

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

FOUNTAIN VALLEY UNIFIED SCHOOL

OAH Case No. 2017110243

FOUNTAIN VALLEY UNIFIED SCHOOL
DISTRICT,

v.

OAH Case No. 2017120743

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on November 3, 2017. On December 5, 2017, OAH continued Student's case based on a showing of good cause. On December 19, 2017, District filed a due process hearing request, naming Student. On December 22, 2017, OAH consolidated both cases and ordered that the timeline for issuance of the decision in the consolidated matter to be based on the filing date of Student's case.

Administrative Law Judge Laurie Gorsline heard this matter in Fountain Valley, California on March 13, 14, 15, 21, 22 and 27, 2018.

Attorney Bruce Bothwell represented Student. Father attended all days of hearing and Mother attended portions of hearing. Student did not attend the hearing. Attorney Ernest Bell represented District. District's Director of Student Support Services, Cara Robinson attended all days of hearing. Nancy Finch-Heuerman, Director of the West Orange County Consortium for Special Education, attended portions of

the hearing. At the close of hearing on March 27, 2018, the ALJ granted the parties' request for a continuance to April 18, 2018, for the parties to file written closing arguments. The parties timely filed written closing arguments, the record was closed and the matter was submitted for decision on April 18, 2018.

ISSUES

STUDENT'S ISSUES:

Did District deny Student a free appropriate public education in the June 16, 2017 individualized education program, as amended on October 13, 2017, by:

1. Failing to develop and offer appropriate goals in all areas of need, specifically academics, social interaction, communication, behavior, and adaptive skills;
2. Failing to include autism as a basis for special education eligibility;
3. Failing to offer Student an appropriate placement;
4. Failing to offer Student appropriate related services, specifically:
 - (a) Social skills intervention;
 - (b) Behavior services; and
 - (c) Speech and language therapy?¹

DISTRICT'S ISSUE:

Did District offer Student a FAPE in the June 16, 2017 IEP, as amended on October 13, 2017, such that District may implement it without parental consent?²

¹ During the hearing, Student withdrew issue 4(d) pertaining to educational therapy.

² This Decision will refer to the June 16, 2017 IEP, as amended October 13, 2017,

SUMMARY OF DECISION

Student proved, of 18 goals included in the June 2017 IEP, reading goal 3 was not appropriate, a procedural violation of state and Federal law. Student failed to prove this . procedural violation constituted a substantive denial of FAPE. Student did not prove District denied Student a FAPE by not developing additional goals. Student did not prove he was denied a FAPE by District's failure to offer him eligibility for special education under the category of autism. The evidence established District's assessment results were consistent with multiple disabilities based upon, among other things, intellectual disability eligibility. The evidence established that District's offer of placement was inappropriate because it did not specifically include individualized specialized academic instruction. With the exception of speech and language services, Student failed to prove that District denied him a FAPE by failing to offer him additional related services. District may not implement the June 2017 IEP without parental consent because the June 2017 IEP did not offer Student an appropriate placement or speech services.

FACTUAL FINDINGS

1. Student was a 14-year-old male at the time of the due process hearing. He was eligible for special education and related services as a child with multiple disabilities. Student resided within District with Parents during all relevant times.

2. Student had a history of seizures since age two. He was eligible for special education at age three under the eligibility category of speech and language impairment. He attended a District special day class between kindergarten and third grade. Father became concerned with Student's educational progress at the end of third grade. Student had been receiving speech services from District, but Student's

as the June 2017 IEP.

speech was unintelligible. Student's neurologist, Diane Stein, M.D. referred Student to speech pathologist Judy Segal.

3. In 2012, Father provided District a letter from Dr. Stein. The letter stated Student, who was then eight years old, had epilepsy without convulsions, autism and developmental delay. Dr. Stein was concerned Student was not attending well because of his autistic traits and was hopeful that with behavioral intervention he would be better able to make eye contact to benefit from speech therapy. She noted Student had trouble following directions when attempting to pronounce part of a word and then fluently articulate the word. She hoped he received testing and treatment from a speech therapist familiar with speech apraxia. Apraxia is an inability to accurately form and say words and sounds.

PRIVATE SPEECH ASSESSMENT

4. On June 4, 2012, Ms. Segal conducted a private speech assessment of Student. Ms. Segal reported her findings and recommendations in a written report. Ms. Segal did not testify at hearing. Student had the ability to produce utterances from one to seven words in length, and poor intelligibility made it difficult for his listener to understand him. In an individual setting, Student appropriately initiated interactions, demonstrated knowledge and use of turn taking skills. He used language to greet, comment, make requests for information, respond, negate and label. In class, he engaged with adults and peers, and appropriately participated in all activities. His teacher reported he demonstrated no difficulties with transitioning. He had significant difficulty producing intelligible speech and demonstrating understanding and use of a variety of basic concepts. Testing results revealed a severe speech and language disorder characterized by a severe articulation disorder, secondary to a severe oral apraxia and a severe apraxia of speech, and deficits in all linguistic domains with communication skills ranging from below two years of age to five years seven months.

Student had abnormal auditory perception and a mixed receptive/expressive language disorder. With medication, Student had improved in his ability to learn and retain information in all academic areas and all linguistic domains. Student's apraxia of speech and communication disorder was his major handicapping condition. Student's inability to produce consistent spontaneous language that was understood, adversely his ability to interact with others and demonstrate what he learned. Ms. Siegel recommended Student receive private speech therapy five times per week, individual speech therapy at school two to three times per week for thirty-minute sessions, and individual speech therapy from a non- public agency for two to three times per week for one-hour sessions.

DISTRICT'S 2012 PSYCHOEDUCATIONAL ASSESSMENT

5. In May 2012, District conducted a multidisciplinary psychoeducational evaluation of Student. Student was referred for assessment to determine the appropriateness of his current eligibility. The assessment also served as an early three-year reevaluation. Parents were concerned Student may present behaviors related to autism or other developmental disabilities such as intellectual difficulties. District's school psychologist was the primary examiner. He reported the assessment results in a written evaluation dated June 13, 2012. Student was eligible for special education at the time of the assessment under the category of multiple disabilities, in part because of significantly below age level cognitive skills. The assessment included testing, record review, interviews, clinical observations and a review of health history.

6. Student engaged in good eye contact during testing and transitioned without difficulty. During observations, he was on task, complied with all activities and participated. On the playground, he joined other peers in play, engaged in good eye contact, tried to communicate with his teammates, smiled, and laughed as he played. Based on the language sample collected, his utterances ranged from one to seven

words in length. He had a mean length of utterance of 3.0, which meant he was significantly delayed for a child of his chronological age. Student had become much more attentive since a change in medication, and he required minimal prompting after gaining his attention. He was distractible, but more easily brought back on task. He was very cooperative and worked hard as long as he understood how long he would be working and for what he was working. He initiated communication if he was comfortable and interacted appropriately with familiar peers, demonstrated proper turn taking, and asked and answered simple questions. He was functioning significantly below his chronological age in receptive and expressive language skills. Most areas tested placed him functioning at the 3.0 to 4.7 year age range. His academic skills were also significantly below his age level. Student's social, emotional and behavioral development was commensurate with his overall cognitive, language and adaptive abilities, and in some areas, such as socialization at school, above these expected levels.

7. District assessors concluded and reported that Student's speech and language impairment adversely affected his educational performance and that he required special education. None of the testing, including the Social Responsiveness Scale, the Behavior Assessment System for Children-Second Edition, and the Social Skills Improvement Scale supported eligibility under autistic-like behaviors. To the extent some behaviors were similar to characteristics of autism, the same behaviors were consistent with Student's overall level of cognitive, language and adaptive skills.

8. Student met the eligibility for intellectual disability. His overall standard score of 54 on the Kaufman Assessment Battery for Children, Second Edition, and a 68 on the Differential Ability Scales, Second Edition, placed him at significantly below average in intellectual functioning, and he had significant adaptive behavior deficits. Student continued to meet the eligibility for multiple disabilities because Student's deficits included areas such as cognitive/academic, communication, adaptive behavior,

gross motor and social/emotional and behavioral development.

THE 2013 IEP TEAM MEETING

9. On October 18 and 25, 2013, District held Student's annual IEP team meeting. Parents were concerned about Student's progress, skill maintenance, that he had not mastered the alphabet, and had been working on similar math skills for a few years. Father emphasized to the IEP team that Student did not learn in the same way as his siblings. Student learned from consistent, daily instruction in the targeted skills as opposed to large group or infrequent lessons. As part of its FAPE offer, District offered eligibility under multiple disabilities and intellectual disability; a special day class for academics, including English language arts, science, social studies, math and physical education; speech/language services five times per week for 30 minutes (four individual sessions and one group session); adapted physical education; occupational therapy; and 15 goals. Father agreed to parts of the IEP.

THE 2013 PRIVATE AUDIOLOGY REPORT

10. On December 13, 2013, Maria Abramson of Abramson Audiology conducted an auditory processing evaluation of Student and wrote a report documenting her findings and recommendations. Ms. Abramson did not testify at the hearing. Based upon the report, the purpose of the evaluation was to explore Parents' concerns and rule out any auditory weaknesses that contributed to Student's inability to communicate and low academic functioning. Student demonstrated the need to develop the concepts of same and different, and generalize them to sounds so he could learn the auditory skill of pitch discrimination. Student did not have pitch discrimination skills commensurate with a four-year-old; however, he could perform at a five-year-old level on the Test of Auditory Comprehension, which suggested Student was capable of learning how to discriminate pitch via auditory training. Visual support

for spoken language was necessary because Student's dominant hemisphere was visual, not language processing. Ms. Abramson recommended a quiet small classroom with a selection of teachers who used clear style speech and a variety of visual reinforcements. She also recommended that Student be directed to look at the teacher when the teacher spoke to him, that messages be kept short, pre-teaching main ideas and vocabulary, that Student repeat back to the teacher what the teacher said, such as directions, and monitoring of re-auditorizations for accuracy.

THE 2014 PRIVATE PSYCHOEDUCATIONAL EVALUATION BY DR. CHRISTINE MAJORS

11. On January 4, 2014, Christine Majors, Psy.D., a licensed psychologist/neuropsychologist prepared a written report, detailing the results of her December 2013 psychoeducational assessment of Student. Dr. Majors did not testify. Student was referred for assessment to determine his current level of cognitive, academic, behavioral and adaptive functioning. Dr. Majors conducted a clinical interview, observations, a records review and administered a series of tests, including an academic assessment. She reported that Student exhibited fluctuations in attention, was mildly impulsive and easily distracted. Student had good eye contact, his speech was frequently unintelligible, and when prompted to use better speech his answers were often understandable. He frequently required repetition and simplification of directions.

12. Because of his inattention, Dr. Majors administered the "brief form" of the Leiter International Performance Test-Revised as the measure of intellectual functioning, which included measures tapping nonverbal intelligence in fluid reasoning and visualization. Student's current level of intellectual functioning was in the low average range and fluid reasoning within the borderline range. Student's adaptive functioning was in the extremely low range. Student's scores for reading

comprehension, spelling to dictation and applied math were at the pre-kindergarten level and three other scores were at the kindergarten level. She opined that Student had not made academic progress in his District placement.

13. Dr. Majors diagnosed Student with Attention Deficit Hyperactivity Disorder, Predominantly Inattentive Type. Student's identified behaviors and cognitive weaknesses adversely affect his functioning at school. She recommended one-to-one teaching provided by an educational therapist with expertise in teaching children with this level of language impairment such as Ms. Barbara Pliha, intensive speech interventions, and evidence-based treatment interventions such as Lindamood-Bell programs. She recommended a series of accommodations in the classroom, including: extra time for assignments because processing of information was performed at a much slower rate when compensating for cerebral dysfunction; frequent comprehension checks; repeating of directions; reduced rate of speech, length and complexity of language; and a distraction free environment when testing. She also recommended that Student receive an evaluation for a central auditory processing disorder and a complete neuropsychological assessment.

PRIVATE SPEECH SERVICES FROM MS. SIEGEL

14. By 2014, Student was receiving individual speech services two or three hours a week from Ms. Siegel. In Father's opinion, Student's speech improved. Student continued to receive private speech therapy from Ms. Siegel until June 2016.

PLIHA SPEECH & LEARNING CENTER – SEPTEMBER 2014 TO NOVEMBER 2016

15. Student did not attend public school between September 2014 and November 2016. Student began receiving academic services from Pliha Speech & Learning Center, a California certified non-public agency, in September 2014, when he was in the fifth grade. Barbara Pliha was the Director of Pliha since 2009 and a licensed

speech pathologist since 1989. She held a master's degree in education with an emphasis in reading, and a master's degree in communicative disorders. She held a reading specialist credential, a speech- language credential with a special classroom authorization, and a resource specialist certificate. Between 1965 and 1998, she worked for various school districts as an elementary and special day class teacher, a reading specialist, a speech pathologist, and a resource specialist teacher.

16. Pliha provided one-to-one individualized instruction and services to children with learning difficulties in reading, spelling, writing, math and speech and language disorders. It also conducted evaluations, developed treatment plans and IEP's, and implemented instructional and therapy programs for its clients. Pliha utilized Lindamood- Bell programs to teach reading. Lindamood-Bell strategies are systematic multisensory reading and spelling programs. The teachers at Pliha supplemented Lindamood-Bell programs with their own instruction.

17. At Pliha, Student received one-to-one academic services five days a week for two and one half hours per day with movement breaks. He received about an hour of math instruction and about 90 minutes of English language arts instruction. Pliha utilized an instructional plan in which every task was documented so at any given time a different teacher could step in and provide Student with consistent instruction.

18. Alana Wong and Ms. Pliha were two of Student's teachers at Pliha since September 2014. Ms. Wong had a bachelor's degree in psychology and a master's degree in education/elementary teacher education. She was a teacher's assistant at the University of California Early Childhood Education Center from 2001 to 2004 and an academic consultant at the Reading and Language Center between 2004 and 2009. Since 2009, she was the Director of Academics at Pliha. She did not have a teaching credential and held no certificate to teach students with disabilities. She attended eight IEP meetings since 2009, and participated in the formulation of IEP goals with school districts. She utilized the goals in the Lindamood- Bell program which had no

benchmarks and did not develop her own goals for Pliha students.

19. In September 2014, Student initially presented with needs in all areas of academics, including basic number and letter recognition. He could not read or write. Ms. Pliha administered no standardized academic tests in 2014 because Student had no academic skills. Student's instruction at Pliha began with basic letter and number recognition. Student's program included daily homework, which included reading, reading comprehension, writing and grammar. He occasionally initiated conversation. When he communicated, he often blurted out a key word and did not speak in complete sentences. He had preferred topics of conversation, including World War II and battleships.

20. Student initially misbehaved and was uncooperative. Pliha developed a behavior plan in which Student received points used to earn activities he enjoyed at home for participating in class, being on target and doing his best. He became generally cooperative, worked hard and was polite. The behavior plan evolved over the course of time Student attended Pliha, but he always had a behavior plan in effect. Other positive behaviors targeted by the behavior plan included Student's good eye contact, following directions, using language, rather than just pointing, and giving correct answers. The behavior plan was effective because Student wanted to earn the prizes.

21. Ms. Wong worked with Student seven of the approximately twelve hours a week he attended Pliha. Initially, they worked on letter and number recognition, handwriting, letter symbol to sound, counting from one to ten, and spatial concepts. He could not identify letters in words, including letters within his name. The instruction was exclusively one-to-one.

22. Pliha provided minimal opportunity for social interaction because no peers shared the workroom where Student received his academic instruction. Student had limited access to peers in the common area during breaks.

23. Father worked with Student at home for two or three hours after school on a daily basis.³ They worked on Student's homework and speech assignments, reinforcing what Student learned that day. If Student did well, Father rewarded him. Father observed that Student was making progress in math, but that it required constant effort, including repetitive instruction.

24. By November 2016, Student made academic progress. Student worked on phonological processing, tracking individual phonemes within words and identifying changes in words, multisyllabic decoding, matching story sequence pictures, writing sentences and arranging them in sequence order, and writing personal narratives with prompting and guidance. Ms. Wong described his fluency rate as being toward the end of first grade. His comprehension was beginning to middle first grade, and accuracy depended on the text. He could read passages at second grade with good accuracy within decoding, but comprehension questions at that level were challenging. In math, he increased his proficiency in addition and subtraction.

25. Student also received individual speech and language therapy from Ms. Pliha from January 2015 to May 2015 and from June 2016 to November 2016. The speech therapy at Pliha was generally two to three times per week of individual instruction.

DR. ROBIN MORRIS' APRIL/MAY 2016 ASSESSMENT

26. On April 5 and 13, 2016, Robin Morris, Psy.D., L.M.F.T., a clinical psychologist, conducted a psychological evaluation of Student and wrote a written

³ Student's father held a bachelor's degree in applied mathematics and a master's degree in computer science. He was an engineer for 35 years and taught extension classes in computer science, and software architecture and design, at the college level.

report dated May 11, 2016, detailing her findings. Dr. Morris did not testify at hearing. Based upon her report, she conducted interviews, observations, a records review and administered a series of tests, including testing to determine Student's academic and cognitive functioning. On the Test of Nonverbal Intelligence, Fourth Edition, Student's score placed him in the below average range. On the Wechsler Intelligence Scale for Children, Fifth Edition, Student's composite scores all fell between 45 and 67, and his full scale IQ score within the extremely low range. Parents and teachers reported tremendous progress by Student, particularly in the area of language. Although he had apraxia and his language abilities were below his age level, he could use meaningful speech as his primary way of communicating. He continued to exhibit an auditory processing disorder. Dr. Morris opined that Student qualified for special education under the eligibility of other health impaired due to a diagnosis of Attention Deficit Hyperactivity Disorder, Primarily Inattentive and Seizure Disorder, and speech and language impairment. She concluded Student required one-to-one instruction, participating in programs such as Lindamood-Bell, and after he demonstrated growth in his academic skills, a small language-based group academic setting. She also recommended testing by an audiologist, and accommodations to address his auditory processing weaknesses, and reading, writing and math deficits.

DISTRICT'S MAY 2016 MULTIDISCIPLINARY PSYCHOEDUCATIONAL ASSESSMENT

27. District assessed Student in April and May 2016 in preparation for his 2016 triennial IEP. School psychologist Krista Wagnon, and speech pathologist Kerrie Kendzierski, were part of District's 2016 assessment team.

28. District reported the results of its triennial assessments in a 57-page multi-disciplinary psychoeducational assessment report dated May 25, 2016. The written report included a description of Student's background, including his family and educational history, and a summary of the results of the assessments by Dr. Morris, Dr.

Majors, and Ms. Abramson, as well as District's prior psychoeducational evaluations, including the 2012 District evaluation. The report summarized District's health and developmental history/medical findings, and Student's behavior during observations during testing and in the classroom at Pliha. The report included results of assessments conducted in the following areas: Intellectual functioning, academic functioning, communication, auditory processing, visual perceptual processing, social-emotional functioning, adaptive behavior, occupational therapy, and adapted physical education. The report also contained an analysis of eligibility criteria for special education in the areas of intellectual disability, other health impairment, speech and language impairment, specific learning disability, and multiple disabilities.

The speech and language assessment

29. Ms. Kendzerski was a speech pathologist for the Fountain Valley School District since 2014. She held a master's degree in communications sciences and disorders, a bachelor's degree in liberal studies with a special education concentration, a preliminary multiple subjects credential and a speech-language pathology services credential. She worked primarily with students with autism, emotional disturbance, speech and language impairment, and specific learning disability on such issues as language disorders, autism disorders, and communication impairments such as apraxia, stuttering or articulation difficulties.

30. Ms. Kendzerski assessed Student in the area of communication. As part of her evaluation, she completed formal testing and a mean length of utterance calculation, and conducted a records review.

31. Upon first meeting Ms. Kendzerski, Student got up from his seat and walked straight toward the examiner, moving into her personal space. He shook her hand, but did not make eye contact. When asked how he was doing he said he liked World War II airplanes. He transitioned easily from the lobby to the evaluation room,

was consistently cheerful and willingly complied with all testing tasks. He was occasionally distracted, but was easily redirected. When asked when his birthday was, he said "April." When told that his answer was incorrect, he said he did not know. When asked what date of the month his birthday was, he said, "Monday." After he was given multiple choices and prompts, Ms. Kendzierski told Student the month and date of his birthday. Later in the testing session, Student was asked the same question. He said he did not know. She gave him three choices for the month, which he correctly identified. She then gave him four choices for the date and he correctly chose the date of his birthday. After seventy-five minutes of testing, Student could not be redirected after going off task. He frequently used a rising intonation when answering questions, particularly during the on-word vocabulary measures, stating the words as though they were questions.

32. Ms. Kendzierski conducted an observation at Pliha. Student was given prompts by his teacher as well as simple and repeated directions through each step of his work and frequently through each step of the problem. He was given various forms of reinforcement throughout his session for his accuracy, focus and behavior. He was generally attentive and sat still through his session. His focus was achieved by obtaining his attention and/or eye contact before assigning a task, giving direction, or asking questions. He occasionally needed reminders to attend or for eye contact. He was inconsistent in his ability to follow directions. When his teacher gained his attention he usually could follow one-step directions with ease. If the direction included more than one component, and/or more than one-step, he would often need repetition of the information. At one point, Student noticed Ms. Kendzierski in the waiting room. He waived and said "hello," and stated he remembered her. He then returned to the table and attended to the task. After 15 minutes into his session, he received an increased amount of information and started to answer the questions incorrectly before taking the time to think before responding. With prompting from

his teacher, he could take a deep breath and regain focus. He experienced a couple of seizures during the session. When asked, Student could identify the length of the seizure as “medium,” or “long.”

33. Ms. Kendzierski had training in assessing for autism. Student did not demonstrate any hallmark signs of autism to her consistently enough to suspect autism. Her suspicion was that he was functioning at a cognitive level lower than his age level and his behavior, which was inconsistent, was reflective of his cognitive level. According to her, Student was cognitively functioning at the time of the assessment at an age range of three to seven-year-old. Ms. Kendzierski identified his unique needs as falling in the areas of receptive and expressive language and speech. She did not find that he had needs in pragmatics because he was socially functioning within the age range of his overall functioning. At hearing, in response to Student’s counsel’s leading question, she admitted social interactions and pragmatics were variations of the same concept.

34. Student’s assessment scores in language acquisition fell below the first percentile. For articulation, his overall score for sounds and words was below the first percentile. Only 15 percent of Student’s sentences had good intelligibility; while the majority of his sentences were of fair intelligibility.

35. A mean length of utterance is the average length of a student’s utterances produced spontaneously to determine the complexity and length of language used. The mean length of utterance was calculated by determining the number of morphemes for each utterance in the language sample, subtracting out any repetition, stutter or unintelligible words, and dividing the number of morphemes by the total number of utterances in the language sample. A language sample was based on a student’s spontaneous utterances prompted by the examiner.

36. Ms. Kendzierski calculated Student’s mean length of utterance as 2.78, which was a decrease in his score of 3.0 from District’s assessment in 2012. Student’s

score meant he was significantly delayed for his chronological age. As children aged, it was expected that their mean length of utterance got longer, indicating the complexity of their language improved. A child was expected to be at stage six at age four. Student's score of 2.78 was at stage two and correlated to a very young child.

The psychoeducational/academic assessments

37. Ms. Wagon was District's school psychologist since 2006. She had a master's degree in counseling and school psychology and a bachelor's degree in human development. She held credentials in school psychology and was a licensed professional counselor. She worked as a school psychologist for other school districts between 2001 and 2006. Her duties as a District school psychologist included evaluation of children for special education, counseling, and consultations with teachers and parents.

38. Ms. Wagon assessed Student in the areas of cognition, adaptive behavioral skills, social emotional functioning, and she was present for the academic assessment conducted by a District education specialist. In addition to standardized testing, Ms. Wagon conducted observations, interviews with Parent and teacher, and a record review.

39. To determine cognition, she administered the entirety of the Wechsler Intelligence Scale for Children, fifth edition, and the Naglieri Nonverbal Ability Test-Individual Administration. The Wechsler Intelligence was an individually administered, comprehensive clinical instrument for assessing the intelligence of children, comprised of ten subtests and composite scores that represent intellectual functioning in specific cognitive domains. The full scale IQ was derived from all ten subtests, and the nonverbal IQ was a combination of eight of the subtests that did not rely on a student to produce a verbal response, in order to assess a student's cognition not relying on their verbal skills. Although the nonverbal subtests required some oral instructions,

test administration also included nonverbal instructions including visual prompting. The nonverbal instructions were given by showing the child what he needed to do, practicing with the child before administration of the test through visual modeling and pointing. Most of the subtests required visual prompting in the event the student could understand some of the oral directions. Ms. Wagnon administered the Wechsler Intelligence test because it was a comprehensive assessment and she believed Student could complete the test based on the nonverbal instructions. The nonverbal instructions on the Wechsler accounted for auditory processing or language issues.

40. On the Wechsler Intelligence test, Student's full scale cognitive functioning was within the extremely low range, more than two standard deviations lower than the average score of other children his age, taking into account his apraxia. His nonverbal score was also within the extremely low range. Ms. Wagnon opined that the cognitive test results were valid and accurate.

41. Ms. Wagnon also administered the Naglieri which was designed to provide a brief nonverbal measure of general ability. It was equivalent to one subtest on the Wechsler Intelligence test, which was a more comprehensive measure of intelligence than the Naglieri. It required both verbal and nonverbal instructions. At hearing, she admitted a more current version of the Naglieri existed at the time she assessed Student, but explained that this test version was appropriate for purposes of information and validating scores. Student's standard score was within the borderline range, with a confidence interval placing Student within the intellectual disability range.

42. Ms. Wagnon's assessment of Student's social emotional functioning included administration of the Behavior Assessment Scales for Children, third edition, observations, interviews, and portions of the Vineland Adaptive Behavior Scales, which looked at social functioning. Student was very socially appropriate given his language levels and cognitive levels. Parents mentioned no social emotional concerns at the

onset of the assessment, although Ms. Wagnon had not received back the rating scale from Parents at the time of the report. During the assessment, Student greeted Ms. Wagnon, used appropriate eye contact, and used a range of facial expressions and some humor. Although Ms. Wong reported clinically significant areas of concern in learning problems, atypicality, withdrawal and functional communication, she reported that social skills were within the average range. In adaptive functioning, Student was impaired in all areas of adaptive functioning, and overall, had low, to moderately low, adaptive behavioral skills.

43. Ms. Wagnon collaborated in the administration of the academic assessment which included the Wechsler Individual Achievement Test-III, the Kaufman Test of Educational Achievement Second Addition, and the San Diego Quick Assessment, which measured the recognition of words out of context. Student's academic scores were mostly two standard deviations below the mean. On the Wechsler Achievement, his composite standard score in reading was 56, a 52 in written expression, and a 43 in mathematics. On the Kaufman Achievement, his standard composite score in reading was 60, and a 61 in math. On the San Diego Quick, Student's instructional reading level was at the primer level. When asked to read words at the first grade level, these words were at his frustration level.

44. In social emotional functioning, Student was generally compliant but had some instances of very mild reluctance or resistance. Ms. Wong reported when a concept was new, or challenging, Student demonstrated frustration rather quickly. Student required prompts to take a breath or to take time to gather his thoughts/language. The report stated that no other behavioral or social emotional concerns were observed over the course of multiple assessments and observations. In adaptive functioning, the ratings noted some social deficits across home and school settings. Student sometimes avoided interactions, sometimes ignored people around him, and did not consistently demonstrate initiation/friendship-seeking behaviors with

others his age. His maladaptive behavior in the Vineland was in the average range overall.

45. Based on the assessments, District determined Student met several areas of special education eligibility, including multiple disabilities, intellectual disability, other health impairment due to attention difficulties and seizures, specific learning disability in the area of math, and speech language impairment. The assessment report contained an analysis for each of these eligibilities.

46. Student met the criteria for eligibility under other health impairment, based on his history of epilepsy, myoclonic seizures, and inattention. Student met the eligibility criteria for specific learning disability based on a severe discrepancy between intellectual disability and academic achievement in the area of math problem solving, and processing disabilities, which existed in the areas of attention, auditory processing, and language processing. Student met the eligibility criteria for speech and language impaired in the areas of receptive and expressive language, articulation, and fluency. Student's cognitive functioning was within the intellectual disability range. Student's receptive/expressive language and articulation were far below what was expected for his age. Student met the eligibility criteria for multiple disabilities based on his deficits in cognitive/academic achievement, communication, adaptive behavior and gross motor, in addition to meeting the criteria for his other concomitant categories of eligibility.

47. Ms. Wagon disagreed that Dr. Majors' or Dr. Morris' cognitive results were a more accurate measure of Student's cognitive functioning. Although the Leiter-R administered by Dr. Majors was a nonverbal measure of IQ, it was only the "brief" form and only one measure of intelligence. It was not a comprehensive assessment of intelligence, and the assessor had the option of giving oral instruction or visual instruction. Similarly, the Test of Nonverbal Intelligence administered by Dr. Morris, was not a comprehensive assessment of cognition. It was equivalent to only one

subtest on the Wechsler Intelligence test, and Student's scores on the Wechsler Intelligence test administered by Dr. Morris, were consistent with a finding of intellectual disability. The administration of the Test of Nonverbal Intelligence required oral instruction and visual modeling.

48. District's 2016 assessment did not include an analysis of whether Student met special education eligibility for autism. Student was assessed multiple times and none of the prior assessors found him to be autistic, including Dr. Morris. Ms. Wagnon saw no red flags during her assessment, which suggested autism. She did not use any measure that specifically targeted autism because nothing in her assessment indicated the need for that measure. She did not see any perseverations. Although Student brought up World War II on one occasion, it was an appropriate response to the question posed to him. She never saw repetitive self-stimulatory behavior or observed issues with transitions. When she assessed him, Student immediately walked in, and made eye contact, greeted her, smiled, and waved. He sought out the assessors' interaction and attention, demonstrating engagement and a range of emotional expression that showed communicative intent, including surprise, concern, and confusion. He was compliant with all tasks given to him and responsive to all questions. She observed no issue with eye contact or issues with personal space. He demonstrated social emotional reciprocity over the course of assessment, made jokes, and looked to the assessors for shared enjoyment which contra-indicated autism.

49. At hearing, Ms. Wagnon opined that Student's attention problems could be part of many disabilities and were not indicative of autism. She opined that there were indications that Student had impaired social functioning, but there were also indications that social functioning was an area of strength for him. The impairments in social functioning were very typical of student with apraxia and intellectual disability or deficiency. She agreed Student had communication deficits,

but they were not indicative of autism. Instead, his deficits were consistent with apraxia and the level of Student's overall communication functioning. Although some of Ms. Wong's scores fell into the clinically significant range on the Behavior Assessment, that assessment was not diagnostic of autism. Ms. Wagnon opined that in Student's case, these scores were due to his global deficits, including cognition, communication, and adaptive functioning, which were typical for a student functioning at Student's level. All of the testing she conducted indicated that Student's social skills and communications functioning were due to his cognitive functioning. In Ms. Wagnon's opinion, low adaptive skills were more characteristic of an intellectual disability than autism, and that while a student with autism might have low adaptive skills in the area of socialization that was not necessarily true in other areas of adaptive functioning.

THE MAY 2016 IEP

50. District convened Student's triennial IEP team meeting on May 25, 2016, with the required members of the team in attendance. Parents' main concern was that Student did not make progress during his years in the District. The IEP team reviewed the results of the assessments and Student's present levels of performance. District reported that Student continued to need work on fluency and accuracy when reading texts at the end of the first grade level. He could write all upper case and lower case letters, write legibly, and he could spell his name with his teacher present. He could add double digit numbers with regrouping accurately but could not subtract two-digit-by-two-digit numbers when regrouping was required. He demonstrated appropriate turn taking and wait time during shared activities with peers. His speech intelligibility was significantly impaired. He was effective with using visual and gestural supports to help communicate when he was misunderstood. Student was functioning significantly below his chronological age with regard to receptive and expressive language skills, which fell in the first percentile across assessments. His areas of most

significant deficits in receptive/expressive language were in following multi- step directions, word structure, recalling sentences and overall expressive language. He presented with speech errors and characteristics consistent with verbal apraxia, and his errors increased as the length of the word/phrase increased. His speech was characterized as choppy, and his flow of speech was sometimes disrupted by stuttering-like disfluencies.

51. In the areas of pragmatics, he greeted others with a cheerful smile in situations with adults. He was not observed with peers. He asked and answered questions. He was inconsistent with the accuracy of his responses, but when his attention was gained, Student attempted to appropriately answer. He asked questions of other people, but they were generally egocentrically focused on his own wants and needs. He asked questions to clarify information, but it was usually about his own experience and preferences. His eye contact and appropriate personal space was inconsistent. He understood and used many gestures appropriately. Student used language with a variety of communicative intents, including requesting, asking questions, sharing information about himself and he was always willing to repeat himself when there was a communication breakdown.

52. The District members of the IEP team reported Student required significant support/modifications in core content areas to receive educational benefit. They informed Parents that Student would have opportunities for whole group, small group, and individualized instruction in a District special day class. As part of a FAPE, District offered multiple disability special education eligibility. The placement offered was specialized academic instruction in a special day class for math, science, history and English language arts with a modified curriculum, and a general education classroom for physical education and an elective. Related services were offered in the following areas: individual speech and language therapy for 50 minutes twice a week and group adaptive physical education for 30 minutes twice a week. Student was

offered goals in the following areas: reading fluency, math money values, writing sentences, social engagement, reading comprehension, math subtraction, speech and language (intelligibility – two goals); expressive language (subject verb agreement, vocabulary); receptive/expressive language; receptive language (following directions); and gross motor skills. Extended school year was also offered, which included placement in a special day class, speech and language services and adapted physical education.

THE OCTOBER 2016 SETTLEMENT AGREEMENT

53. On October 26, 2016, Parents and District entered a written settlement agreement, resolving disputes regarding Student's educational issues through June 30, 2017. As part of the agreement, Parents consented to the May 25, 2016 IEP except as to Student's participation in an elective class. The parties agreed that for the 2016-2017 regular school year, Student would attend District's Talbert Middle School beginning at 10:00 a.m. for periods two through six of the instructional day, Monday through Friday, and that District would provide one additional individual session of speech-language therapy per instructional week by a District speech-language pathologist, such that Student received a total of three 50-minute individual sessions per instruction week.

54. In the event of dispute after June 30, 2017, the parties agreed the May 2016 IEP as modified by the settlement agreement constituted Student's stay put placement, and to reimburse Parents for one hour per of educational therapy per instructional day, up to 175 hours per instructional year.

THE SERVICES AT PLIHA FROM NOVEMBER 2016 TO JUNE 2017

55. From November 2016, Student's academic instruction at Pliha was reduced from 2.5 hours per day to 90 minutes per day and mathematics was no longer

addressed at Pliha. He attended Pliha Monday through Friday between 8:00 a.m. and 9:30 a.m.

56. In November 2016, Ms. Pliha conducted testing in the academic and speech areas, but prepared no report. She administered the Woodcock Johnson IV Tests of Achievement. As compared to his scores on the same tests administered by District in April/May 2016, Student's standard scores increased or remained the same, demonstrating academic progress.

57. Ms. Wong, and not Ms. Pliha, worked with Student between November 2016 and June 2017. At hearing, Ms. Wong explained that as of November 2016, she believed Student could benefit from a group setting for nonacademic subjects. She did not believe a group setting would have been appropriate for English language arts given the level of prompting Student required, both verbal and gestural. For example, she had to point to visuals, such as the behavior chart within each trial of a task. Often, when given a direction, Student did not respond, requiring her to check to determine if he understood the direction and prompting him to complete the task. Small group instruction in either math or English language arts would not have been appropriate in June 2017 unless Student had first received individual one-on-one adult support with guided practice, without the presence of other peers, to first learn new concepts. Although she never observed Student receive instruction in a small group setting, she credibly opined that he required one-to-one instruction to learn new concepts in English language arts, and he would not attend to a lesson involving a new concept with peers in the room. She also clarified that any subsequent small group instruction would only be appropriate if: The students in the small group were at a similar instructional level; Student had adult support near him, including the availability of one-to-one support, to make certain he understood, because he did not always ask questions, and to provide modeling for sentence structure for language; and the availability of visuals, teacher notes, manipulatives. In June 2017, Student needed

repetition and visuals as a reference in order to participate in the learning, and he needed prompting to identify which visuals/supports he needed for the task.

58. After November 2016, Pliha teachers continued to work with Student on decoding, spelling, writing, reading fluency and reading comprehension. Student's progress after November 2016 was slow. There were still some behavior issues interfering with his learning and he needed prompting, but they were less frequent and he was more easily redirectable. When asked a question he answered it with a word and then focused on his preferred topics or did not respond. Student's attitude was generally better, but it depended on the task and the reward. Ms. Wong did not see a change in his motivation since November 2016. Although she gave verbal praise after every trial before discussing errors, Student's response to verbal praise was inconsistent. He retained some skills he learned as of November 2016 and in other areas he slowed. Ms. Wong revisited skills to check for retention and found the skills are not as stable as they once were. For example, in decoding, he did well in isolation, but within the reading context, he was not using the same strategies. He did not check his writing work for capitalization, spelling or punctuation to see if it was logical, whereas prior to November 2016, he performed this task. He seemed to forget basic math facts he had learned, instead, he counted on his fingers and gave inaccurate answers. Student's behavior plan transitioned to a tally sheet in which he earned points during each 90-minute session for certain behaviors, which were divided into four targeted areas, eye contact, answering the question, correct answers and using his words, such as initiating a question. In her opinion, it was hard for Student to attend and put forth his best effort, and the plan facilitated his efforts, which resulted in better learning.

59. Student had limited opportunity to engage in group play every day during breaks at Pliha. Ms. Wong had an opportunity to observe Student with peers. Although she observed that Student often played with Legos on his own unless group

play was facilitated, it was unclear from her testimony how often or when she observed Student in the common area.

THE 2016-2017 SCHOOL YEAR

60. The 2016-2017 school year started on September 7, 2016. Student attended seventh grade at Talbert for the 2016-2017 school year beginning in November 2016.

61. Chelsea Von Iderstein was Student's special education teacher for English language arts, math and history/social science and his case carrier. Ms. Von Iderstein received her master's degree in special education in 2015. She held a teaching credential for instruction of students with mild to moderate disabilities including an autism authorization. She received training in applied behavior analysis and positive behavior intervention support. As a teacher, she taught exclusively in Talbert's mild-to-moderate special day classes comprised of sixth to eighth graders since 2015.

62. Ms. Von Iderstein's duties included modification, differentiation and accommodation of the common core curriculum and implementation of social skills in the classroom. She also wrote IEP's, and administered academic assessments. She received special education teacher training and collaborated with the District speech pathologist and psychologist, in which she learned strategies she implemented in the classroom. Between 2012 and 2015, she worked for another school as a behavioral tutor and instructional aid for students with a range of mild to moderate disabilities, both individually and in group settings. As an instructional aide, she reinforced students' learning and as a behavioral tutor she implemented applied behavior analysis strategies and took data. As a teacher, she supported students with a variety of disabilities. She supported students who had reading challenges through scaffolding (such as mind maps or graphic organizers), differentiated instruction

(modifying curriculum) and directed instruction (giving students an opportunity to work with a teacher in a group). She was trained in modifying curriculum for students not at grade level.

63. Ms. Von Iderstein's classroom configuration promoted small group instruction and discussion with a teacher in the middle of the group. Small group discussion was important because it allowed students to check for understanding and peer modeling. Ms. Von Iderstein often had students work with partners and teach each other on solving problems. In her opinion, peers often related better to each other and students mastered concepts by teaching their peers. In a small group instructional model, peers motivated other peers to learn and problem solve and allowed student to socialize.

64. Ms. Von Iderstein had a copy of Student's May 2016 IEP in her classroom and understood that Student's special education eligibility meant he had low cognitive functioning, medical disabilities such as seizures, and language impairments such as apraxia. Ms. Von Iderstein reviewed District's May 2016 psychoeducational report in November 2016 and was aware of the bases of Student's eligibility. During the 2016-2017 school year, Ms. Von Iderstein taught one student with multiple disabilities similar to Student's and worked with students with multiple disabilities as an instructional assistant.

65. Ms. Von Iderstein described Student's initial academic skills as globally impacted in math, reading, and writing, and speech with low cognitive functioning skills. In the classroom, she observed that Student tried to make others laugh and was interested in what others were doing. In her opinion, his main obstacles to learning was that he had low functioning skills and deficits in the key areas, needed repetition and modeling, was slow at processing, and needed directions for clarification. He needed the work and the curriculum modified.

66. In communication skills, she observed that Student physically struggled, had slow auditory processing and needed time to process what others said. Student used a voice amplification system, in the form of a headset and necklace to amplify the teacher's voice. As far as speech production, he could have discussions, but struggled to find the right words. He could not produce long sentences. The speech pathologist informed her he needed words to start him off, otherwise he stuttered. He required visuals, models, repetition, differentiated instruction, scaffolding, and reinforcements. He was a people pleaser, wanted to know if he was doing the task correctly and was competitive with peers.

67. At hearing, Ms. Von Iderstein admitted she observed that when Student listened to an explanation or lecture that he missed every few words or syllables of words. Although she claimed Student required minimal prompting the entire time he had been in her class, her testimony was not persuasive because it conflicted with more persuasive evidence, including District's assessments. She admitted Student required prompting to learn independent skills.

68. Ms. Von Iderstein also testified inconsistently, evasively and unpersuasively as to whether Student performed better when he received one-to-one instruction. She hesitated when asked qualitative questions about Student's ability to learn in a one-on-one instructional environment, evasively responding that her classroom provided both one-to-one and whole group instruction. She denied that one could measure whether Student performed better with individual instruction because that was essentially asking who was a better teacher. She claimed that because Student received both types of instruction and progressed, she could not determine if Student benefited more from a group or individual setting. At another point in her testimony, she made the implausible statement that group instruction was always better than individual instruction. In her opinion, a group setting was more appropriate to address Student's needs because in her math class he clearly improved

his scores. She admitted Student demonstrated improvement in English language arts, but claimed she could not know if Student worked better in a group or individual setting because he did not participate in a group setting for this subject. In history, she stated he did well, but that he performed better in a group setting. Ms. Von Iderstein demonstrated difficulty answering questions regarding the topic of one-to-one instruction, and responded with palpable hesitation in giving many of her answers, appearing to force a response that conformed to District's position in the case. The inconsistencies in her testimony and the manner in which she testified undermined her credibility on this issue.

69. Ms. Von Iderstein observed Student having seizures about five times per period on average, in which he briefly stopped responding and shook before he resumed his task. She did not observe that Student questions were focused on his own wants and needs. She did not observe that Student did not generally share information about his own preferences or experiences as opposed to those of his communication partners. She never observed Student engaged in some of the conduct noted during Ms. Kendzierski's assessment or otherwise observe conduct which caused her to suspect Student had autism. He made eye contact, was not rigid, did not have stimming behaviors, and did not have difficulty making transitions. He brought up World War II about four times in the four months she worked with him as of June 2017, and he did not force any topic of discussion. He volunteered in classroom discussions and she saw him make progress in social skills. As the school year progressed, Student seemed more comfortable in the classroom, demonstrated interest and participated in small group collaborative learning with his peers. In her opinion, working in small groups helped Student learn. He had an interest in what others were doing and he asked questions. Student required repetition in order to retain information. Ms. Von Iderstein implemented a form of a positive behavioral point system for Student in the classroom. Points and stars were charted on the

students' desks similar to white boards which were used to earn prizes. Her testimony that Student generally answered questions without having to gain his attention was not believable because she gave no specifics and lacked credibility in other parts of her testimony.

70. Student became more social as the 2016-2017 school year progressed. At first, Student isolated himself during lunch playing Legos because he was at a new school and did not know anyone. After the Thanksgiving and Winter breaks, in February 2017, he began wandering around looking at what other people were doing and started to interact more with peers.

English language arts

71. English language arts instruction in Ms. Von Iderstein's special day class consisted of the first two periods of each weekday, beginning at 8:43 a.m. and ending at 10:30 a.m., except on Thursdays when all of the class periods were shorter. The class was comprised of approximately 15 sixth and seventh graders who had a range of disabilities, and four adults. The students' level of functioning covered a range of cognitive abilities spanning several grades.

72. The special day class utilized a research based reading intervention program entitled Language Live, which District adopted as a curriculum and addresses skills in reading and spelling, including comprehension, reading fluency, vocabulary, and phonemic awareness, which included teacher instruction and online instruction for reinforcement. One half of the program consisted of about 20-30 minutes of whole group teacher directed instruction, and then 30 to 40 minutes of small group instruction in groups of three to five children with one adult. Ms. Von Iderstein and the classroom aides rotated from group to group during the week so that all students received approximately 80 minutes per week of small group instruction from Ms. Von Iderstein. The students then transitioned to the other half of the Language Live

program, which was delivered online for 15 to 20 minutes daily, in which the students worked on reading and spelling skills on their own Chromebook after logging onto their own site of Language Live. Each student had individualized lessons assigned to them based on their instructional level as determined after a benchmark assessment. There were students who presented at the same ability level in reading and writing as Student and she could have grouped them in the same small group. There were three students at or slightly above Student's instructional level.

73. There were opportunities for one-to-one instruction. If she saw that a student was not understanding a specific concept, she pulled the student aside and provided individual instruction. She estimated students received about 30 minutes of one-to-one instruction, on average, per week during the first and second period block of English language arts, but admitted the amount of time varied based on the students' needs. One-to-one instruction was provided based upon the student's individual needs, and whether Ms. Von Iderstein believed the student needed reteaching, follow-up for comprehension of the lesson, or to work on IEP goals.

74. Student arrived at English language arts class around 10:00 a.m., during second period, missing all but about the last 20 minutes of instruction. Ms. Von Iderstein mostly worked with him one-to-one. On Thursdays, an abbreviated day at Talbert, he received no English language arts instruction because he arrived at school after second period ended.

Math

75. Student attended Ms. Von Iderstein's math special day class during fifth period in the same special day classroom as language arts. The math class was comprised of approximately 11 or 12 students in sixth, seventh and eighth grades, with a range of disabilities, and four adults, some of whom had applied behavior analysis training. The students' level of functioning covered a range of cognitive

abilities spanning several grades. Math instruction typically included whole group instruction and practice as a whole group. During the rest of the week, the class typically began with whole group instruction for review for five to ten minutes, followed by small group instruction of three to four students per group led by an adult. On Fridays, the students participated in online math games during the last 15 minutes of the 51-minute math period, except on Thursdays when the period was 45 minutes. She organized the students in small group according to instructional levels. There were two students at Student's instructional level. She could pull students aside and work with them one-to-one level or in small group.

Social studies/history

76. Student attended Ms. Von Iderstein's history special day class. The history class was comprised of approximately 13 or 14 students in sixth, seventh and eighth grades, and three adults. The class was divided into three groups by grade level and Ms. Von Iderstein worked out of the general education curriculum at each group grade level which was modified as necessary. All of the history instruction was delivered in a small group of four to five students, except on Thursdays, which consisted entirely of whole group instruction. Ms. Von Iderstein rotated among the groups in the same way as she did in her English language arts class. Ms. Von Iderstein worked with students on reading comprehension skills.

Science

77. Ms. Donnelly was Student's special education science teacher for the 2016- 2017 school year. Ms. Donnelly had a bachelor's degree in political science and teaching credentials for multiple subjects, language and academic development, and mild/moderate preliminary education specialist instruction with an autism authorization. She began teaching at Talbert in the fall of 2016. Between September 2014 and January 2016, she was a special education teacher for five months, a student

teacher for two months, a substitute teacher for six months and an instructional assistant for nine months, at two other school districts.

78. The class was comprised of about 12 students from sixth through eighth grades with a range of disabilities, and two to three support staff. The class was 50 minutes four days a week and approximately 30 minutes on Thursdays. Ms. Donnelly taught out of three science books, sixth, seventh and eighth grade science books, which were assigned to students, based on their grade level. She utilized both large group and small group instruction. At the beginning of the week, in a large group, the class reviewed vocabulary and the concepts to be taught that week for about 15 or 20 minutes, and then broke up into small groups for 20-30 minutes. One to three times per week, there was less small group instruction due to interruptions from other students.

79. In November 2016, Student first presented as quiet, complied with directions and seemed interested in the class. He was working at first grade reading level and mostly responded with one-word answers. She did not remember if he made consistent eye contact. He followed one step and multi-step directions. She worked on Student's goals in her class, but she did not report on the objectives or annual goals. When asked if Student received one- to-one attention in class, Ms. Donnelly's response was evasive. If Student received one-on- one attention in class, it was when he had not finished a task. Ms. Donnelly did not use positive behavioral rewards system called for in Student's May 2016 IEP. In her opinion, Student did not need it, because he was compliant.

80. Between November 2016 and June 2017, Ms. Donnelly observed Student make academic progress in reading and writing. He could attend to the reading and participate in class discussions about the reading materials by answering questions and filling out the worksheets. He seldom spoke and took time to formulate his thoughts before he spoke. She helped Student by modeling the behavior of

answering in a complete sentence, asked him speak in a complete sentence or repeat what he said and provided him with sentence structure. He volunteered in classroom discussions and she saw him make progress in social skills. As the school year progressed, he seemed more comfortable in the classroom, demonstrated interest and participated in small group collaborative learning with his peers. In her opinion, working in small groups helped Student learn. He had an interest in what others were doing and he asked questions. His work output demonstrated progress because he wrote the information, followed directions and labeled the information. The class also had a helper in the classroom in the form of a general education peer who facilitated social interaction and worked with students to peer model behavior, typical speech and enthusiasm for the subject. The helper was very active in engaging with the Student.

Physical education

81. Gary Petrilla was a District general education physical education teacher at Talbert since 2012. He held a bachelor's degree in kinesiology and a credential in physical education. His duties included keeping the students active, assisting them in working as a team, and helping them improve their individual skills and in becoming better people.

82. Student attended Mr. Petrilla's fifth period physical education class during the 2016-2017 and 2017-2018 school years. The 52-minute general education class was comprised of about 50-55 students. Mr. Petrilla taught team sports and fitness activities and another teacher taught dance, and the class had two assistants.

83. Student was supported in class by additional adult support staff from Ms. Donnelly's or Ms. Von Iderstein's class. Mr. Petrilla never had to tell Student twice to do something, and Student did not require a lot of support from his support staff. There were a number of transitions during class, and Student did well with those transitions. Students were required to line up before they went to the locker room, were escorted in a group to the locker room, got dressed, reported to grid numbers for roll call, and then participated in warmup exercises. Student was quiet, respectful and always on task. He performed well, always participated, and made efforts to improve. He participated in team sports and seemed to enjoy it. He was positive and outgoing and interacted with other students in the class. He had no difficulty following instructions. Student did not engage in odd or inappropriate behaviors. He never brought up the topic of World War II. He was social, demonstrated a sense of humor and had friends.

District speech and language services

84. Ms. Jessica Haro was a licensed speech and language pathologist since 2008. She held a master's degree in speech language pathology and was credentialed for speech language pathology. She was employed by District since 2008, and assigned to Talbert since 2010.

85. Ms. Haro provided 50-minute individual speech and language services to Student three times per week beginning in November 2016. She reviewed the May 2016 District assessment and 2016 IEP before she began providing services to Student. She took detailed data collection to chart Student's progress on his goals, preparing for IEP's and for trialing language. In her opinion, he made progress since she began working with him.

86. Ms. Haro did not observe the types of behaviors reported by Ms. Kendzierski during the 2016 assessment. Student never got too close and had no

issues with eye contact. Student was not ego centrally focused on his own wants and needs. Student mentioned he liked World War II airplanes a couple of times. If she gave him a simple task, he followed it, but it was necessary to repeat new skills he learned to make certain he retained those skills.

Student's focus was achieved by gaining his attention and/or eye contact before assigning a task, giving directions, or asking questions and this was true through the date of hearing. His speech and language delays negatively impacted his ability to formulate questions, impacting his ability to regularly initiate and sustain short conversations about general topics. It was difficult for him to formulate whole questions other than short questions such as "what is your favorite...?" He did not initiate conversations on preferred topics, but asked about her favorite things. During sessions, he required moderate prompting. He continued to benefit from prompts to attend when he was distracted, through the date of hearing. She admitted that at the time of hearing he still required prompting, but could generate longer sentences of four to five words with a minimal amount of prompting.

87. Ms. Haro opined that Ms. Kendzierski's speech and language assessment scores in expressive and receptive vocabulary acquisition, which were below the first percentile, were very significant because scores below the first percentile were some of the lowest scores obtainable. She explained that Student's articulation score was a significant issue for him because the majority of his sentences were not intelligible.

88. Ms. Haro agreed Student had apraxia based on his speech errors and difficulty with producing speech sounds. She defined apraxia as a motor speech disorder which made it difficult to speak because the signal between the brain and oral musculature was scrambled resulting in phonological processing errors that changed the sounds typically expected in certain words. For example, prior to and as of June 2017, Student had the phonological process of assimilation, taking one sound in the

word and placing it in the wrong place, which was treated by working on the specific types of errors Student made. Part of her work with Student included working on those errors.

The January 10, 2017 meeting

89. Parents requested a parent-teacher conference, which District held on January 10, 2017. Among those in attendance were Father, Ms. Von Iderstein, Ms. Donnelly, Ms. Haro, Talbert's principal, and a District program specialist.

90. Father passed out a handout at the meeting. The handout listed Parents' concerns including: Student regressing in speech, reading and possibly math, since November 2016; Student reporting he liked Talbert because it was easy; Talbert not providing enough homework; and no coordination between Pliha and Talbert staff. It also stated that Student had seizures, apraxia and an audio processing disorder, and that Dr. David Velkoff explained that for Student to listen to an explanation was the same as a normal person missing every few words or syllables of words in a conversation. The discussion made no sense to Student and he lost interest. Student was easily distracted by noise in a classroom setting and he learned better in a one-on-one instructional environment. District needed to treat Student as if he was deaf and be made to look the teachers face when the teacher spoke to him. Learning and reproduction of learned facts was difficult for Student and it was possible for him to forget learned facts.

91. District personnel shared their experiences in supporting students with auditory processing challenges and that teachers were using reinforcement systems to support Student. Ms. Haro shared she had not seen regression, and that Student had met one speech intelligibility goals and partially met the other, and that Student was missing a great deal of instruction because he arrived to school late. They reported that Student was social and engaged with peers in class and during unstructured

times. Father explained that Student benefitted from repetition and requested additional homework. District agreed.

Progress on 2016 IEP goals

92. Ms. Von Iderstein was responsible for the implementation of some of Student's 2016 IEP goals. Ms. Von Iderstein prepared the progress reports on six of Student's academic goals. She reported on progress on the goals three times during the school year, December 15, 2016, March 23, 2017 and June 16, 2017. Although she continuously worked on goals during the school year, as the reporting date approached, she began conducting the trials and writing it down on teacher created data charts upon which she based her progress reports. A teacher-created chart was a document Ms. Von Iderstein created charting Student's scores from his work samples.

93. Regarding Student's 2016 IEP reading fluency goal, there were no dates on some of the trial data she was shown during the hearing, and Ms. Von Iderstein had difficulty explaining how many trials she conducted. Student did not meet the December 2016 and March 23, 2017 benchmarks as measured by the teacher-created chart.

94. Regarding Student's 2016 IEP social engagement goal, Ms. Von Iderstein took data on trials for the goal. She addressed Student's social engagement by observing Student in social settings, including working in small groups, unstructured play for students such as fun lunch clubs or eating lunch. Fun lunch clubs were held three times per week, on Mondays, Wednesdays and Friday, where Ms. Von Iderstein opened her classroom to students with and without IEP's and provided games for students to play. During fun lunch clubs, she observed Student independently engaging with peers. By March 2017, Ms. Von Iderstein reported that Student was independently engaging in social play or a group activity with 45 percent accuracy. By June 2017, Student was independently engaging in social play or a group

activity with 75 percent accuracy.

95. At hearing, Ms. Von Iderstein had difficulty explaining the data because the data appeared to be incomplete as to how she determined Student's progress. She persuasively explained how Student made a 30 percentage point gain in less than three months. When Student arrived in November 2016, he did not know anyone, and was shy. It was not until after the holidays when routines started to become established that he started to become more comfortable at school. She observed that as the school year progressed, he became more outgoing, started to have more of a sense of humor, and was more self- confident. He participated more often and engaged more frequently with peers.

PRIVATE ASSESSOR HELENA JOHNSON, PH.D.'S PSYCHOLOGICAL EVALUATION

96. Parents privately retained Helena Johnson, Ph.D. to assess Student in spring 2017, in order to inform Parents about Student's academic progress, placement and intervention after he began attending Talbert.

97. Dr. Johnson has been a licensed psychologist since 2006. She received her doctorate in clinical psychology in 2005. She participated in a one year pre-doctoral internship in clinical child psychology and a one year postdoctoral fellowship at UCLA Neuropsychiatric Institute Department of Psychiatry and Biobehavioral Sciences. While at UCLA, she worked in many clinics, including the Autism Evaluation Clinic where she was trained by experts in the field to identify and differentiate autism from other conditions as well as to identify comorbid conditions. She has been in private practice since 2006. The majority of her practice involves clinical evaluations and psychoeducational evaluations across the range of educational eligibilities, with a specialty in autism. She has conducted independent educational evaluations for ten different school districts.

98. Dr. Johnson had the highest level of extensive training at UCLA for administering standard measures for assessing for autism, specifically the Autism Diagnostic Observation Schedule and the Autism Diagnostic Interview Revised. The ADOS is a semi- structured direct assessment for autism, which has high reliability and validity. The ADIR is a semi structured parent interview, which is very useful in differentiating autism from other developmental delays.

99. She met with Parent on March 28, 2017 and performed the ADIR. On March 29, 2017, she observed Student at Pliha. On May 3, 9 and 10, 2017, she performed direct testing of Student. She observed Student three times at Talbert in between May and June 2017. As part of her assessment, she utilized various measures including standardized tests, rating scales and record review, and Parent and teacher input. Her findings were contained in a 72-page written assessment report dated June 9, 2017.

100. Dr. Johnson observed Student at Pliha, and at Talbert during a speech therapy session, in his classroom during lunch, in Ms. Donnelly's science class, and Ms. Von Iderstein's math class, for about three hours. Her report contained a detailed description of her school observations, along with a summary. She observed that Student displayed clear skill deficiencies across academic settings, most particularly in foundational reading skills. During reading instruction at Pliha, he required teaching on the subject in the sentence he was reading. His reading was choppy and slow. He required teaching to appropriately pronounce a vowel team. At times, Student added incorrect sound to words. His expressive language was dysfluent, had a mechanical tone, and evidenced articulation errors. Ms. Wong had to cover parts of words, help him identify that he had used the incorrect sound for the letter, and provide him with visuals when he could not immediately identify a word as a verb as opposed to a noun. He required frequent and immediate assistance in order to be instructed. In Dr. Johnson's opinion, Student seemed overly focused on his pencil.

101. At Talbert, outside of speech therapy, Dr. Johnson observed that Student was rarely prompted to correct his spontaneous language, and he was not provided with the visual steps for what to do when he was not understood by the listener. She observed that Student required individual instruction of assistance for the majority of his academic time at Talbert. For example, within a small group, Student began working on math with the teacher and an assistant present. Student was given the problem $5 + \quad = 9$. Student counted out nine blacks and put the number 8 in the blank. He then separated the blocks and got more for the next problem, which was $6 + \underline{\hspace{2cm}} = 15$. Student wrote 10. He had a seizure and then continued with his work. The teacher noticed that his first problem was incorrect and walked him through it with the manipulatives, which required one-to-one assistance for much of the work. It was not clear that he understood the concept of how many blocks to put out in each section to complete the problem. As he got the next one incorrect, the teacher wrote the numbers that represented the manipulatives on the desk in front of the manipulatives. Student was then prompted to pick two different colors to complete the problems, however, it did not appear that he understood, as he continued to use the same color and was prompted.

The other peers at the table had long since finished their work and were playing computer games. After receiving help on the next item that he completed incorrectly, Student guessed the answer to $3 + \quad = 10$. He still needed to get the correct number of blocks and show his work, but he stopped short of the correct number of blocks and was prompted. Ms. Von Iderstein told Dr. Johnson that Student had worked on this all week and that Student knew how to do it.

102. Dr. Johnson observed Student having lunch in the classroom on two occasions with other peers and adults. During the first observation, Student heated his lunch in the microwave, sat at a desk and did not interact with anyone while he ate his sandwich. He approached an aide and engaged in a joke-type interaction. The teacher

reported that Student had engaged in shared enjoyment with his peers and that he engaged with adults more than peers. He and a couple of other students covered their ears during a fire drill. The teacher reported that Student sometimes waits until there were not as many students around before he transitioned and that she had once saw Student cover his ears before he left the room to do an errand, and that Student was interested in having a new pencil every day. During a facilitated game, Student raised his hand to participate although Dr. Johnson did see him seek to help peers as part of the team. During the second observation, Student engaged in back and forth exchanges with an aide about their lunches. He sat at his desk to eat his lunch and started making loud silly noises and when someone commented, he asked if he was acting too silly. There were other peers and adults in the classroom. She did not see Student engage with peers. With the exception of one group of general education peers at another table and two female students talking to each other, most of the other students were seated at separate areas and were not interacting with each other. Student asked permission to play Legos, said hi to a peer, and played Legos independently of his peer.

103. At hearing, Ms. Von Iderstein and Ms. Donnelly admitted that Dr. Johnson's descriptions of her observations while in their respective Talbert classrooms were accurate. Ms. Donnelly disagreed with some of Dr. Johnson's interpretations. Ms. Von Iderstein attempted to explain away the level of assistance Dr. Johnson reported Student needed to do the work, but acknowledged that in the small grouping, Student did not understand the concepts, so she had to work with Student individually.

104. Across contexts observed by Dr. Johnson, there were some use of visuals, manipulatives and experiential learning. She also noted Student's IEP suggested that Student should be afforded a much greater use of visual and reinforcements during his day and that he could have been more independent in his learning at Talbert if he had greater access to visuals, such as lists of steps for

activities, across classes. Dr. Johnson opined that Student's social response and social initiation was extremely low, he exhibited very limited nonverbal communication, and he had an unusual voice quality. In contrast to adults with whom he socially engaged, he demonstrated very little social initiation with and social response with peers. In her opinion, he evidenced an over focus on an interest and self-stimulatory behavior.

105. Dr. Johnson administered the Universal Nonverbal Intelligence Test-Second Edition in order to assess Student's cognitive functioning because of Student's auditory processing issues and speech and language deficits. At hearing, she explained that no verbalizations are required for administration by either the examiner or examinee. Although the Weschler Intelligence was a comprehensive assessment of intelligence, she opined that was not appropriate to base an IQ on this test where child had severe language impairment and auditory processing deficits because administration of the test required verbal instruction. In her opinion, the lengthy verbal instructions on the subtests exceeded Student auditory processing and language abilities. Auditory processing was Student's ability to discern the sounds, and make sense of the sounds in the oral language he heard and have it be meaningful to him. She also claimed she did not administer the Wechsler Intelligence test because Student had already been assessed using that test twice before and she did not believe it was necessary to test him with a comprehensive measure. In her judgment, the Universal Intelligence Test was the most appropriate measure, the most comprehensive nonverbal measure, and it was not unusual for an examiner to use only one test.

106. At hearing, she characterized Student's overall cognitive ability as around 80; however, she agreed Student's full scale IQ score of 74, with the margin of error placed Student at the very top of the mild intellectual disability category. She claimed that Student's scores on the Universal Intelligence, the Test of Nonverbal Intelligence and the Leiter-R were inconsistent with a finding of intellectual disability

eligibility. Dr. Johnson also criticized the District's assessors' conclusion that Student's cognition fell within the extremely low range overall, claiming it failed to take into account that Student scored ten points higher on the Naglieri than on the Weschler Intelligence test. In Dr. Johnson's opinion, Student's higher score on the Naglieri was a more valid measure of his thinking and reasoning abilities because it was nonverbally administered and did not require a verbal response. However, she also claimed she would not base a determination of cognitive ability on the Naglieri. It was only a brief measure of general ability, and that "brief" measures should not be used to determine intellectual impairment under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. She volunteered that the measure had been criticized by experts for having too much variability in pulling scores to the high and low ends, and the version of the Naglieri administered by District was out of date.

107. In Dr. Johnson's opinion, eligibility was important because District had lower expectations for Student based on the cognitive score as evidenced by his goals, which were mostly focused on supports that were used to instruct a child, such as manipulatives and sentence starters, but would not allow the child to emit the skill independently. Dr. Johnson did not address any particular goal during her testimony.

108. As part of her assessment, Dr. Johnson administered the Test of Auditory Processing Skills, Third Edition, which measured an individual's ability to perceive auditory stimuli and process it. She claimed most of the scores she obtained were consistent with District's 2016 score. In Dr. Johnson's opinion, it was very difficult for Student to hear sounds and give them meaning, and this was not necessarily the result of cognitive impairment. Dr. Johnson concluded Student had a severe auditory processing deficiency.

109. Dr. Johnson administered the Autism Diagnostic Interview-Revised, which was used to obtain a comprehensive developmental history. The primary purpose of this interview was to obtain detailed descriptions of the behaviors from

Parents falling into three categories (Reciprocal Social Interaction, Communication, and Restricted, Repetitive Stereotyped Patterns of Behavior) that are necessary to differentiate the diagnosis of Autism Spectrum Disorder. Among other things, Parents reported that Student did not initiate interaction with peers or did not sustain social interaction. Among familiar peers, Student liked to be silly to get attention, demonstrated immature behavior and engaged in play such as thumb wars. Among unfamiliar peers, Student tended to hide behind his parents and did not initiate interaction. He had not learned to sustain social interaction. When Student wanted something or help, he was reported to coordinate vocalization and gaze. Over the last two years, Student began offering comfort to others, such as giving them a hug and said, "are you ok?" with a change in facial expression, however, he did not flexibly offer comfort in range of circumstances. He offered to share with others and to seek enjoyment with others. He showed things to his parents and directed their attention. He evidenced reciprocal smiling and showed a range of facial expressions to communicate. He required prompting to direct gaze to others. He required prompting to respond to adults. He did not demonstrate sufficient interest in children. Regarding comprehension of simple language, Student understood it, and could spontaneously put words together in phrases. Student had circumscribed interests, such as the Titanic, although the interest changed. Between the ages of 4-5 years old, he was reported to have a sensitivity to general noises by covering his ears, even when people sang at church.

110. Dr. Johnson found that Student demonstrated qualitative abnormalities in reciprocal social interaction, a failure to develop peer relationships, and a lack of social emotional reciprocity. She also found that Student demonstrated qualitative abnormalities in use of gesture to compensate for spoken language, varied spontaneous make-believe or social imitative play, initiation or sustaining conversational interchange and had stereotyped, repetitive or idiosyncratic speech.

She also found that Student demonstrated restricted, repetitive, and stereotyped patterns of behavior in the areas of preoccupations or circumscribed interests and compulsive adherence to nonfunctional routines or rituals. Student met the cut-off scores on the Autism Diagnostic Interview-Revised, in the areas of Reciprocal Social Interaction and Communication. The score for Restricted, Repetitive and Stereotyped Patterns of Behavior fell below the cutoff by one point. However, additional behavioral symptoms of noise sensitivity and inflexible behaviors were considered in the DSM-V diagnosis of Autism Spectrum Disorder and, in her opinion, Parents' reported symptom were consistent with a DSM-V diagnosis of Autism Spectrum Disorder. At hearing, she credibly explained that the ADIR manual specifically addressed the situation when a score falls one point below the cut-off, and a one point was an accepted amount of error in the test.

111. At hearing, she explained that the algorithm was based upon the DSM-IV, but under the DSM-V, the criterion for autism was met because that included other behaviors, which Parents reported. She also maintained that Restricted, Repetitive and Stereotyped Patterns of Behavior are not necessary for eligibility under autism. She obtained scores for Student on the Autism Diagnostic Interview-Revised, but they were not in her report. The Autism Diagnostic Interview-R was just one aspect of a comprehensive evaluation and could not be used in isolation to provide a diagnosis.

112. Dr. Johnson used the Behavior Assessment System for Children-Third Edition, which assessed emotional and behavioral development across clinical and adaptive scales, with four options for responding from "not at all" to "always." Parent, Ms. Von Iderstein, Ms. Donnelly and Ms. Wong filled out rating scales. She asked Ms. Wong to fill out rating scales because she knew Student well, and Ms. Wong reported she has observed Student with peers. In school problems, all teachers reported Student had learning problems to differing degrees. Ms. Von Iderstein and Ms. Donnelly noted that Student's ability to comprehend and complete schoolwork fell in

the at-risk range, while Ms. Wong reported Student had clinically significant difficulty with comprehension and completion of school work. In addition, Ms. Wong reported that Student was at-risk for attentional difficulties in an academic setting. In behavioral symptoms, Parent, Ms. Wong and Ms. Donnelly reported that Student was at-risk overall in this category. All respondents indicated Student presented in an atypical and withdrawal to differing degrees. Dr. Johnson concluded this meant his behaviors were odd and he was generally disconnected from his surroundings, and had difficulty making friends or unwilling to join group activities. Parent, Ms. Wong and Ms. Donnelly ratings indicated clinically significant levels of symptoms related to a developmental social disorder that, in Dr. Johnson's opinion, aligned with autism. All teachers indicated that Student had challenges with executive functioning, specifically problem solving, such as organizing and initiating tasks.

113. Dr. Johnson reported on the Adaptive Behavior Assessment System 3, which examined Student's functioning in multiple skill areas and in comparison to chronological age. Dr. Johnson found that overall, Student had extremely low adaptive functioning. His performance on this measure was below expectations based on his age and Dr. Johnson's determination of Student's nonverbal cognitive ability, which discrepancy she maintained was consistent with autism. At hearing, she also acknowledged that low adaptive functioning could be indicative of an intellectual disability and required in order to have an intellectual disability.

114. Dr. Johnson reported on her results of the Social Responsiveness Scale, which she described as an autism specific measure that is highly associated with the DSM-V to diagnose the syndrome of autism. She asked Ms. Wong to fill out rating scales because she knew Student well, and Ms. Wong reported she had observed Student with peers and the measure includes interactions with adults. Ms. Von Iderstein did not yield any elevated scores. Parent, Ms. Wong and Ms. Donnelly's responses indicated moderate to severe overall deficiencies in social interaction and

social communication across settings, and severe restricted interests and repetitive behaviors at home and at Pliha. Parent, Ms. Wong and Ms. Von Iderstein's reports indicated that Student's social awareness was typical of his peers. Parent, Ms. Wong and Ms. Donnelly's responses indicated moderate to severe overall deficiencies related to autism, and Ms. Von Iderstein's scores were nearing the clinically significant range.

115. The Autism Diagnostic Observation Schedule-Second Edition, module 2, was a measure of social communication and social behavior in children who produced flexible phrase speech and was used as a diagnostic indicator for Autism Spectrum Disorders. Module 2 was the appropriate module for Student, given the level of Student's spontaneous language. Student spontaneously speaks in flexible phrased speech, at least two words together with inconsistent beginning carrier phrases. Module 3 required complex fluent language and Student did not demonstrate this level of language at the time of testing and would have been an inappropriate choice. Student's goals were consistent with module 2. Items presented in the schedule provided a variety of opportunities for participants to engage in typical social interactions of exchange. Based on the individual's social interaction, scores were derived to determine whether there were diagnostic indicators for Autism Spectrum Disorders.

116. Dr. Johnson administered the ADOS by herself. The standard administration required the ADOS2 be administered by one person. When another professional was present in the room during administration it was important that the examinee never be confused about which person was the examiner, with whom the examinee was expected to interact. Anyone present beyond the examiner should serve solely as an observer. Dr. Johnson reported that Student's algorithm scores were highly consistent with autism and his symptoms related to autism fell in the high end of the moderate range. At hearing, Dr. Johnson denied that Student's failure to initiate interaction and sustain interaction had anything to do with apraxia because the

measures she used controlled for language.

117. Dr. Johnson's discussions with Parents, and Student's behavior as noted by Ms. Kendzierski in District's 2016 assessment, raised questions in Dr. Johnson's mind as to whether Student had autism, including that he moved into her personal space, lacked eye contact, over focused on a topic, and had raised speech intonation. She explained that concerns for social awareness, perseveration, lack of eye contact and abnormal voice quality were consistent with autism. Dr. Johnson observed all but one of these same behaviors, and in addition, she observed repetitive stereotypical body movements, which she opined were not attributable to anything other than autism, very minimal social communication and response, content to play on his own, and repetitive play skills. Dr. Johnson had to gain Student's focus each time she gave her nonverbal test. She found him when left to his own devices in a world of his own, which was consistent with autism. Dr. Johnson opined that Student's social initiation was low and it was mostly on a preferred interest. She claimed Parent's reporting of very elevated scores on the Conner Behavior Rating Scale, which was a survey questionnaire which gathered symptoms largely for several domains including ADHD, warranted comprehensive evaluation.

118. Dr. Johnson's report addressed the two academic achievement tests she administered to Student, the Wechsler Individual Achievement Test-Third Edition and the Woodcock Johnson IV Tests of Achievement. She compared the scores to Student's Woodcock Johnson composite and subtest scores at Pliha from November 2016.

119. In reading, Student read simple, one syllable sight words well and struggled when the word became two syllables, and his errors in oral reading were largely mispronunciations. In writing, he did not use capitalization or punctuation for writing samples, with the exception of a period at the end of one sentence. On sentence writing fluency, he used capitalization and punctuation inconsistently. In

math, Student correctly answered most simple single-digit addition and subtraction math facts, but he did not correctly answer any two or three digit addition and subtraction or multiplication. There was no change in Student's standard scores or grade equivalency in applied problems. Although his standard scores did not change, grade equivalency increased in the following areas: Composite reading, broad reading, academic skills, broad achievement, letter-word identification, passage comprehension, sentence reading fluency, and sentence writing fluency. His standard scores in spelling, calculation and math facts fluency increased, but decreased in basic reading, word-attack, and writing samples. Dr. Johnson identified the areas she thought qualified for specific learning disability as: Basic reading skill, reading comprehension, reading fluency, calculation, and applied math. At hearing, Dr. Johnson explained some of Student's scores: Overall, he did not make progress in written language, but he improved in math calculation. In math facts fluency, which are rote skills, and were the easiest skills for Student to learn, his standard score increased by several points.

120. Overall, on the Wechsler Achievement test, Student's scores fell into the very low range, with overall reading and math in the low range and overall writing in the very low range. He did not write a corresponding letter upon hearing a letter sound for spelling. He did not understand the task of writing an essay. For numerical operations, he did not correctly answer double-digit addition, although it was reported he performed this type of problem prior to November 2016. In applied math, Student did not correctly answer items requiring the calculation of coins, read an analogue clock or a bar graph, although each of these problems he could complete prior to November 2016.

121. At hearing, Dr. Johnson opined that Student made academic progress in some areas between November 2016 and May 2017. Math facts, single digit addition and subtraction, was the clear area of progress between testings. The fact that Student

made progress in math facts did not necessarily mean he could make progress in English language arts in the special day class. Math facts could be memorized which was not the case for reading and writing which was more complex, and she did not expect he could make that kind of progress in English language arts. Applied math was more complex than math facts, and often required a strong foundation in language, reading and auditory processing. Although she contended Student did not make some progress in applied word problems on the subtests between November 2016 and May 2017, she agreed that Student's standard score remained <40 even though his grade equivalence did not change. In her opinion, Student could learn rote skills in the special day classroom at District, which are not language laden, but she observed he required consistent one-to-one help while in the classroom. Student learned better when there was not much of a language component. Student's math progress demonstrated that a special day classroom was appropriate for some aspects of academics, but she maintained that based on her assessments, Student could not learn reading in a group setting or he would regress. Unlike math, reading instruction requires many more cues given Student's deficits in language and auditory processing, to understand and apply the information. For example, a relative strength for Student was decoding, but he was very challenged in the areas of reading fluency and written expression, which was consistent with his language impairment and auditory processing impairment. Math calculations are not as affected by these challenges.

122. According to Dr. Johnson, Student only made the gains he did after receiving one-to-one intervention which lead him to his current level of ability. She supported her opinion with Dr. Majors' 2014 assessment, which concluded that Student had not made month-to-month academic progress or any progress in reading comprehension in the 18 months prior to her assessment while in a District setting. According to Dr. Johnson, Student had a "big hole to climb out of" when he began at Pliha in 2014. Dr. Johnson explained that the decline in Student's writing skills and

while receiving the majority of instruction at Pliha, was due to the reduced amount of instruction at Pliha after November 2016, and that Student required additional one-to-one instruction in order to maintain skills. She observed that he was appropriately behaviorally supported at Pliha, in that they had a consistent reinforcement plan.

123. At hearing, Ms. Von Iderstein explained that Dr. Johnson's comparison of Student's scores reflected an improvement in all but one area.

124. In her report, Dr. Johnson concluded Student met the special eligibility criteria and DSM-V diagnostic criteria for autism because she observed the required deficiencies across settings. She also concluded Student met the eligibility criteria for specific learning disability in several areas due to significant discrepancies in his cognitive ability and academic achievement and the present of severe auditory processing deficits.

125. Dr. Johnson did not determine whether Student met the criteria for intellectual disability. Because Student did not receive autism specific treatment or adaptive functioning treatment, she deferred determination as to whether Student was intellectually disabled because that treatment could possibly increase his cognitive scores. Dr. Johnson claimed there was research, which she did not identify, that after two to three years of autism specific intensive intervention in approximately 40 percent of individuals, cognitive scores increased. She was unable to give the specifics or any approximation as to the amount of increase in cognitive scores. Because she could provide no details, her testimony on this issue was unpersuasive. She also needed more information to determine if Student's low adaptive functioning was simply because of intellectual disability, or autism. The information she identified she needed was an analysis of Student's ability to engage and participate in intensive applied behavior analysis over a period of years, typically three to five years, and retested to determine if his scores improved.

126. Dr. Johnson admitted that the purpose of considering differential diagnosis was accuracy of assessment results. A differential diagnosis was an attempt to determine, as between two conditions, which condition existed as opposed to a comorbid diagnosis. She claimed her evaluation considered a differential diagnosis of intellectual disability, but she was impeached on this issue. There was no analysis of that evaluation in her written report and she admitted she did not determine as part of her assessment that Student did not have an intellectual disability. The lack of analysis undermined her credibility on her opinions regarding Student's eligibility. She ultimately admitted that she could not state that Student was not intellectually disabled. She acknowledged Student was on the borderline of intellectually disabled based on her assessment. Because Dr. Johnson did not rule out intellectual impairment, her opinions regarding the reasons Student did not initiate social interaction appropriately or spontaneously use language because of autism was not persuasive.

127. She agreed that there was overlap in criteria in the categories of special education eligibility, including autism and speech and language impairment. She denied there were symptoms of intellectual disability, which looked like autism, but was impeached on this issue. Although she claimed intellectually disabled individuals do not consistently have odd behaviors that are stereotypical and are not socially withdrawn, her testimony on this issue was confusing and unconvincing. She admitted that autism and intellectual disability could be comorbid conditions, and about 40 to 50 percent of people with autism demonstrate intellectual impairment. She agreed that deficient auditory processing could be commensurate with intellectual disability, in that she would expect an individual's cognitive ability to have an equivalent auditory processing score on some tests, but vary on others such as auditory comprehension and auditory reasoning. Taken together, she insisted that Student's global adaptive composite score of 61 on the Adaptive Behavior Assessment and the Universal

Intelligence test score of 74 were indicative of a specific learning disability, but at one point, admitted those scores could be suggestive of intellectual disability.

128. Dr. Johnson's report contained three pages of recommendations. Among other things, she recommended that for appropriate academic skill acquisition and maintenance, and given Student's severe underlying auditory processing deficits, he required two to three hours per day of evidence based, one-to-one academic intervention to address the areas of foundational reading, written expression, and applied math for at least six months. She recommended that Student's math fluency be addressed through a special day class/small group placement with one-to-one assistance during instruction and with greater emphasis on Student's math calculation skills. For the rest of his school day, she recommended Student remain in a special day class in order to address Student's autism specific needs of social interaction and social communication in group settings with peers. She also recommended Student receive 30 minutes of evidence-based group social skills intervention within the special day class, three times per week, to be generalized the other two days of the week because it could not be assumed that social skills would generalize without specific programming that targeted generalization. She also recommended Student's IEP include intensive behavior intervention supervision on a weekly basis to ensure social skills acquisition, maintenance, generalization, and meaningful data collection among staff. She recommended school based individual speech for 30-minutes four times per week and 30 minutes of group therapy once per week to address social communication with peers. She also recommended additional goal areas, including a goal in applied math, but she did not comprehensively address each of these during her testimony.

129. At hearing, she explained that it was not appropriate for Student to be educated in a group environment because of his learning disabilities, language impairment, and challenges in acquiring and retaining information. Student did not

naturally create a visual image in his mind as to what a word meant and file it away as typical children do. Student had very unique needs, and it was a time-consuming process for him to gain academic skills. In her opinion, Student required intensive instruction in a one-to-one setting; if he was not in a one-to-one setting, there would be lost opportunities, more mistakes, and a denial of the regular feedback he required. Student had attention difficulties, and the one-to-one instruction not only gave him feedback regularly on his performance, but also made certain he was attending and receiving reinforcement. Without one-to-one instruction, Student would not make progress or regress in reading and writing, and or applied math because of the language basis and verbal mediation in math word problems. In her experience, frequent trials to shape skills were necessary for children with learning disabilities and a deficit in academic achievement, and individual instruction permitted frequent trials in close succession that allow a child to gain and acquire a skill more quickly. Student's auditory processing disorder would have a significant impact on him if he were educated in a group setting because of his difficulties in perceiving information and his need for cues for appropriate auditory processing. He could not differentiate some sounds and it would take him longer to understand what he was supposed to do if he does not have that focused attention. In a group, while other children are attended to, he would lose instructional minutes and make more errors. She explained that a behavior interventionist at the advisory level was necessary because District did not have behaviorally trained staff who knew how to develop Student's social skills. While learning with peers can be motivating for children in middle school, Dr. Johnson did not find this was the case with Student based on her observations. She saw him initiate one interaction with the peer and it was unclear what his overture was, and his language was not facilitated as required by his IEP. Because Student demonstrated at school, a preference towards isolative behavior during unstructured time and very limited social response, social skills instruction was necessary.

130. Dr. Johnson denied that her recommendations would have changed if she had not concluded he was autistic. Her recommendations would have been the same even if Student was intellectually disabled, acknowledging he could be in the intellectually disabled range based on her testing. Regardless of eligibility based on autism or intellectual disability, she opined that her recommendations appropriately set forth what Student needed in order to make progress.

THE MAY/JUNE 2017 DISTRICT ACADEMIC ASSESSMENT

131. Ms. Von Iderstein conducted an academic assessment in May and June 2017 and prepared a written report with her findings dated June 16, 2017. The purpose of the assessment was to establish Student's current academic levels to determine if his IEP needed modification. Student was compliant and willing to participate during testing. He could work for 20-30 minutes at a time and earned reinforcements throughout to help keep him motivated. In Ms. Von Iderstein's opinion, Student's behavior did not appear to be egocentric. He talked about subjects other than World War II, such as Sponge Bob Square Pants and Disneyland.

132. As part of the assessment, Ms. Von Iderstein administered the Kaufman Educational Achievement Test 3, the Gray Oral Reading Tests-Fifth Edition, and the Test of Word Reading Efficiency-Second Edition. She also utilized several other informal tests, including the San Diego Quick Assessment, Fry's Oral Reading Test, Burns and Roe Informal Reading Inventory, and the Math Diagnostic Placement Test. The academic assessment report also stated the results of the Fountas & Pinnell Benchmark Assessment System, which was administered to Student in March 2017, by a special education teacher on special assignment. Based on this test, Student's instructional reading level was Beginner Reader which was pre-grade one.

133. The Kaufman was a standardized assessment that included nine composites in the standard battery, which included measures of key academic skills in

reading, math, written language and oral language. As compared to his 2016 scores, Student's composite scores increased in reading and math.

134. Ms. Von Iderstein concluded that Student was working at a beginning second grade reading level. He had significant difficulty with phonological processing. He required support in blending, rhyming, and segmenting phonemes. On the San Diego Quick assessment, he improved his individualized word reading skills as compared to his 2016 scores on the same test. On the Burns and Roe assessment, she reported Student could decode at a third grade level with 85 percent accuracy. She reported an increase in reading comprehension as compared to his 2016 Kaufman score.

135. Student continued to need support in writing. During the written expression subtest, he did not seem to understand what was expected of him. When given the instruction: Write the beginning of a sentence to an already providing ending of sentence, he simply copied the sentence frame. When writing an essay about a story that was read to him, he did not write in complete sentences. He performed very low on the subtests for written expression and spelling. In writing fluency, he could formulate basic sentences relatively quickly and utilized a picture. She reported an increase in Student's writing fluency, standard score based on a comparison of his 2016 Wechsler Achievement test sentence composition score of 55 to a score 73 on the Kaufman. Both subtests required the students to create their own sentences.

136. In math, Ms. Von Iderstein reported Student continued to need support in math concepts and applications and needed a heavily modified math curriculum. Student needed to practice in understanding the meaning of mathematical symbols and he required supports such as visuals and manipulatives during learning. He could use a multiplication chart when practicing and he used manipulatives to help him count. He also used realistic tangible money to help support his functional math skills.

She reported an increase in Student's math score, from a pre-k level and kindergarten level in 2016, to a second grade level on the Kaufman. Although her testimony was evasive, at one point, she admitted she was referring to Student's 2017 Kaufman math fluency score of 76, and his Wechsler Achievement 2016 math fluency score of 56. She also admitted that these were two different instruments and that the Wechsler Achievement test was timed, and that a comparison of math composite scores on the Kaufman between Student's 2016 and 2017 Kaufman scores showed a decrease in math composite scores from 61 to 57. Her report did not include all of the areas of the Kaufman in which Student did not improve and she had no explanation as to why she did not include this information, including Student's decline in spelling, or his decline in math computation in her report.

137. In oral language, he could use progressive helping verbs, such as, "is" correctly in verbal sentences, and able to use coordinating conjunctions like "and." He could verbally produce sentences containing the correct use of prepositional phrases such as "in the fountain." However, he was inconsistent when using more complex prepositional words such as the word, "with" and he could not use subordinating conjunctions like, "until." He was not able to use present tense verbs with "s" ending and unable to use past tense markers correctly, such as "was/were," or "ed" endings.

138. The assessment included teachers' observations. Ms. Donnelly reported that lessons were taught by the teacher and small group activities taught by an aide. Student continued to need prompting to get out his materials and join the seventh grade group. During group work, Student actively and diligently participated in completing the work assignments and participated in group discussion. He demonstrated the ability to copy information from the board and participated in group discussions. He interacted with the peer mentor in the classroom. He tried hard to complete assignments and worked up to his ability. He consistently followed directions and was well-liked in class. He previously may have protested when asked

to correct errors and on some occasions cried, but could regulate himself. He learned to accept redirection and apply coping strategies. He demonstrated more behaviors earlier in the school year, but learned the consequences of task avoidance behaviors and task compliance, such as praise or rewards.

139. The one notable behavior observed among Student's teachers (which included Ms. Von Iderstein and Ms. Donnelly) was that Student was prompt dependent concerning academic behavior. Student also required prompting to be prepared for instruction. Regarding Student's schoolwork, when teachers/staff were in close proximity to Student, Student performed with a greater level of accuracy compared to when he worked independently. Another notable behavior was that Student did not self-advocate. He did not raise his hand for help in class; and waited for a staff member to approach him. His prompt dependence often resulted in one-to-one instruction. One focus area was reducing prompt dependence. Social games were facilitated two times a week and a PAL lunch one time a week. He learned to choose an activity rather than engage in his preferred solitary activity during unstructured times. He was able to choose a social game or join a game independently with 80 percent accuracy. Examples were given of Student's interacting with peers. He played with peers in a game of paper airplane races and Student independently initiated support for another peer by showing him what page to find the definition on in his history book and proceeded to share his colored pencils with the peer by handing him the pencils and saying, "here you go," and when the peer thanked him, Student responded with, "you're welcome." Student and the peer worked on their projects together throughout the entire period in a sustained interaction, sharing pencils. Student was also able to comment and join in on typical peer conversations during small group activities and teacher facilitated social events.

140. At hearing, Ms. Von Iderstein explained that Student had preferred solitary activity (playing Legos) during unstructured time on Tuesdays or Thursdays

when her classroom was open to the students, but there were not any facilitated activities on those days. As the year progressed, Student was more outgoing, started to eat lunch with peers and interact more often. In June 2017, social skills were not an identified area of concern.

THE IEP TEAM MEETING ON JUNE 16, 2017 AND THE OCTOBER 13, 2017 AMENDMENT

The June Iep Team Meeting

141. District held Student's annual IEP team meeting on June 16, 2017. All required members of the IEP team attended. Parents were provided with a copy of Procedural Safeguards and participated during the meeting. Dr. Johnson appeared by telephone.

142. Ms. Von Iderstein and Dr. Johnson shared the results of their evaluations. Parents were concerned about Student's reading comprehension, math, and communication skills with peers. Attention was discussed, but Dr. Johnson attributed Student's attention issues to auditory processing. Parents asked for recommendations in supporting Student's social interactions at school. The team discussed Student's participation in social activities and interactions with peers. Ms. Von Iderstein reported that Student willingly participated in social activities without prompting to engage. Mr. Pertillia reported that Student engaged with peers and was well-liked, highly social and got along well with all students in class. The adaptive physical education specialist reported that Student was popular and always engaged. Student referenced peer models when he was unsure how to participate and modeled his peers. Ms. Donnelly shared that Student asked questions of and engaged with peers and showed interest without prompting. Multiple examples were shared during the IEP team meeting. The IEP team also discussed Student's speech, language and communication issues.

143. The IEP team reviewed Student's progress on his goals and discussed new goals. Student was reported to have met his 2016 IEP annual goals in the following areas: Math money values; writing sentences, social engagement, math subtraction, intelligibility (two goals), receptive expressive language, and expressive language: Vocabulary, receptive language: Following directions, and gross motor (two goals). He did not meet his goals in the areas of reading comprehension and expressive language subject verb agreement. Some of the results of the academic assessment and Student's current functioning were reported in Student's present levels of performance. In pragmatics, Student was friendly and polite. He consistently greeted, gave farewells and used polite niceties. He initiated with peers and adults, however his initiations were often asking "what is your favorite" questions or single response questions. He responded to others initiation and could appropriately take turns talking. He attended to speakers with his face/body and he understood and used appropriate nonverbal language. He did not regularly initiate and sustain short conversations about general topics in part because his speech and language delays negatively impacted his ability to formulate questions. He expressed his needs and wants, and asked and answered questions; however his sentence structure was typically in error during unstructured conversations. He continued to benefit from prompts to attend when he was distracted. In the area of social emotional, Student did not demonstrate behavioral or social emotional concerns. He was compliant and followed school rules. When he was frustrated, he could regroup and return to task without issue. Under adaptive skills, Student needed consistent prompting to get prepared for class, to get out his binder, to turn in his homework and to turn in his classwork. Student was compliant and followed school rules, but did not raise his hand to request help or clarification. He sat and waited until a staff member prompted him to ask for help or asked if he needed help.

144. The IEP team identified Student's areas of need as math (making change, finding the total costs, division); reading (sight words, compound words, comprehension); writing sentences; self-advocacy; executive functioning, gross motor skills, speech/language (speech intelligibility, consonant blends, regular past tense verbs, syntax, (including subject verb agreement), personal narratives and pragmatics.

145. The IEP team discussed services, programming, least restrictive environment, accommodations and modifications. The team explained that social skills would be embedded within the special day class in addition to social skills instruction provided within the group speech therapy. District offered to assess Student with regard to autism and agreed to provide Parents with an assessment plan.

The Fape Offer

146. The offer of FAPE included specialized academic instruction in a special education classroom for math, science/social studies and English language arts with a modified curriculum, with mainstreaming in physical education, and an elective class. District offered related services as follows: Group speech and language services for 50 minutes per week; individual speech and language services for 50 minutes twice per week, and adapted physical education 30 minutes per week in a group setting. The offer also included transportation and four weeks of extended school year specialized academic instruction of 240 minutes per day five times per week, individual speech and language services 60 minutes per week and adapted physical education for 30 minutes per week.

147. The IEP team developed seventeen goals in the following areas: math (goals 1, 2, and 7); reading (goals 3, 5-6); writing (goal 4); self-advocacy (goal 8); executive functioning (goal 9); speech and language (goal 10-intelligibility, goal 11-consonant clusters, goal 12-regular past tense verbs, goal 13-syntax, goal 14-narratives, goal 15-pragmatics), gross motor (goals 16 and 17). District agreed to

develop an applied math problems goal.

148. District proposed the following accommodations: preferential seating; check in's for monitoring seizures and attention; repeated directions; positive behavior supports; visual supