 29, 2013, No. CV 12-403 CAS (AGRx).) 2013 WL 393034, \* 10.)

#### ISSUES 1(E) AND 2(E): FAILURE TO CONSIDER THE RESULTS OF PRIVATE ASSESSMENTS AND RECOMMENDATIONS OF PRIVATE PROVIDERS

##### Parties' Contentions

57. Student primarily argued that District ignored the recommendations of his private assessors in developing his IEPs, particularly regarding early findings that Student suffered from anxiety. Student further alleges that District failed to consider the assessments conducted by Pediatric Minds when Student re-enrolled in its program in November 2016. Student further contends that other private assessments were equally disregarded by District. District argued that it reviewed and considered all assessments Parents provided to it and considered all recommendations made by Student's private providers.

##### Legal Authority

58. A school district is required to consider the results of a privately procured assessment when developing an IEP. (Ed. Code, § 56341.1.) However, the school district is not required to adopt its recommendations. (Ed. Code, § 56329, subd. (c).)

##### Analysis

59. The evidence in this case fails to persuasively substantiate Student's contentions on this issue. To the contrary, the evidence demonstrates that District considered the assessments, recommendations, and input from Student's numerous

private providers. District assessors reviewed Student's private assessments as part of the March 2016 multidisciplinary assessment. Student's IEP team reviewed and discussed Dr. Braun's assessment and recommendations at two IEP team meetings in fall 2016. District adopted many of Dr. Braun's recommendations at those meetings and adopted additional recommendations after Dr. Braun re-assessed Student. District participated in the Pediatric Minds' discharge meeting in January 2017 and discussed the assessments Pediatric Minds had administered as well as Pediatric Minds' findings and recommendations.

60. During the two school years at issue in this case, District service providers met with Mother and Student's private providers to discuss Student's progress and the private providers' recommendations. District developed goals, added information to Student's IEPs, collected data on Student's behavior, and considered services, based on those discussions.

61. At the IEP team meetings culminating in District's May 18, 2017 IEP offer, District referenced the several new private assessments Parents provided to District. District IEP team members reviewed the assessments prior to the IEP team meetings. Ms. Purnick asked Parents and their advocate if there was anything in the assessments that they specifically wanted to bring to District's attention or if there was any particular portion of the assessments that Parents believed needed to be discussed in context of developing Student's IEP. Neither Parents nor their advocate asked for such a discussion.

62. The IDEA did not require District to adopt all of the suggestions and recommendations from Student's private providers. District considered them, and adopted many of them to the extent the IEP team felt they were appropriate for Student's educational needs, which is all the IDEA required District to do. Student failed to meet his burden of persuasion as to these issues.



### ISSUE 3: FAILURE TO PROVIDE ALL EDUCATIONAL RECORDS

#### Parties' Contentions

63. Student contends that District failed to provide Parents with full, legible copies of Student's educational records after their requests on August 5, 2016, and in April 2017. District responds that it provided all records when requested and offered to make copies of any records that were illegible.

#### Legal Authority

64. The IDEA and state educational statutes grant parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) The purpose of this is to assist parents in making informed decisions about their child's education, including being able to fully participate in all aspects of the IEP process.

65. A school district must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the district. (34 C.F.R. §300.613(a).) The district must comply with a request without unnecessary delay. (*Ibid.*) While federal regulations require that educational records be provided within 45 days of request, California law affords parents the right to receive copies of all school records within five business days of the request. (*Ibid.*; Ed. Code, § 56504.) The right to inspect and review education records includes the right to receive an explanation and interpretation of the records; the right to receive copies of the records if failure to provide copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative inspect and review the records. (34 C.F.R. §300.613(b).)

## Analysis

66. The only evidence Student presented to support this allegation is Mother's vague testimony that she did not receive all of Student's records and that some of the data collection records in the parties' evidence binders was illegible. Student did not identify in his complaint, through testimony at hearing, or in his closing brief exactly which records District failed to provide.

67. Parents did not prove they requested records on August 5, 2016. Rather, the evidence proved that in their September 5, 2016 letter to District, Parents requested all of Student's service logs and provider notes "from August 8 to the present." District provided the service logs and provider notes to Parents on September 13, 2016. Ms. Purnick spoke with Mother on September 14, 2016, to clarify the records she wanted. Ms. Purnick provided the additional requested records on September 19, 2016. There is no evidence that District failed to provide other requested records.

68. Parents, through their advocate, made another request for records in April 2017, asking for clear copies of Student's records related specifically to behavior data, including summaries, reports and analysis. District responded by stating that it had already provided the records pursuant to a previous request for records Mother made a couple of months earlier. District offered to make new copies of any of the records that were not legible. It asked Parents to identify the illegible records and come to the District office where new copies could be made. Given how voluminous the records were, District appropriately declined to simply re-copy everything because it might again provide illegible records if it was unaware of which portion of the records could not be read. Parents never responded to District. They never indicated which of the records were illegible and they never went to District's office to review the file and indicate which records they wanted re-copied. District acted promptly and reasonably to Parents' request for records. Student failed to meet his burden of proof that District

denied him a FAPE with regard to any issue of record production.

#### ISSUE 4: FAILURE TO PERMIT OBSERVATION

##### Parties' Contentions

69. Student contends District deprived him of a FAPE by failing to permit Dr. Hannauer or other Pediatric Minds' staff to observe Student at Orangethorpe when they requested it on April 4, 2017. District contends that it properly declined to permit the observation until after it made an offer of placement for Student's 2017 annual IEP.

##### Legal Authority

70. A student has the right to have his or her expert observe a school district's proposed placement prior to testifying in a due process hearing. (Ed. Code, § 56329, subds. (b) and (c); *Benjamin G. v. Special Education Hearing Office* (2005) 131 Cal. App. 4th 875 (*Benjamin G.*); *L.M. v. Capistrano Unified Sch. Dist.* (9th Cir. 2008) 538 F.3d 1261.)

71. Education Code section 56329, subdivisions (b) and (c), provide that where a school district's assessment procedures permit the district to observe a child in the classroom, it must give the same opportunity a parent's independent educational assessor. This applies equally to independent educational assessments initiated before or after a due process filing.

72. The court in *Benjamin G.* examined the legislative history of Education Code section 56329, subdivision (b), and held that the statute mandated an opportunity for a student's hired expert to observe the school district's proposed placement prior to testifying at a due process hearing and regardless of whether the observation is technically a part of an independent educational evaluation. (*Benjamin G., supra*, 131 Cal.App.4th at pp. 883-884.)

## Analysis

73. Student met his burden on this issue. On the other hand, District's arguments justifying its actions were not persuasive. Student requested to have Dr. Hannauer observe him in his multi-age classroom at Orangethorpe after the first IEP team meeting to develop Student's 2017 annual IEP but before the second meeting convened. Parents wanted the observation so that they could have input from Dr. Hannauer regarding whether Student demonstrated anxiety at school, whether Dr. Hannauer believed Student's placement served his needs, and how, if at all, Student's behavior affected his ability to access his education. This information was pertinent to Parents' ability to participate in the process of developing Student's annual IEP, which would include a placement for the upcoming 2017-2018 school year. District's rejection of Parents' request for observation deprived them of this information and therefore significantly impeded their ability to be part of the IEP process.

74. District denied the request because it had not yet made an offer of placement, and because it felt that Parents and their behaviorists already had sufficient time observing Student at school during the 2016-2017 school year. District informed Parents it would re-consider the observation request after it made the offer. District also claimed it did not have enough time to arrange for an observation.

75. District made no attempt to try to find a convenient date for the observation if the time frame requested by Student was not possible. It simply told Student to ask again after District made an offer. The fact that the in-home behaviorists had already observed Student was not a reason for District to deny an observation by Dr. Hannauer, as District contends. An additional observation would not have been disruptive to the school, school staff, or the educational process. Additionally, none of the in-home behaviorists ever suggested that Student required a different placement. Rather, Dr. Hannauer and her staff at Pediatric Minds recommended that Student

required a general education classroom with a very small student to teacher ratio. Therefore, it was important that Dr. Hannauer or staff at Pediatric Minds view Student's present placement to see if their recommendation comported with the reality of Student's educational needs at school, as part of the consideration of the appropriate placement for Student.

76. District argued it was proper to deny the observation because neither Dr. Hannauer nor any other private provider was in the midst of assessing Student. District also argued Parents and their private providers had ample opportunity to observe Student because Mother observed Student informally during her volunteer days in his classroom and during many formal observations of his program. At least two of Student's in-home behavior supervisors observed Student various times throughout the school year. Finally, District argued there was no pending due process proceeding and, therefore, the case of *Benjamin G.* does not apply.

77. District's focus on the fact that it had not yet made a placement offer is not persuasive. District's position for almost two full school years was that Student was successfully accessing his education in the multi-age classroom at Orangethorpe. Because that setting was his present placement, it was highly probable that the same setting would at least be under consideration as the new offer of placement. This was not a situation where Parents were asking to observe every possible placement District might have on its campuses. Parents were asking permission to have their expert, who had recommended against the placement without seeing it, observe the current placement as part of the IEP process. The request was reasonable, particularly in light of Pediatric Minds' recommendation for a different placement.

78. District staff had ample time to observe Student. Ms. Akrawi observed Student four times as part of her assessment. Mr. Ellis did further observations. The purpose of the Education Code's mandate for Parent-requested observations, and the

reasoning in the *Benjamin G.* case, is to permit Parents to have some of the same opportunities school districts have by virtue of the fact that the child in question is attending school at the district day after day.

79. Parents' opportunity to participate in Student's educational process was significantly impeded because they did not have the information that Dr. Hannauer's observation would have provided them. Parents' decision to remove Student from Orangethorpe and enroll him at Irvine's Child Development School was based in part on the recommendations of Dr. Hannauer and her staff. If District had permitted Dr. Hannauer or her staff to observe Student in his placement, their recommendations might have been different. Even if they continued to recommend a different placement, Dr. Hannauer and her staff would have had a concrete basis for the recommendation, which they did not have when they made their recommendation. This is all information that would have informed Parents of what might be appropriate for Student and it would have informed Parents' decision-making process during the course of the annual IEP team meetings. They were deprived of that information.

80. Student met his burden of proof that District's interference with Parents' right to participate in Student's 2017 annual IEP process by refusing an observation by Dr. Hannauer at school resulted in a denial of a FAPE to Student.

#### STUDENT'S ISSUES 5(A), 5(B), 5(C), 6; AND DISTRICT'S ISSUES 10, 11, AND 12: ADEQUACY OF DISTRICT'S ASSESSMENTS

##### General Legal Authority - Assessments

81. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single

procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

82. If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

83. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) In California, a test must be selected and administered to produce results "that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure . . ." (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code § 56320, subd. (c), (f).)

84. Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) School districts are required to ensure that the assessment

tools and strategies provide relevant information that directly assists persons in determining the educational needs of a child. (34 C.F.R. § 300.304(C)(1)-(7).)

85. Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

86. California education law includes several other requirements for assessments and assessment reports. An assessor must produce a written report of each assessment that includes the following: a) Whether the student may need special education and related services and the basis for making that determination; b) The basis for making the determination; c) The relevant behavior noted during the observation of the pupil in an appropriate setting; d) The relationship of that behavior to the pupil's academic and social functioning; e) The educationally relevant health and development, and medical findings, if any; f) For pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; g) A determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and h) The need for specialized services, materials, and equipment for pupils with low incidence disabilities, consistent with guidelines established pursuant to Education Code, section 56136. (Ed. Code, § 56327, subds. (a) through (h).)

87. Once a student has been referred for a reassessment, a determination of eligibility and an IEP team meeting shall occur within 60 days of receiving parental consent for the assessment. (See 20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).)

#### Independent Educational Evaluations

88. Under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502



(a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

89. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

#### District's March 2016 Multidisciplinary Assessment

##### PARTIES' CONTENTIONS

90. District contends that its psychoeducational assessment administered by Ms. Towers and Ms. Chavez, and the speech and language assessment administered by Ms. Makino, were appropriately administered and met all legal requirements. District contends that it does not have an obligation to fund the independent educational assessments Parents requested. Student contends the assessments were not proper for several reasons: Ms. Towers failed to interview Parents; she concentrated on Student's strengths rather than tease out his weaknesses; she used an outdated version of one of the tests; she did not report age equivalencies; and she was not qualified to assess Student's complex disabilities. With regard to the speech and language portion of the multidisciplinary assessment, Student contends: Ms. Makino did not obtain input from Parents; she did not take notes during her assessment; and she was not knowledgeable

about Student's complex disabilities. Student did not address the issue of Ms. Chavez's academic assessment at the hearing.

#### ANALYSIS

91. District proved by a preponderance of the evidence that its psychoeducational assessment and speech and language assessment met all criteria established under federal and state law. First, District provided Parents with an assessment plan for its multidisciplinary assessment to which Parents signed consent. District also timely filed for due process to defend the validity of its assessments on June 6, 2017, less than a month after Parents requested independent assessments.

92. District's assessments, taken together and considered individually, satisfied the federal and state standards regarding the reassessment of a child with a disability. District assessors were qualified to perform their respective evaluations. They selected and administered their respective evaluations so as not to be racially, culturally or sexually discriminatory. The assessors evaluated Student in his native language. They administered their evaluations in the language and form most likely to yield accurate information on Student's academic, developmental and functional abilities. The assessors utilized assessment measures for purposes for which the assessments were valid and reliable.

93. The District assessors were trained and knowledgeable and administered their respective evaluations in accordance with applicable test manuals. They utilized assessment measures tailored to evaluate specific areas of educational need, and the assessments did not solely provide a single intelligence quotient. The assessors selected and administered assessment measures that accurately reflected Student's aptitude, achievement level and behavioral functioning. They did not use a single measure or evaluation to determine Student's continuing eligibility for special education, or in assisting Student's IEP team in developing an appropriate educational plan. Taken

together, the District assessments evaluated Student in all areas of his suspected disability. Finally, the District assessors prepared a joint multidisciplinary assessment report which contained all information required by federal and state law.

94. Both assessments included direct observations of Student by Ms. Towers and Ms. Makino in his classroom, on the playground and during the testing process. Both assessments utilized many different testing instruments, both standardized and non-standardized, to evaluate every possible aspect of Student's disability or possible disability and deficits. Ms. Towers and Ms. Makino reviewed all of Student's records, including previous school assessments and those of his private assessors which were part of his school record. They also received input from Student's teachers.

95. Student contends that the assessments were not valid because neither Ms. Towers nor Ms. Makino reported Student's scores as age or grade equivalencies, which provide additional information about a student's test scores. Ms. Towers and Ms. Makino credibly testified that age and grade equivalencies are not as accurate as standard scores and percentiles in reporting test results. Student argued that Dr. Davidson used age and grade equivalencies in her assessments and advocated for their use during her testimony. However, Dr. Davidson's testimony was not as persuasive as that of District's assessors. Specifically, her testimony critiquing District's assessments for lack of age and grade equivalencies was not persuasive because she stated in her own second assessment of Student that grade and age equivalent scores are "impure" although they can still be useful. No legal requirement exists that assessors must provide grade and age equivalencies. Therefore, even if it were more thorough to include them, the failure to do so did not undermine the validity of the assessments.

96. Student contends that the psychoeducational and speech and language assessments were invalid because neither Ms. Towers nor Ms. Makino interviewed Parents. Ms. Towers obtained input from Parents through their completion of various

rating scales that formed part of her assessment. Ms. Makino received input from Parents at the IEP team meeting convened after District completed the multidisciplinary assessment.

97. There is no statutory requirement that an assessor personally interview a child's parents as part of the assessment process. Title 34 Code of Federal Regulations part 300.305(a) requires that an IEP team and other qualified individuals must review a child's existing evaluation data and, on the basis of that review, *and input from the child's parents*, identify what additional data, if any, is needed to determine whether a child continues to have a disability, the child's present levels of performance, and what the child's special education needs are. The IDEA and its regulations do not require that the input from the child's parents be in the form of an interview as part of the assessment process, nor did Student offer any authority to the contrary. In addition to providing some input during the assessment process, Parents were active participants in all IEP meetings, in particular the meeting where the IEP team discussed the assessments at issue. Ms. Towers and Ms. Makino considered Parents' input, including their suggestions for present levels of performance and goals. Both assessors incorporated Parents' input into the IEP. They added to the description of Student's present levels of performance, revised goals, and suggested programming, services, accommodations, and supports to address Student's needs at school. Student failed to provide any persuasive evidence that Parents were prevented from giving their input or that Ms. Towers or Ms. Makino failed to consider their input during the assessment and IEP process.

98. Student also contends that Ms. Towers and Ms. Makino were not qualified to assess him because they were not experts in Student's anxiety disability or in cognitive behavioral therapy. Student's contention is unfounded. Ms. Towers was a school psychologist with a master's degree and 15 years' experience assessing special

education children. The majority of her additional training was focused on children with autism. She was also a certified behavior intervention case manager. There is simply no evidence that she was not qualified to assess Student or to administer the testing instruments she selected. With regard to Ms. Towers not being qualified because of her lack of knowledge of cognitive behavioral therapy, Student's argument is misplaced because cognitive behavioral therapy is a methodology not a disability. There is no contention that Ms. Towers was going to provide Student with cognitive behavioral therapy. Her lack of knowledge of a particular methodology to address mental health issues is therefore irrelevant to her ability to assess Student.

99. Student's contention that Ms. Towers was not a qualified assessor is weakened by the fact that Dr. Davidson had similar qualifications to Ms. Towers. Both had similar master's degrees, experience, and training, with the sole difference that Dr. Davidson had a doctorate in educational management, which is unrelated to administering psychoeducational assessments. Dr. Davidson acknowledged during her testimony that she had no training in cognitive behavioral therapy and could only refer her clients to professionals that did. Dr. Davidson's lack of training and experience in cognitive behavior therapy does not undermine in any way her actual assessment. Her assessment was thorough and in-depth; it is her conclusions and recommendations that this decision finds unpersuasive.

100. Likewise, there is no persuasive evidence that Ms. Makino was not fully qualified to assess Student. She had a master's degree in communication development and almost 20 years of experience as a speech and language pathologist at the time she assessed Student. Her education and experience assessing Student was greater than that of Student's expert, Ms. Caccavale, who had not been practicing as a speech and language pathologist as long as had Ms. Makino and who had not worked in a public school system. Neither Ms. Makino nor Ms. Caccavale had experience with cognitive

behavioral therapy. However, both had experience assessing autistic students and both had experience with students who had anxiety. Their lack of experience with the methodology of cognitive behavioral therapy had no negative impact on the validity of their assessments or the speech therapy both provided to Student. It is disingenuous for Student to attack the credentials of District's assessors but urge that his private assessors' opinions be found more credible when they had the same education, training, experience, and lack of familiarity with cognitive behavioral therapy as did District's assessors. Student has failed to persuasively prove that Ms. Towers and/or Ms. Makino were not qualified to assess him.

101. Student's other contentions regarding the assessments done by Ms. Towers and Ms. Makino are likewise unpersuasive, for the many reasons discussed above. District proved that it met all procedural requirements associated with the assessments, including timely filing to defend their validity. Student is not entitled to either a speech and language or psychoeducational independent educational evaluation at District's expense.

#### Mr. Ellis's March 24, 2016 Functional Behavior Assessment

#### PARTIES' CONTENTIONS

102. Student contends that Mr. Ellis's March 24, 2016 functional behavior assessment was not valid for several reasons. He first contends that Mr. Ellis should not have utilized Student's aides to collect behavioral data for the assessment. He also contends that Mr. Ellis failed to test his hypotheses about two of Student's behaviors, thereby invalidating the assessment. District contends that the assessment met all legal requirements such that Student is not entitled to an independent functional behavior assessment at District's expense.

#### LEGAL AUTHORITY SPECIFIC TO FUNCTIONAL BEHAVIOR ASSESSMENTS

103. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Although there are no specific legal guidelines for a functional behavior assessment, if such an assessment is used to evaluate an individual child to assist in determining the nature and extent of special education and related services that the child needs, the functional behavior assessment is considered an evaluation under federal law. (*Letter to Christiansen*, 48 IDELR 161 (OSEP 2007). Consequently, a functional behavior assessment must meet the IDEA’s legal requirements for an assessment, such as the requirement that assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. The assessment must be comprehensive and the analysis of the assessment results must be thorough, accurate, and reliable. (34 C.F.R. § 300.304(c)(7); Ed. Code § 56320 subd. (b)(2) and (f); *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1121(*Timothy O.*).

#### ANALYSIS

104. Student first contends that Mr. Ellis’s functional behavior assessment was not valid because he; Student’s aide, Ms. Garcia; and an assistant assigned to Ms. Chavez’s classroom, collected the data for the assessment. Student contends that data should have been collected by people who did not know Student and were not interacting with him while collecting the data. Dr. Davidson supported this position. She opined that best practices require that the observer not be a person working with the Student because it might impact the neutrality of the data collection process.

105. Although Dr. Davidson testified that other authority support her opinion regarding data collection, she did not state what or who that authority was. Her opinion

that unknown data collectors should be used for behavior assessments was contradicted by every one of Student's experts who testified at hearing and who had at some point collected data on Student's behavior for their own assessments. Dr. Hannauer and Pediatric Minds assessed Student and took data on him during the time he attended Pediatric Minds. They used their own staff who had been working with Student to collect the data. Student's in-home applied behavior analysis therapists consistently took data on him while they worked with him.

106. Brianna Cooper, a Board Certified Behavior Analyst from In Steps, was one of several behaviorists who supervised Student's in-home behavior for some of the time he received in-home services from that agency. She specifically rejected the idea that it was inappropriate to use unknown data collectors. In Steps used the student's own behavior therapist, the student's assigned behavior supervisor, and the student's parents to collect behavior data. All these people were known to the student. Ms. Cooper specifically rejected the idea that any of these people would be biased in their collection of behavior data. She opined that they would all have the same definitions of the operational behaviors for which they were collecting data.

107. Similarly, the Irvine Child Development School, where Student began attending school at the beginning of the 2017-2018 school year, used the behaviorists and teachers who worked with Student to collect data on his behavior. For these reasons, Dr. Davidson's opinion that Mr. Ellis's behavior assessment was flawed because Mr. Ellis and Student's aides collected the data was unpersuasive and was not given any weight.

108. Mr. Ellis did not test the validity of his hypotheses regarding Student's aggression and elopement. In his assessment report and in his testimony at hearing, he stated that he had not done so because it would have disrupted the educational environment. Behavior assessors verify their hypotheses by artificially creating situations



where a child engages in the targeted behavior. The assessor then responds to the behavior in a variety of ways to see how the child reacts and to determine whether the assessor's theory about the reasons for the child's behavior was correct.

109. Student experts Dr. Davidson and Ms. Cooper criticized District's functional behavior assessment because of the lack of verification of the hypotheses with data. Dr. Davidson opined that without such verification, the assessment was just an anecdotal report of data and not a full functional behavior assessment. Ms. Cooper supported Dr. Davidson's opinion. She opined that a behaviorist has an ethical obligation to follow certain assessment procedures and that best practices was for the assessor to test the validity of his or her hypotheses about why a child was engaging in a given behavior. Ms. Cooper stated that the only reason not to do so would be if it could result in danger to the child or to others.

110. District did not offer a concrete justification for Mr. Ellis's failure to test the validity of his hypotheses concerning Student's eloping and aggression behaviors. Although Mr. Ellis found that it would be disruptive to the school environment, he did not testify that it would be dangerous to test his hypotheses. Student did not elope out of the classroom or out of the school campus and there was no indication that his elopement behavior ever put him or others in danger. Likewise, Student's aggression was minimal, consisting of occasionally hitting a peer with an open hand or pushing peers when he did not like what was happening during an interaction, particularly on the playground. Student's aggression never hurt anyone, and his peers engaged in similar behavior. There was no evidence that testing Mr. Ellis's hypothesis that the aggression was because Student wanted to get away from peers who had been aggressive toward him, or wanted to avoid peers not following rules, would have put anyone in harm's way. Likewise, there was no evidence that testing Mr. Ellis's hypothesis that Student eloped to get to a location sooner would have put Student or anyone else

in danger. A functional behavior assessment that fails to provide sufficient data to reliably determine the function of a student's serious behaviors does not constitute an appropriate evaluation. (See, e.g., *Cobb County School Dist. v. D.B.* (N.D.Ga. Sept. 28, 2015, No. 1:14-CV-02794-RWS) 2015 WL 5691136.) For these reasons, District failed to prove by a preponderance of evidence that its functional behavior assessment was legally valid.

111. However, Student did not prove in his case that the failure to test the validity of the hypotheses regarding his elopement and aggression behaviors denied him a FAPE. A District's failure to conduct an appropriate assessment is a procedural violation of the IDEA. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused the student a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subds. (f)(2) & (j); *Target Range, supra*, 960 F.2d 1479 at p. 1484, superseded on other grounds by statute, ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."]; *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910) [rejecting a structural defect approach and finding a procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation].)

112. Here, Student did not prove that he was denied a FAPE or deprived of educational benefits because of the inadequacies in the functional behavior assessment. He offered no evidence or persuasive argument in his closing brief to support such a finding. For example, neither Dr. Davidson nor Ms. Cooper opined that District's IEP

offers were inadequate because of the invalid functional behavior assessment. Mother, the only one of Student's parents to testify at the hearing, did not testify that she was unable to participate in developing Student's IEPs because the assessment did not test all of the hypotheses concerning Students' behavior. Further, Student's aggression and elopement behavior were not significant, especially compared to his typically developing peers in his class. No other evidence established that the procedurally deficient functional behavioral assessment resulted in the IEP team's inability to develop an educational program or behavior support plan for Student that addressed his behavioral needs. For these reasons, although District did not meet its burden to demonstrate the functional behavior assessment met all legal requirements, Student failed to demonstrate that the inadequacies in the assessment denied him a FAPE, justifying any remedy other than that discussed above for District's procedural violation.

#### Ms. Akrawi's Social/ Emotional Assessment

#### PARTIES' CONTENTIONS

113. Student contends that the social emotional assessment was flawed because it assessed Student's behavior rather than his mental health issues. Student argued that because Mr. Ellis significantly participated in the collection of data for the social emotional assessment, Parents were misled as to its purpose and its function. Student contends that the assessment only addressed behavior and did not address Student's anxiety issues. Student further contends the assessment was flawed because it contained data collected on the behavior of peers, which was an improper component of the assessment and not relevant to Student's issues. District contends that the assessment met all legal requirements.

114. Like a functional behavior assessment, a social/emotional assessment must meet all legal requirements. Ms. Akrawi was qualified to perform the social/emotional assessment and performed the assessment in accordance with the statutory

requirements. She selected and administered the assessments so as not to be racially, culturally or sexually discriminatory. She evaluated Student in his native language and administered the assessments in the language and form most likely to yield accurate information about Student's behavior and social/emotional functioning. She used the assessment measures for purposes for which the assessments were valid and reliable. Her assessments were tailored to evaluate specific areas of educational need and did not solely rely upon a single intelligence quotient. She conducted the assessments in accordance with the instructions for each assessment. She gathered information for the assessment by observing Student, reviewing his records, and administering a variety of tests.

115. Student's criticism that the assessment was invalid because Ms. Akrawi collected data on Student's peers in addition to Student was not persuasive. District's position over the two years Student attended a District school was that many of his behaviors were not outside the norm for a typically developing peer of his age in his particular classroom. The data collected for the social/emotional assessment confirmed that, in many cases, Student's behavior was similar to or of lessor intensity than that of his peers. Student provided no authority through testimony or closing argument to support his position that taking data on peers is improper or somehow invalidates the assessment.

116. Student's argument that the social/emotional assessment looked at his behavior rather than at his anxiety, was also not persuasive. First, Ms. Akrawi's assessment included the administration of several testing instruments that analyzed issues such as anxiety, through the completion of rating scales by Father and Student's teacher. These included the Behavior Assessment System for Children, the Connors Behavior Rating Scales, the Emotional and Behavior Problems Scales, and the Scale for Assessing Emotional Disturbance. Ms. Akrawi also observed Student four times in

different environments to assess not only his behavior but whether he was exhibiting anxiety in any setting at school. None of his teachers or his related services providers indicated a significant problem with anxiety.

117. Student failed to prove that Ms. Akrawi should have utilized other types of assessment tools. None of Student's experts critiqued her assessment, in contrast to Dr. Davidson's and Ms. Cooper's criticisms of District's functional behavior assessment. Ms. Akrawi addressed the concerns Parents specifically raised. She used a variety of assessment tools, received input from Parents and Student's teachers and services providers, observed Student, reviewed his records, and memorialized her findings in a thorough report. The report was discussed in detail at an IEP team meeting. Parents' disagreement with Ms. Akrawi's findings and/or recommendations is not a factor in determining the validity of her assessment. To the extent that Parents believed that the social/emotional assessment was going to address different concerns, they could have, but did not, request District to administer an educationally related mental health assessment. None of the District IEP team members observed any behavior that suggested Student needed such an assessment. District proved by a preponderance of evidence that Ms. Akrawi's assessment met all legal requirements. Student failed to demonstrate that it did not, and therefore has not met his burden of proof as to this issue.

#### ISSUE 7(A) AND 7(B): FAILURE TO ASSESS IN THE AREAS OF CENTRAL AUDITORY PROCESSING DISORDER AND VISUAL PROCESSING

##### Parties' Contentions

118. Student contends that he had suspected disabilities in the areas of central auditory processing disorder and visual processing. He contends that District should therefore have assessed him in both areas. District responds that Student failed to prove that assessments were warranted in either area.

## Legal Authority

119. For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

120. A school district’s failure to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park, supra*, 464 F.3d at pp. 1031-1033.)

## Analysis

### CENTRAL AUDITORY PROCESSING DISORDER

121. Student first argued that District was on notice that he might have had a central auditory processing disability because Ms. Towers reviewed Dr. Davidson’s first assessment of Student from 2014, which determined Student had auditory processing deficits. Dr. Davidson recommended the use of a system that directs sound directly to the student through earphones. However, Student’s argument begs the question. Dr. Davidson acknowledged in her testimony that she is not a trained audiologist, and therefore not qualified to test for central auditory processing disorders. Dr. Davidson, as did Ms. Towers, administered tests to Student to determine if he had an *auditory processing* deficit, not a *central auditory processing disorder*. Ms. Towers’s psychoeducational assessment thoroughly assessed Student in the area of auditory processing. Her test results did not indicate Student had an auditory processing disorder. Nothing in Ms. Towers’s assessment results or in Student’s classroom performance indicated any reason to believe that he had a central auditory processing

disorder that needed further assessment.

122. Parents did not consider central auditory processing disorder a possibility until Dr. Reid suggested in the summer of 2016 that they have Student assessed for the disorder. Dr. Reid recommended Dr. Braun. Rather than ask District for the assessment, Parents privately funded the assessment. Dr. Braun subsequently participated in two IEP team meetings in the fall of 2016 where Student's IEP team discussed the results of her assessment. District did not dispute the validity of Dr. Braun's test results. However, at the IEP meetings, District IEP team members questioned Dr. Braun as to how the diagnosed central auditory processing disorder affected Student's educational performance. Dr. Braun never observed Student in the classroom and did not have specific answers to District's questions. Dr. Braun's assessment report made classroom recommendations, but they were not based on a connection between the diagnosed central auditory processing disorder and Student's educational needs. Neither Dr. Braun nor any other qualified audiologist testified at the hearing and thus there was no persuasive evidence that Student actually required any of Dr. Braun's suggested interventions.

123. However, in spite of District's skepticism about Student's needs for intervention based on the deficit, District acknowledged that Student had a diagnosed auditory processing disorder and included Dr. Braun's assessment results as part of Student's present levels of performance when it amended his IEP in the fall of 2016. District implemented many of Dr. Braun's recommended accommodations and supplementary aids. District agreed to add more of her recommendations to Student's IEP as well. District did not agree to her recommendation for the CAPDOTS program. Although District did not agree to fund Student's attendance at a Lindamood-Bell program, it agreed to use Lindamood-Bell methodologies during Student's speech and language therapy as Ms. Makino had been trained in it.

124. District accepted Dr. Braun's assessment results and did not dispute Student had a central auditory processing deficit. District therefore did not need to do its own central auditory processing assessment. Student's reliance on the case of *Timothy O., supra*, is not persuasive. In *Timothy O.* the Ninth Circuit found that "[I]f a school district has notice that a child has displayed symptoms of a covered disability, it must assess that child in all areas of that disability using the thorough and reliable procedures specified in the Act. School districts cannot circumvent that responsibility by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion." (*Timothy O., supra*, 822 F.3d at p. 1119.) Here, District did not rely on informal observations about Student in determining his needs. Rather, it relied on Dr. Braun's formal assessment. District has never contended that Dr. Braun did a faulty assessment. District accepted the results, noted them on Student's IEPs, and provided a Student a significant amount of accommodations in conformance with Dr. Braun's recommendations.

125. Student failed to prove that he was denied a FAPE, that he suffered a loss of educational benefit, or that his Parents' right to participate in his IEP process was significantly impeded by District's failure to assess in the area of central auditory processing disorder. Student also did not prove that Student's central auditory processing deficit impacted his ability to access his education or was the reason for any of his behaviors at school. Dr. Braun acknowledged at Student's IEP team meeting in fall 2016 that central auditory processing deficits often do not affect a child's education until he or she is in third grade. Student was in first grade at the time of the assessment. Dr. Braun re-assessed Student in spring 2017, less than a year after her initial assessment. Student's test results on the second assessment were normal in all but two areas. Dr. Braun acknowledged at the 2017 IEP meeting that central auditory processing disorders can sometimes resolve by themselves. Based on all these factors, Student



failed to meet his burden of proof that he was denied a FAPE based upon District's alleged failure to assess him for a central auditory processing disorder.

#### VISUAL PROCESSING ASSESSMENT

126. Student argued that District should have assessed him in the area of visual processing. The only support Student provided for this argument was a passing reference in his closing brief to Dr. Davidson's recommendation for a visual processing assessment in her 2014 assessment of Student.

127. As part of her psychoeducational assessment, Ms. Towers extensively assessed Student's visual processing. Although Student had a below average score in visual memory, Ms. Towers observed no evidence that the weakness impacted Student's classroom performance. Student was meeting or exceeding grade level academic standards, which indicated he might have been using his strengths in other areas to compensate for the weakness. He did better in other areas of visual memory and did not demonstrate memory deficits on other tests. Ms. Towers therefore opined that there was no reason to believe at the time of her assessment that Student had a visual processing disorder that required assessment.

128. Ms. Towers's opinion is supported by the fact that District also administered to Student the Beery-Buktenica Developmental Test of Visual-Motor Integration – Sixth Edition, as part of its occupational therapy assessment. Visual perception includes the ability to perceive, discriminate, and recall form and space. The assessment tests the extent to which the student can integrate visual and motor abilities, also known as "eye-hand coordination." Students need these skills to copy from a board, complete puzzles, and recall visual information. Student's visual-motor integration standard score was 106, in the average range. His visual perception score was 120, in the high range. The test demonstrated that visual perceptual skills were an area of strength for Student. Therefore, there is no persuasive evidence that District had a reason to

suspect that Student might have a visual processing disorder. Student failed to meet his burden of proof on this issue.

#### ISSUES 8(A)-8(H): DENIAL OF FAPE FOR THE 2015-2016 SCHOOL YEAR UP TO MARCH 2016

129. Student generally contends that District failed to offer him a FAPE during the 2015-2016 school year because District did not develop appropriate goals to address all of Student's needs; failed to address his anxiety and other behavioral issues at school; failed to provide him a program that addressed his needs as a twice-exceptional child; failed to provide appropriate related services; and failed to provide appropriate and adequate extended school year services. District responds that it provided Student with a FAPE at all times.

April and May 2015, September 2015, January 11, 2016, January 29, 2016, and February 17, 2016 IEPs

#### STUDENT'S CONTENTIONS

130. Student raised issues regarding his April and May 2015 IEPs. Although Student did not seek to extend the applicable two-year statute of limitations, he alleged that his April and May 2015 IEPs "as implemented" denied him a FAPE. By that argument, Student appears to contend that, at least regarding substantive aspects of the IEPs, inadequacies of an IEP developed outside of the statute of limitations can be argued as continuing into the time period within the two-year statute of limitations. To the extent Student so contends, he is mistaken.

#### Legal Authority

131. Special education law does not recognize the doctrine of continuing violations as an exemption from the two-year statute of limitations. (71 Fed. Reg. 46697 (Aug. 14, 2006); *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257,

268-269; *Moyer v. Long Beach Unified School Dist.* (C.D.Cal., Jan. 24, 2013, No. CV 09-04430 MMM AJWx) 2013 WL 271686; *Patrick B. v. Paradise Protective and Agricultural School, Inc.* (M.D.Pa., Aug. 6, 2012, No. 1:11-CV-00927 ) 2012 WL 3233036, p. 6; *Baker v. Southern York Area School Dist.* (M.D. Pa., Dec. 8, 2009, No. 1:CV-08-1741) 2009 WL 4793954, p. 5; *Evan H. v. Unionville-Chadds Ford School Dist.* (E.D. Pa., Nov. 4, 2008, No. 07-4990) 2008 WL 4791634, p.5.)

132. The issue therefore is whether District became aware of any changes in Student's needs after he started school for the 2015-2016 school year, but failed to respond to those needs by not reassessing Student's changed circumstances and/or modifying the April and May 2015 annual IEPs. The law requires an IEP team to meet at least annually "to determine whether the annual goals for the pupil are being achieved, and revise the individualized education program, as appropriate, to address among other matters the following: (1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate...." (Ed. Code, § 56341.1, subd. (d).) An IEP meeting must be called when the "pupil demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

#### Analysis

133. Student failed to demonstrate that District was aware of any changes in his needs but failed to address them from the time he started kindergarten in August 2015 through March 24, 2016, when District convened the first meeting to develop Student's 2016 annual IEP. The evidence demonstrated that District was thoroughly involved in addressing Student's needs, addressing Parents' concerns, and in making modifications to Student's IEP as needed.

134. District convened an amendment IEP team meeting on September 3, 2015, to review Student's progress during his first month in kindergarten, which was the first time he attended a District school. The IEP reviewed Student's progress on his goals.

Student was progressing on his goals. He was academically ahead of his same-aged peers. The IEP team deleted some goals, revised others, and decreased Student's specialized academic instruction based on his academic progress in class. District agreed to take data on whether Student required extended school year services during all school breaks.

135. The IEP team met on again on September 14 and 16, 2015. District reviewed Student's speech goals. Ms. Makino revised the goals based on suggestions from Parents and other IEP team members. District addressed Parents' concerns that District was not implementing Student's behavior plan. District agreed to conduct more classroom observations and monitor Student's behavior. The IEP team reviewed private assessments Parents provided to the team. Parents did not request any additional related services at this time. There was no persuasive evidence that Student's needs had changed or that he required additional goals or additional related services.

136. District convened another amendment IEP team meeting on October 7, 2015. The IEP team added a social initiation goal for Student and updated baseline data on his behavior goals. Student's behaviors in the four identified areas of concern: inappropriate touching, talking out in class, aggression, and elopement, had all decreased. The IEP team developed a new behavior intervention plan for Student based on data collected by Mr. Ellis and Ms. Garcia. The behavior plan included classroom accommodations to assist Student; the accommodations were also included in Student's IEP. The behavior plan and the modifications to Student's IEP addressed all of his needs known at the time. There was no persuasive evidence that Student required any further modification to his IEP at this time.

Extended School Year Services During the 2015-2016 School Year: January 11 and January 29, 2016 IEP Team Meeting

PARTIES' CONTENTIONS

137. Student contends that he required year-round services in occupational therapy, speech and language, social skills, and behavior. This included not only summer break, but school breaks during Thanksgiving, winter break, and spring break. District responds that Student did not require services during Thanksgiving break, winter break, or spring break.

LEGAL AUTHORITY

138. In addition to special education instruction and services during the regular school year, school districts must provide extended school year services in the summer if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom extended school year services must be offered under section 3043:

“ . . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.”

## ANALYSIS

139. Student's IEP team convened on January 11, 2016, to again discuss Parents' request for extended school year services. Parents' request was primarily based on behavioral issues Student demonstrated during occupational therapy sessions. District collected data after its Thanksgiving break and after the winter break. Although Student demonstrated some decreased self-regulation during occupational therapy and speech and language therapy sessions, he could participate in the sessions and make progress on his goals. Student recouped any regression in skills within a short time of returning to school. The regression he demonstrated was in regulation of his behavior and not in the actual occupational therapy or speech skills themselves.

140. The need for extended school year services is based on both demonstrated regression *and* demonstrated limited recoupment capacity. The latter requirement basically means that extended school year services are needed if a child takes too long to regain skills that have regressed. In this case, Student did not prove that he took such a long time to regain skills that District was required to provide him with related services during District's one-week Thanksgiving breaks, District's two-week winter breaks, or District's one-week spring breaks. Whatever regression Student demonstrated was in the area of behavior. The evidence showed that Student easily returned to previous levels within a short time of returning to school.

141. The evidence demonstrated that from September 11, 2015, to March 16, 2016, District convened numerous and lengthy IEP meetings to discuss Student's progress. District revised present levels of performance, revised present goals, deleted others, and added new goals, all where needed and all with participation and input from Parents. District had no reason to add to or modify Student's program or related services. District did not fail to meet Student's needs during this time frame. To the extent Student alleges that District did not do so, he failed to meet his burden of proof.

ISSUES 8(A) AND 9(A): FAILURE TO DEVELOP APPROPRIATE AND AMBITIOUS GOALS  
IN ALL AREAS OF NEED

Parties' Contentions

142. Student contends he failed to make progress on some of his goals and that District failed to develop appropriate and ambitious goals in all areas of disability. District contends that Student's goals addressed all of his needs.

Legal Authority

143. Federal and State law specify in detail what an IEP must contain. Among other things, it must include a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).)

144. The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general education curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).)

145. The IEP team is charged with developing measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (*Letter to Butler* (OSERS Mar. 25, 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12406, 12471 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his goals. (20 U.S.C. §

## Analysis

### MARCH 2016 TRIENNIAL/ANNUAL IEP

146. Student's 2016 triennial/annual IEP team meeting took place over four dates between March 24, 2016, and May 18, 2016. During that time, Student's IEP team developed goals in the areas of academics, speech and language, occupational therapy, and behavior. The speech and language goals and behavior goals somewhat overlapped in addressing Student's pragmatic and social needs, including his ability to appropriately interact with peers and adults. Although District IEP team members proposed draft goals, which District provided to Parents before the IEP team meeting at which goals were discussed, the full IEP team, including Parents and their in-home behaviorist revised the goals during the IEP team meetings. Revisions included changes to baseline information in the goals and inclusion in the goals of additional strategies suggested by Parents and their behaviorist.

### MARCH 20, 2017 ANNUAL IEP

147. Student's IEP team met on March 20, 2017, to develop his 2017 annual IEP. The team discussed Student's progress on his present goals and discussed his present levels of performance. The team reconvened on May 4, 2017, to complete the development of the IEP. District proposed goals in the areas of academics, behavior, speech and language, and occupational therapy. The IEP team developed the goals based on input from District IEP team members, Parents, Parents' in-home behavior provider, and Parents' advocate.

148. Student offered no persuasive evidence of how the goals for his March 24, 2016 or March 20, 2017 annual IEPs should have been different or why they did not meet his needs. Although District did not include in the annual IEPs every goal



suggested by Parents or their private providers, Student did not prove that he required the additional goals to receive a FAPE. Dr. Davidson criticized the fact that the objective of Student's new behavior goal in his March 201, 2017 IEP only required him to decrease his inappropriate comments by half. She did not state how this denied Student a FAPE. None of Student's other witnesses discussed his IEPs during their testimony. Although Student's private speech therapist and behavior therapists had occasionally suggested additional goals for Student, none discussed at hearing why the additional goals were needed for Student to have a FAPE or why the goals in his IEPs were insufficient. Student failed to meet his burden of proof that the goals in the two annual IEPs at issue in this case were inappropriate or failed to address all his needs.

ISSUES 8(B), 8(C), 8(D), 8(E), 9(B), 9(C), 9(D), AND 9(H): FAILURE TO PROVIDE APPROPRIATE LEVELS OF RELATED SERVICES IN SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, AUDITORY PROCESSING, AND SOCIAL SKILLS

Parties' Contentions

149. Student contends that District failed to offer sufficient speech and language services and occupational therapy services based on the fact that he received private services outside of school hours, funded by Parents' insurance, with co-pays paid by Parents. Student contends that District should have provided Student with additional services comparable to what he received privately. Student also contends that he had a central auditory processing disorder and that District should have provided him with the CAPDOTS program and the Lindamood-Bell program to address the disorder. Student also contends District failed to meet his needs in the area of social skills. District contends that it offered Student sufficient services to meet his needs and enable him to access his education.

## Legal Authority

150. Related services include speech and language services, occupational therapy services, and other services as may be required to assist a student with a disability to benefit from special education. (20 U.S.C. §1401(26)(A); 34 C.F.R. § 300.34(a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union, supra*, 15 F.3d at p. 1527.) State law adopts this definition of related services. (Ed. Code, § 56363, subd. (a) & (b).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities and achieve the goals of his IEP. (*Park, supra*, 464 F.3d at p. 1033.)

## Analysis

### SPEECH AND LANGUAGE THERAPY

151. Student relied on the fact that his insurance company authorized occupational therapy and speech and language therapy to support his contention that District's offer of services in these areas was not sufficient. The crux of Student's argument is that he only achieved progress because of the additional services. Student's position was not supported by any evidence. None of his witnesses' testimony supported his contention.

152. District offered Student a total of two hours of speech and language therapy per week in the April and May 2015 IEPs. It continued to offer the same amount in Student's March 24, 2016 triennial/annual IEP. The services consisted of both individual therapy and group therapy. In the March 20, 2017 IEP, District offered Student a total of 90 minutes a week of speech and language therapy, again consisting of individual and group therapy.

153. Parents never asked District to increase the amount of Student's speech

and language therapy during the development of any of Student's IEPs. None of their private providers, including Dr. Davidson, recommended that Student receive more than two hours a week of speech and language therapy.

154. Ms. Caccavale's testimony as expert for Student did not support Student's contention that he required additional speech and language therapy. Ms. Caccavale privately provided Student with two hours a week of speech and language funded by Parents' medical insurance. The private services were based on a medical model rather than an educational model. The insurance company required that Ms. Caccavale periodically assess Student to determine if he continued to require service. The insurance company required that the assessment and determination of need for services be done in a vacuum, without reference to any other speech services Student might be receiving. Therefore, when Ms. Caccavale recommended Student needed two hours total speech therapy sessions a week to make progress, her recommendation was not made *in addition* to the services Student received from District but *irrespective* of those services. Ms. Caccavale offered no opinions at hearing, and Student offered no evidence, that supported Student's contention that District's offer of speech and language services during the two years at issue was not appropriate. Student has not met his burden of proof as to these issues.

#### OCCUPATIONAL THERAPY

155. Student contends that the occupational therapy services provided in his IEPs was similarly inadequate based on the fact that he received private occupational therapy through Parents' medical insurance. Student provided no support for his contention. Dr. Lindquist was the only occupational therapist to testify at hearing. He did not testify or even suggest that Student required additional school-based occupational therapy to receive a FAPE. Student failed to meet his burden of proof that he required more occupational therapy than what his IEPs provided.

## AUDITORY PROCESSING

156. Student contended that District failed to address his central auditory processing disorder. Student contended District should have followed Dr. Braun's recommendations and paid for the CAPDOTS program and for the Lindamood-Bell program.

157. Student failed to meet his burden of proof on this issue. Although Dr. Braun diagnosed Student with a central auditory processing disorder, she was unable to articulate to Student's IEP team how the disorder affected Student in the classroom. Dr. Braun acknowledged to the IEP team that children with the disorder often did not manifest any effects of it until third grade; Student was in first grade when she diagnosed him. Dr. Braun also acknowledged that the disorder sometimes cleared up on its own. By the time she re-assessed Student in spring 2017, his central auditory processing test scores were normal in all but two areas.

158. Dr. Davidson testified that Student required the Lindamood-Bell program to address his central auditory processing disorder. However, her testimony was not persuasive. She based her opinion on the fact that Student's scores on Lindamood-Bell's assessments increased after he attended an 80-hour Lindamood-Bell program in summer 2017. But Dr. Davidson failed to note the many areas in which Student's scores were stagnant or actually decreased after he attended the program. Additionally, Dr. Davidson either failed to address discrepancies in the Lindamood-Bell assessments or failed to coherently address the discrepancies. Moreover, although the Lindamood-Bell program was designed to increase Student's reading comprehension, it did not. Ms. Nguyen, his teacher at Irvine's Child Development School, testified that although Student had strong academic skills and was at grade level, he continued to have a weakness in reading comprehension. Student offered no persuasive evidence that Lindamood-Bell addressed any deficit Student might have continued to experience in

central auditory processing.

159. The evidence persuasively demonstrated that District adequately addressed Student's central processing disorder once they were informed of it. Student's IEP as of October 2016 already contained many of Dr. Braun's recommendations for classroom accommodations and supplementary supports. District added additional accommodations and supplementary aides to Student's March 2017 IEP based on Dr. Braun's recommendations. District also agreed to have Ms. Makino implement Lindamood-Bell methodologies during her speech therapy sessions with Student.

160. Student was making good progress in the general education curriculum. He was able to follow oral instructions. He was able to complete his assignments, even when the assignments were presented orally rather than in written form. His reading comprehension was at grade level. He interacted with his peers in class and on the playground. His difficulties were based on his pragmatic deficits attributable to his autism and not to his central auditory processing deficit. Student presented no persuasive evidence that District failed to adequately address his central auditory processing disorder. Student failed to meet his burden of proof as to this issue.

#### SOCIAL SKILLS

161. Student contends that District denied him a FAPE by failing to provide adequate social skills services to him. Student argued Parents enrolled him in a social skills class through Irvine's Child Development School in spring 2017, and he benefited from the class, claiming these facts support his contention. Student's argument begs the question of whether he required additional social skills services to receive a FAPE.

162. Although Student's experts Ms. Gonzalez, Dr. O'Haire, Dr. Swords, and Dr. Schuck testified to the benefit he received from the Child Development School's social skills class, none of them addressed whether Student required additional social skills to

receive a FAPE. None of these witnesses had a clear understanding of Student's needs at school. Their testimony concentrated on the fact that the social skills class maximized focus on Student's social skills needs and addressed Student's behavioral issues in environments outside of the school setting. The testimony of these experts therefore did not support Student's contention that he required more social skills services at school.

163. Student's argument is further weakened by the fact that District attempted to increase the amount of his group speech therapy and to decrease the amount of his individual speech therapy, specifically so that District could focus on Student's pragmatic speech and social interaction goals and his needs in those areas. Parents refused to consent to increasing Student's time in group therapy sessions. It is disingenuous for Student to assert that District failed to meet his social skills needs when District attempted to do just that but was prevented from implementing the proposed service. Student failed to meet his burden of proof that District should have offered him additional social skills services.

#### ISSUES 8(G) AND 9(I): FAILURE TO OFFER PARENT TRAINING

##### Parties' Contentions

164. Student contends that Parents requested parent training throughout the two school years at issue but District declined to provide it. When District did not provide it, Parents obtained training through private sources. Student contends that Parents required the training to understand his needs. District responds that it did provide training to Parents. District further contends Student failed to demonstrate what type of training it should have provided to Parents.

##### Legal Authority

165. California law defines special education as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the

pupil to benefit from instruction. (Ed. Code, § 56031.) "Related Services" include transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401 (26).) In California, related services are must be provided "as may be required to assist an individual with exceptional needs to benefit from special education...." (Ed. Code, § 56363, subd. (a).) Parent training can be a related service when it is necessary to assist the special needs child to benefit from his special education. (Ed. Code, § 56363, subd. (b)(11).)

### Analysis

166. Parents requested training at various times during the two years Student attended Orangethorpe. They never specified exactly what type of training they wanted, other than to state they needed training to understand Student's goals, how to implement them, and how to help Student generalize skills learned at school to his home and community environments.

167. In response to Parents' request, District added provisions to all of Student's IEPs for meetings between Parents and Student's District related service providers, as well as between District providers and Student's in-home behaviorists. The IEPs provided twice monthly meetings between Parents and the occupational therapist and the speech and language therapist, either in person or by phone.

168. The IEPs also provided monthly consultation between District behavior specialist and Parents. The IEPs specified that the meetings were also for the purpose of parent training, in addition to providing Parents the opportunity to address concerns they might have. Mr. Ellis, the District behavior specialist, met numerous times at Student's home with Parents and Student's in-home behaviorist to discuss behavior strategies, goals, and Parent concerns. Additionally, District agreed to Mother's request to observe Student's speech and language therapy sessions during summer 2016 to

help train Mother on how to implement Student's speech goals.

169. Parents felt they needed additional training to address the issues they had with Student at home. The two parent training courses they attended through Irvine's Child Development School were thorough and beneficial and helped them address those problems. However, Student did not prove that Parents required more training from District to assist Student to benefit from his education, which is the basis upon which a district is required to provide such training. Instead, the evidence supported District's position that it provided sufficient and adequate training to Parents through mandated meetings and consultation between Parents and District Staff, through Mother's many observations of Student in his classroom and therapy sessions, and through Mother's participation in the classroom as a volunteer. Student failed to meet his burden of proof as to this issue. District did not deny Student a FAPE by declining to provide parent training in addition to the consultations included in Student's IEPs.

#### ISSUES 8(H) AND 9(J): FAILURE TO PROVIDE EXTENDED SCHOOL YEAR SERVICES

##### Parties' Contentions

170. Student contends that District failed to provide him with appropriate extended school year services. He contends Parents therefore were forced to privately fund a variety of programs to ensure that he did not regress during school breaks. District responds that it provided sufficient extended school year services during summer 2016. District asserts that at the IEP meetings to develop Student's March 2017 annual IEP, District IEP team members discussed that Student did not demonstrate any significant regression at the beginning of the 2016-2017 school year after returning from summer break. The District team members therefore concluded that he did not require services during summer 2017 to address regression.



### Legal Authority

171. School districts are required to provide extended school year services if a child would regress in his or her programming and have limited capacity to recoup the lost skills. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); Cal. Code of Regs, tit. 5, § 3043.)

### Analysis

172. Student's contention that he required extended school year services during District Thanksgiving, winter, and spring breaks, which lasted no more than two weeks, was not persuasive or supported by any credible evidence. Any regression Student experienced was easily recouped.

173. District provided Student with extended school year services during summer 2016. It provided him with speech and language therapy, occupational therapy, and in-home behavior consultation. District staff was scheduled to meet with Mother after the 2016-2017 school year began to discuss any regression Student might have experienced over the summer. District provided Mother with data showing Student's progress as she requested. After she reviewed the data, Mother cancelled the meeting because Student did not demonstrate any regression in speech and language or occupation therapy.

174. Student demonstrated some regression in behavior during the first month of the 2016-2017 school year. Mr. Ellis hypothesized Student regressed because during the early weeks of the school year he was in a student group led by Mother. Student's teachers moved Student to a group led by a different parent volunteer. Student's behavior improved considerably. After a month, Student successfully moved back to Mother's group. Student failed to demonstrate that he required more extended school year services than those offered by District during summer 2016.

175. However, Student proved he continued to need extended school year

services during summer 2017, at least in the areas of speech and language and behavior consultation. Student continued to have pragmatic language and social interaction deficits. Student did not meet all of his speech and language goals. Although his earlier behaviors of eloping, inappropriate touching, aggression, and talking out of turn, were not significantly impacting his ability to access his education, he developed new behaviors of making inappropriate comments in that later part of first grade. The new behavior warranted continued consultation with Parents and District's behavior specialist over the summer.

176. District IEP team members based their decision not to offer Student extended school year services in summer 2017 on Student's lack of significant regression and his easy recoupment when he returned to school after summer 2016. However, the lack of regression was due in some part to the summer services District provided. Student met his burden of proof that he required extended school year services during summer 2017.

#### ISSUES 8(F), 9(E), AND 9(F): FAILURE TO PROVIDE APPROPRIATE LEVELS OF BEHAVIOR INTERVENTION, AN APPROPRIATE BEHAVIOR SUPPORT PLAN, AND IN-HOME APPLIED BEHAVIOR ANALYSIS

##### Parties' Contentions

177. Student makes several contentions regarding District's alleged failure to address his behavior needs. Student first argued District did not offer him an individually designed program. Student did not specify this as a separate issue in his complaint or during the prehearing conference in this case, but argued it as a separate issue in his closing brief. Student intertwined his contentions that District failed to address his needs as a twice-exceptional student; failed to address his anxiety; failed to address his behavioral functioning needs; and failed to address his social emotional needs. Student interspersed in his argument the contention that District should have provided him with

in-home applied behavioral analysis therapy rather than force Parents to use their medical insurance to obtain that service. District responds that it developed IEPs that at all times addressed Student's needs in the school environment as they were known to District at the time.

#### Legal Authority General to all Sub-Issues

178. In considering the substance of an educational plan, "(T)he test is whether the IEP, *taken in its entirety*, is reasonably calculated to enable the particular child to garner educational benefits." (*Lessard v. Wilton-Lyndeborough Cooperative School Dist.* (1st Cir. 2008) 518 F.3d 18, 30 (italics added); see also *T.Y. v. New York City Dept. of Educ.* (2nd Cir. 2009) 584 F.3d 412, 419 [judging the "IEP as a whole"].) Further, a court or tribunal must judge an IEP at the time of its development, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*); *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Tracy N. v. Department of Educ., Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) An IEP is "a snapshot, not a retrospective." (*Adams, supra*, 195 F.3d at p. 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) However, "after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1004 [citing *Adams, supra*, 195 F.3d at p. 1149].)

#### Failure to Address Student's Needs as a Twice-Exceptional Child

##### PARTIES' CONTENTIONS

179. Student contends that he is a "twice-exceptional" child, and that District failed to acknowledge it and address his needs because it lowered expectations for him. District contends that its IEPs addressed all of Student's educational needs.

#### LEGAL AUTHORITY

180. “Twice-exceptional” refers to a child who is intellectually gifted but also has a qualifying disability under the IDEA. The IDEA does not address “twice-exceptional” or “gifted” students. (*Letter to Anonymous*, 55 IDELR 172 (OSEP January 13, 2010).) Under the IDEA, being intellectually gifted is not considered an eligibility category that entitles a child to special education and related services. (*Roane County Sch. Sys. v. Ned A.* (E.D. Tenn. 1995) 22 IDELR 574.) It is only when a gifted child also has an independent qualifying disabling condition that he or she is eligible for special education and related services, even if the child is classified as gifted under state law. (*Board of Ed. of the City of New York*, 28 IDELR 1093 (SEA NY 1998).) As a result, existing case law relates to twice-exceptionality as it applies to a gifted child’s *eligibility* for special education.

#### ANALYSIS

181. In this case, Student contends that his scores on intelligence tests demonstrate that he was intellectually gifted. Student bases this contention on the I.Q. scores Dr. Davidson obtained when she first assessed Student in November 2014, when he was just under four years old. Student’s non-verbal I.Q. score was 134. However, Student’s special non-verbal composite score on District’s March 2016 triennial assessment was only 117. Although higher than average, that score is not in the gifted range. Likewise, when Pediatric Minds assessed Student when he began the program in November 2016, Student’s non-verbal I.Q. score was also 117. Given the identical scores, District’s assessment results and Pediatric Minds’ assessment results are a truer picture of Student’s intellectual abilities, and support a finding that he does not fall into the range of an intellectually gifted person.

182. Student did not prove that District had lower expectations for him given his level of intellect. Student was in a general education classroom, receiving the same

curriculum and other educational supports as his typically developing peers. Ms. Karcher's and Ms. Keller's academic testing placed Student at or above his grade level. He was in the highest reading group in the class. His lessons were not modified. His teachers expected him to do his schoolwork at the same level as his non-disabled peers, and Student demonstrated that he was capable of doing so.

183. Here, District did not disqualify Student from special education based on his above-average or even gifted intellect. District continued to find Student eligible and created an IEP for him in the same manner as it would for any child with a qualifying disability. District did not lower academic expectations for Student. It provided him with an education equal to that of his typical peers, addressing his needs appropriately with services, supports and accommodations. It was not required to do more.

184. District did not lower its expectations for Student in the area of behavior. Student criticized that District collected data on the behavior of Student's peers in determining whether Student's behaviors at school were at level that required intervention. Mr. Ellis's functional behavior assessment, Ms. Akrawi's social/emotional assessment, and Ms. Karcher's and Ms. Keller's classroom observations established that Student's behaviors often occurred at the same level or, in some cases at a lower level, than his same-aged peers. The children in the multi-aged classroom did not always raise their hands before speaking up in class. They engaged in similar types of eloping from areas by running out of line or leaving their desk before completing a task to do something more preferred. The kindergarten and first grade children sometimes cried. They sometimes had tantrums. They sometimes pushed or hit their peers when frustrated or upset. They touched each other playfully in line. However, for some unexplained reason, Parents refused to accept that many of the behavior problems that they asserted Student had and needed to be addressed with intensive services were the similar behavior issues that typically developing kindergarten and first grade students

demonstrated, and that District teachers successfully handled with general education strategies.

185. District did not lower expectations for Student. It analyzed his behavior in the context of his peers in the multi-age classroom and appropriately concluded Student was no different than the other children. Parents wanted District to apply a different, *higher* standard of behavior to Student than it applied to the rest of the children in his classroom. Student did not prove that District was required to do so.

#### Failure to Provide In-Home Applied Behavioral Analysis Therapy

##### PARTIES' CONTENTIONS

186. Student contends that District was responsible for funding an in-home applied behavior analysis therapy program for him. He contends that District's failure to do so denied him a FAPE. District responds that it addressed all of Student's needs through the program and services it provided Student at school.

##### LEGAL AUTHORITY

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

##### ANALYSIS

188. Student argued that District should have funded an in-home applied behavior analysis program for him because Parents' medical insurance determined Student required such a program and funded it. Student provided no persuasive authority to support his contention that a service a medical insurance company determines to be medically necessary for a child *ipso facto* means the child needs it to

receive a FAPE at school.

189. Student argued that both Dr. Davidson and Ms. Cooper found he continued to require applied behavior analysis intervention at home. Student's reasoning has several flaws. First, Student failed to provide any persuasive evidence that he required the in-home behavior program to access his education and receive a FAPE. No one specifically described Student's home behavior program. The only concrete evidence in the record concerning the home behavior program was that Mr. Ellis consulted frequently with Student's many in-home behavior supervisors to discuss strategies District used in school and strategies the behavior agency used at home. The purpose of the consultations was to try to fine tune the strategies used at school to those that were assisting Student at home, and to avoid using strategies that were incompatible. The purpose of the in-home program was to address Student's behavior needs at home. Student did not prove that there was a correlation between the need for a home-based program and similar school services. Nor did Student prove that the in-home program was instrumental in helping Student access his education at school.

190. Additionally, the evidence demonstrated that despite the efforts of highly trained and competent behaviorists from In Steps such as Ms. Cooper who provided intensive in-home applied behavior analysis therapy, Student's maladaptive behaviors at home continued unabated. For that reason, Parents sought out different approaches to address the behaviors. They first enrolled Student in the Pediatric Minds program and then in the UCLA behavior program while Student was in preschool. They subsequently re-enrolled him in the Pediatric Minds program in November 2016 and sought out cognitive behavior therapy interventions by Dr. DePompo in January 2017.

191. Student's expert Dr. Hannauer emphatically testified that applied behavior analysis does not extinguish anxiety in children such as Student. She opined that discrete trial training, a principle component of applied behavior analysis therapy, often

worsened emotional distress and anxiety and did not help address those conditions. Given Student's failure to respond to the applied behavior analysis interventions he received for many years at home and Dr. Hannauer's rejection of it as a method for addressing Student's in-home behaviors, Student insistence that he was denied a FAPE by District's failure to fund such a program for him was unsupported by any credible evidence. Student has failed to meet his burden of proof that he required an in-home applied behavior analysis program to access his education. There was no denial of FAPE.

### Failure to Address Behavioral and Social-Emotional Needs

#### PARTIES' CONTENTIONS

192. Student's contention that District failed to meet his social/emotional and behavioral needs is the crux of this case. Student contends that District was aware of his problems but failed to address them. He contends that District's efforts at addressing his behavior failed to acknowledge that they were based on anxiety. He therefore contends that District's interventions fell short of providing him with a FAPE. District responds that it addressed Student's problems through assessments, goals, behavior support plans, and the provision of a one-on-one aide. District contends that it responded appropriately and consistently to Student's needs, addressing any changes to those needs throughout the two years Student attended school in District.

#### LEGAL AUTHORITY

193. A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer, supra*, 546 U.S. 49, 56-58.) In addition, educational needs include functional performance. (20 U.S.C. § 1414 (d)(1)(A)(i)(I); Ed. Code § 56345, subd. (a)(1).) The "educational benefit" to be provided to a child requiring special



education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization.

(*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*San Diego*).)

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

195. If a child's behavior impedes his learning or that of his peers his school district must consider and implement positive behavioral interventions, strategies, and supports to address the child's behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

#### ANALYSIS

196. Student first contends that Parents informed District that Student suffered from anxiety, but District ignored the information. Student argued District refused to note Parents' concerns in IEPs and ignored Mother's oral discussions with District personnel about Student's anxiety.

197. Student did not support his contention with any persuasive evidence. The documentary record in this case contains all of Student's IEPs from April 2015 to May 2017. Each IEP team meeting held during that time lasted several hours. Each IEP document developed from each meeting contained pages of specific and detailed notes

chronicling the discussions between all of the IEP team members present at the IEP team meetings. Each time after District provided Parents with a copy of an IEP document, Mother meticulously reviewed it to ensure that it comported with the discussions at the IEP team meetings. She often took several months to do so. When Mother determined that something was missing and/or incorrect, she wrote to District informing them of this and requesting that the IEP document be modified to reflect her concerns. District diligently responded to her concerns in writing. It added to or modified the IEP, for example to add Parents' concerns, after receiving the correspondence from Mother. If District failed to note a discussion about anxiety, or if anxiety at school had been an issue, the evidence established that Mother would have noted it in her correspondence with District staff.

198. There is no indication in any of the IEP documents or correspondence in evidence that proved that Parents brought up the issue of anxiety being the cause of Student's problematic behaviors until November 2016 after Parents enrolled Student for a second time in the Pediatric Minds' intensive outpatient program. Parents did not write to District to inform them of Student's escalating behaviors out of school. They did not ask District to convene an IEP meeting to discuss them. They did not ask District to fund the Pediatric Minds program before enrolling Student in it. Rather, they waited until after they made the decision to enroll him before informing District that Student was going to start the program and needed to leave school a few hours early to attend it.

199. In response to Parents' concerns expressed in November 2016, District proposed conducting a social/emotional assessment of him. It convened IEP team meetings in January 2017 to discuss Parents' concerns. District participated in the Pediatric Minds' discharge meeting in January 2017, by sending three District staff members to the meeting. Ms. Akrawi's social/emotional assessment addressed the

concerns Parents had about Student's emotional lability, rigidity, and anxiety. In April 2017, District supplemented its social/emotional assessment to address Student's new behaviors. District is only bound to address issues of which it knew or should have known. (*Adams, supra*, 195 F.3d at p. 1149.) District had no reason to know and was not aware of Parents' concern about anxiety until November 2016. Student therefore failed to prove by the preponderance of the evidence that District ignored Parents' concerns that anxiety caused Student's behavior problems.

200. Student next asserts that District's behavior interventions were insufficient and inappropriate. Student points to the fact that several of the rating scales filled out by Student's teachers and Parents for District's March 2016 multidisciplinary assessment indicated that Student had elevated issues with anxiety. Student contends that his anxiety caused all his behavior problems, that cognitive behavioral therapy is the only way to address the anxiety, and that District failed to provide him with that type of therapy, thereby depriving him of a FAPE.

201. Student failed to demonstrate that District denied him a FAPE by providing inadequate or inappropriate behavioral interventions to address his behaviors at school. The evidence established that District sufficiently addressed Student's behaviors at school in all of his IEPs at issue in this case. District provided Student with a one-on-one aide throughout his school day at all times at issue in this case. Student contends that the aide was "mean" and failed to always redirect his behavior or assist him with peer interactions. These complaints, even if true, do not support a finding that District did not appropriately address Student's behaviors.

202. District assessed Student, created behavior goals, created behavior plans, and consistently revised the goals and the plans, to meet Student's needs. District developed behavior intervention plans based on observations of Student and, in March 2016, based on Mr. Ellis's functional behavior assessment. District could not always

implement the plans, or the goals proposed in them because Parents at times either delayed consent or failed to consent to changes. However, District did implement whatever parts of the plan to which Parents had consented. None of the behaviorists ever told District or Mr. Ellis during his consultations with them that District's behavior strategies were inappropriate or inadequate. Ms. Cooper, the only in-home behaviorist to testify at hearing, did not criticize District's behavior plans or behavior goals.

203. Between September 2015 and January 2017, Student only exhibited four behaviors at school that in some way interfered with his access to his education or intruded on his peers. Student sometimes eloped. He occasionally eloped by leaving a task he was supposed to be doing and looking for something he wanted to do more. He occasionally eloped by running out of line to get on the playground faster or to get back to his classroom faster. He occasionally eloped during field trips by running away from his group, sometimes as far as 30 feet. Student did not elope at school to areas outside of his teachers' or aide's vision. He did not run out of classrooms. He did not elope or attempt to elope off of the school campus. His elopement at school never put him in danger. His elopement at school decreased by March 2016 to a point where it was no different than the conduct of his peers and no longer an issue at school.

204. Student had a maladaptive behavior defined as talking out in class. This behavior significantly decreased between September 2015 and January 2017 to a point where it mirrored the behavior of the typically developing peers in Student's classroom. The behavior stopped interfering with Student's ability to access his education.

205. Student's inappropriate touching and aggressive behaviors decreased over the course of his two years at District. Based upon its data collection, District found that Student's behaviors, such as pushing a peer if the peer had pushed him or when Student was a bit upset with him, and of touching peers while they were in line to go back to class, was no different than the behavior of his same-aged peers. District's provision of a

one-on-one aide, the behavior goals it developed, and the behavior intervention plans it developed, all served to address Student's behavioral needs. Student did not meet his burden of proof that these interventions failed to provide him with a FAPE.

206. Drs. Hannauer, Schuck, O'Haire, Swords, Reid, and Davidson testified that Student's behaviors were caused by anxiety and that Student required cognitive behavioral therapy to control or extinguish them. Dr. Hannauer, Dr. Schuck, and Dr. O'Haire were all knowledgeable about cognitive behavioral therapy. They were intelligent and thoughtful witnesses, with the training, experience, and expertise to arrive at their conclusions. The flaw in Student's reliance on their testimony is that there is absolutely no evidence that any of the behaviors upon which these experts based their opinions occurred at school. With the exception of Dr. Davidson, whose opinions have already been found not to be persuasive other than with regard to her critique of District's functional behavior assessment, none of Student's other experts ever observed him at school. They had no direct knowledge of his in-school behaviors, and were focused on addressing the much more extreme behaviors Parents had to deal with at home, in arriving at their conclusions that Student required cognitive behavior therapy to address the behaviors. Further, none of Student's experts analyzed why Student was exhibiting significant behavior problems at home that required the intensive therapy they recommended, but was not exhibiting these same behaviors at school to any clinically significant level.

207. Student argued that his in-home behaviors are relevant to a determination of what he requires to receive a FAPE, even if there is no evidence that the in-home behaviors had any negative impact on his ability to access his education. Ninth Circuit case law has found that a school district is not responsible for a child's behavior or mental health conditions that solely manifests at home and does not affect the child's access to his or education, or is solely based on medical rather than educational

concerns. (See, e.g., *Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 643 [school district not responsible for the costs of a residential placement for a child with an emotional disturbance whose placement was not necessary for educational purposes; *Ashland School District v. Parents of Student H.* (9th Cir. 2009) 587 F.3d 1175, 1185 [school district not liable for a child's residential placement because it was necessitated by medical rather than educational concerns].)

208. Student's reliance on the unreported case of *New Milford Bd. Of Educ. v. C.R.* (D.N.J. June 22, 2010, No. 09-328 (JLL).) 2010 WL 2571343, to support his position that District was required to address behaviors that only manifested at home, is misplaced. That case, affirmed by the Third Circuit in an unreported decision in *New Milford Bd. of Educ. v. C.R.* (3rd Cir. 2011) 431 Fed.Appx. 157 (*C.R.*), is distinguishable from Student's. In these two cases, the district court and the Third Circuit found that the student's behaviors at home interfered with his access to his education. Based on that finding, both courts found the student continued to require in-home behavior therapy and that the school district's failure to provide it denied the Student a FAPE.

209. These unreported cases do not stand for the proposition that a school district is required to address a child's behavior that only occurs at home and but does not interfere with the ability of the child to access his or her education. In Student's case, there is no evidence that his severe behaviors at home manifested at school or impacted his ability to access his education. Student has failed to meet his burden on this issue. There was no denial of FAPE.

#### ISSUE 9(G): FAILURE TO PROVIDE SUFFICIENT RELATED SERVICES IN THE AREAS OF COUNSELING/MENTAL HEALTH

##### Parties' Contentions

210. Student makes two contentions with regard to this issue. He first contends

that District's offer of counseling services in his May 2017 IEP failed to adequately address his anxiety and therefore denied him a FAPE. Student further contends that due to the extent of his anxiety, he also required additional therapy outside of school hours funded by District to receive a FAPE. District responds that its May 2017 IEP met all of Student's social, emotional, and behavioral needs.

### Analysis

211. A school district is required to meet all of a child's unique educational needs, whether academic or non-academic. (*San Diego, supra*, 93 F.3d at p. 1467.) There is no dispute that this includes mental health counseling as a related service if a child requires it to access his education. The issue here is whether District's offer of counseling met Student's needs.

212. Student's behaviors of eloping, talking out of turn, aggression, and inappropriate touching were addressed through District's behavioral interventions. Although the behaviors fluctuated somewhat, by January 2017 when Ms. Akrawi was assessing Student, those behaviors had mostly decreased to levels where most of Student's behaviors were indistinguishable from that of his same-aged peers.

213. Student's behavior changed in January 2017, although there is no evidence as to why the change happened. In January 2017, Student wrote in his journal during class that he wanted to "bomb the school." School Principal Dr. Soltero-Ruiz appropriately responded to the incident by talking with Student and determining that he did not pose any danger to himself or others. There is no evidence that Student ever repeated this threat or any threat of this type during the remainder of the 2016-2017 school year. Student also evinced other behaviors that he had not before. He began making rude and appropriate comments such as saying someone was "bad;" saying he "hated" someone who had upset him; booing peers who received awards; and saying he was going to send someone to jail who had upset him. These behaviors were new and

were distinct from the previous behaviors that had been controlled.

214. District recognized that the comments and behaviors were new and that they had to be addressed. District also recognized and acknowledged that anxiety or other mental health concerns might be the reason for the behaviors. To address them, its offer of FAPE in the May 2017 IEP included two, 30-minute sessions a week of counseling and guidance sessions.

215. Student contends that these services were not sufficient to address his needs. The weakness in Student's argument is that not a single witness at hearing addressed this offer of services. Drs. Hannauer, Schuck, and O'Haire, all opined that Student's needs were best met by placement in Irvine's Child Development School. They did not observe Student in his placement at Orangethorpe and did not observe the placement at all. Their opinions were based on Student's behaviors outside of school, and based upon what they believed was best for Student. Under *Rowley, supra*, 458 U.S. at pp. 203-04 and *Endrew F., supra*, 137 S.Ct. 988, 996, school districts are not required to optimize a child's educational placement. They are only required to provide one that meets a child's unique needs. None of these witnesses stated why District's placement could not meet those needs. None of them was asked at hearing to review the IEP offers and critique them. And none specifically addressed the adequacy of District's offer of counseling and guidance. Nor did Student ask any of the District IEP team members who testified at hearing of what the counseling would consist. Finally, the FAPE analysis is focused on the appropriateness of District's offer, and not on the alternatives Parents here felt were appropriate for Student. (*A.R. v. Santa Monica Malibu Sch. Dist.* (C.D. Cal. Aug. 12, 2013, No. 2:12-cv-4812-ODW (SHx).) 2013 WL 4052437, *aff'd.* (9th Cir. 2016) 636 Fed.Appx. 385.)

216. Student failed to meet his burden of proof that District's offer of counseling and guidance in the May 2017 IEP failed to meet his needs. There was no



denial of FAPE.

## ISSUE 9(K): FAILURE TO OFFER AN APPROPRIATE PLACEMENT FOR THE 2017-2018 SCHOOL YEAR

### Parties' Contentions

217. Student contends that District's offer of placement in a general education classroom at a District school did not meet his needs. He contends that he required placement in a school such as Irvine's Child Development School, where his anxiety and behaviors could be addressed in a small, structured classroom with other children of similar intellectual capacity and unique needs. District responds that its offer of a general education classroom provided Student a FAPE in the least restrictive environment.

### Legal Authority

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

219. The impetus behind the enactment of special education laws was to move special needs children out of segregated programs. In *Rowley*, the Supreme Court noted the intent of the Education of the Handicapped Act (the predecessor to IDEA) was "to

open the door of public education to handicapped children on appropriate terms . . . ." (*Rowley, supra*, 458 U.S. at p. 192.) California special education laws also emphasize the importance of keeping special education pupils with their typically developing peers. For example, California Education Code section 56000, subdivision (b), provides that the purpose of special education law is to promote maximum interaction between children with disabilities and their typically developing peers.

220. For these reason, special education law mandates that disabled children remain in the general education setting *whenever appropriate*. Under title 20 United States Code section 1412(a)(5)(A), a state must ensure that children with disabilities are only removed from general education classrooms when they cannot be educated there even with the use of supplementary aids and services. (See also Ed. Code, § 56040.1; 34 C.F.R. § 300.114.)

221. The Ninth Circuit fully addressed the issue of least restrictive environment in the case of *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398 (*Rachel H.*). The *Rachel H.* court noted the preference by Congress for educating children with disabilities in regular classrooms with their peers. The court then considered four factors to examine in determining the appropriate least restrictive environment for the child: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. (*Rachel H., supra*, 14 F.3d at p. 1404.)

222. Not every child can or should be mainstreamed. The Ninth Circuit so found in the case of *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834. The court considered the *Rachel H.* factors and determined that a general education classroom was not the least restrictive environment for the child in question. The Court acknowledged that there was a tension within the IDEA between the requirement that a

district provide children with a FAPE to meet their unique needs and the preference for mainstreaming. The Court found that there are cases where the child's disability is so severe that it prevents him or her from being able to obtain a meaningful education in a general education classroom.

#### Analysis

223. Student argued that a general education classroom is not his least restrictive environment. He bases his position on the testimony of Drs. Hannauer, Schuck, and Davidson, who all advocated for Student's placement at the Child Development School or in some equally structured classroom with a small student to teacher ratio.

224. Student benefited from his placement at the Child Development Center. It may have even been the *optimal* placement for him. But the issue is not what was optimal, but whether he was not able to obtain meaningful educational benefit in a public school general education class. The evidence demonstrated that he could make meaningful progress in a general education classroom.

225. Dr. Schuck and Dr. Hannauer based their opinions on what was best for Student, not on whether he was able to make meaningful educational progress in a general education classroom. Neither of these professionals observed the Orangethorpe multi-age classroom or observed any of District's classrooms. Their opinions were based on the problems Student had at home and the improvement in his behavior after he began attending the Child Development School. Neither professional based her opinion on an analysis of the *Rachel H.* factors.

226. Dr. Davidson observed Student at Orangethorpe during the last week of the 2016-2017 school year. Student was unable to get a peer to understand him well. Dr. Davidson opined that Student's aide did not adequately facilitate the interaction between the boys. She also remarked on Student's behaviors at home and how they had

escalated. This was the basis for her opinion that Student required a placement such as the Child Development School. Although Dr. Davidson had been a school psychologist and was the special education director at a public school, she failed to analyze Student's need for a more restrictive placement under the *Rachel H.* criteria.

227. Applying the *Rachel H.* factors to this case results in a conclusion that Student has failed to show that he cannot make meaningful academic, social/emotional, or behavioral progress unless removed from a general education classroom. Student made more than meaningful academic progress in the general education classroom for the entire two years he was at Orangethorpe. His grades in every area were at or above grade level. He made progress on his goals. He made behavioral and social/emotional progress as well. By May 2017, his earlier behaviors of eloping, talking out of turn in class, aggression, and inappropriate touching, were mostly to the point where he was not distinguishable from his same-aged peers. When he began demonstrating new behaviors in January 2017 of making negative comments, primarily to and about peers, District addressed the new behaviors by offering counseling and guidance sessions in the May 2017 IEP. Student offered no persuasive evidence that District's offer of counseling would not address the new behaviors he manifested. The evidence weighed in favor of the educational benefit to Student by remaining in a general education classroom. Student also received significant non-academic benefit by being with his typically developing peers.

228. Student offered no evidence to support his argument that the second *Rachel H.* factor did not support a general education placement. Student's behaviors did not significantly impact his peers or the ability of his teachers to give instruction. Student was not disruptive at school. His peers were not significantly bothered by any of Student's behaviors and their ability to access their own education was not impeded to a point that they missed instruction. Student did not raise the issue that cost was a

factor in any of District's decisions about his education.

229. Based on the totality of the evidence, while a small, structured school such as the Child Development School may have maximized Student's potential, such a placement was not necessary for him to receive a FAPE. The preponderance of the evidence demonstrated that Student made meaningful educational progress in a general education classroom and that, as of May 2017, a general education classroom was his least restrictive environment. District's offer of a general education classroom with related services was reasonably calculated to allow Student to make meaningful educational progress. The Supreme Court's decision in *Endrew F.*, *supra*, which the Ninth Circuit has cited many times, did not change this standard, but rather clarified it. (See, e.g., *M.C.*, *supra*, 858 F.3d at pp. 1189 and 1200; *E.F. v. Newport-Mesa Unified School District* (9th Cir. Feb. 14, 2018) 2018 WL 847744, at \*1).)

230. District's proposed placement met Student's needs. There was no denial of FAPE.

## REMEDIES

1. Student prevailed on Issues 4 and 9(j) by proving that District denied him a FAPE by failing to permit Dr. Hannauer or other Pediatric Minds staff member to observe Student at school before District made an offer of FAPE for Student's 2017 annual IEP, and by District's failure to offer him speech and language therapy and behavior consultation during extended school year 2017. District failed to prove that its March 2016 functional behavior assessment met all legal requirements; Student therefore also is the prevailing party as to issue 11. Student is entitled to a remedy for prevailing on these issues.

2. As remedies in this case, Student seeks reimbursement for the following programs, services, and assessments Parents funded during the two school years at issue in this case: Dr. Davidson's second psychoeducational assessment; Dr. Braun's

central auditory processing disorder assessment and the CAPDOTS program Parents purchased; an independent vision therapy assessment; co-payments Parents paid for insurance-funded speech and language and occupational therapy services; co-payments for in-home applied behavioral analysis therapy; summer programs during extended school year 2016; Lindamood-Bell tuition for summer 2017; social skills program for Student beginning March 2017; individual cognitive behavioral therapy beginning in January 2017; parent training programs in 2017; cost of Student's tuition at Irvine's Child Development School for the 2017-2018 school year; and mileage reimbursement for any at-of-home program or service Parents funded.

3. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

4. Student has only proven that District committed one procedural violation in denying Parents' request to have their chosen expert observe Student at school in April 2017. Student demonstrated that this significantly impeded Parents' ability to participate in Student's 2017 annual IEP as it denied them the benefit of an educated, neutral opinion about Student's present placement. Student failed to show that the denial of an observation impeded his right to a FAPE or caused him a deprivation of educational benefit. The appropriate remedy is to order District to permit an observation at a District school by an expert of Parents' choice and that District fund the observation, including travel time to and from the school. Given the amount of time Ms. Akrawi spent observing Student, District shall permit Parents' expert up to two hours of observation, to be used either in one or two sessions, and two hours of total travel time. Based upon Dr. Davidson's fee of \$200 an hour for observation time, as stated in her invoice for her 2017 assessment of Student, it is reasonable to order District to pay

Student's expert his or her customary fee for observation time, up to a maximum of \$200 an hour, for both the observation time and the travel time. Additionally, since the purpose of the observation Parents requested was to assist them in developing Student's IEP, it is appropriate to order District to fund up to a maximum of two hours of time for the expert to participate in one of Student's IEP team meetings, if requested by Parents. The total award therefore is payment of up to six hours of the expert's time, at a maximum of \$200 an hour. Parents shall have up to one year from the date of this Decision to request the observation. District shall provide payment to Parents' expert within 45 calendar days of receiving the expert's invoice or billing statement.

5. District further denied Student a FAPE by failing to provide him with a total of two hours of speech and language therapy and an hour of behavior consultation during extended school year 2017. Student already receives pragmatic language services and social skills services as part of his program at the Child Development School. He also received private speech and language services. Therefore, ordering District to fund an additional two hours of speech and language and one hour of behavior services would be an illusory and somewhat pointless remedy. Student still has pragmatic language and social skills needs. An appropriate equitable remedy in light of the circumstances is for District to reimburse Parents for the social skills program Student attended beginning March 2017, in the amount of \$1,100. Although Student did not require the course to receive a FAPE, it addressed his pragmatic language and social skills needs and is related to District's failure to provide him with speech and language therapy and behavior consultation during summer 2017.

6. District failed to demonstrate that its functional behavior assessment was valid and met all legal requirements. Parents are therefore entitled to an independent functional behavior assessment at District expense as they requested. District will fund the assessment by a professional of Parents' choice who meets the requirements for

assessors, including assessment fees, set by District or the Special Education Local Plan Area to which District belongs. Student shall have one year from the date of this Decision to provide District with the name of his chosen assessor and the other information District requires for the funding of independent assessments.

## ORDER

1. Within 45 calendar days of the date of this Order, District shall reimburse Parents for the cost of Student's participation in the Child Development School's social skills course starting in March 2017, in the total amount of \$1,100. The documentary evidence of payment Parents provided at hearing, supported by Mother's testimony, is sufficient evidence of costs incurred by Parents and no further documentation is required.

2. District shall permit an observation of one of its classrooms for up to two hours, for either one or two sessions, by the expert of Parents' choice, at a mutually agreeable date and time. District shall pay for up to a total of six hours of the expert's time, at a rate up to \$200 an hour. This shall include up to two hours of observation time; up to two hours of travel time; and up to two hours of attendance at an IEP team meeting convened for Student. Student shall have up to one year from the date of this Decision to request the observation. District shall pay the expert his or her fees within 45 calendar days of receipt of the expert's invoice or billing statement.

3. All other relief sought by Student is denied.

4. District shall fund an independent functional behavior assessment by Parents' choice of assessor. The assessor must meet District criteria or criteria set by the Special Education Local Plan Area to which District belongs. Student shall have up to one year from the date of this Decision to submit the name of an assessor to District, along with all other information required by District. District shall pay for the assessment within 45 calendar days of its receipt of the assessor's invoice or billing statement.



5. District is not required to fund the psychoeducational, speech and language, or social/emotional independent educational evaluations Parents requested.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on issues 4, 9(j), and 11. District prevailed on issues 1(a) through 1(e); 2(a) through 2(e); 3; 5(a) through 5(c); 6; 7(a) and 7(b); 8(a) through 8(h); 9(a) through 9(i) and 9(k); 10, and 12.

## RIGHT TO APPEAL

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

Dated: May 25, 2018

\_\_\_\_\_/s/\_\_\_\_\_  
DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearings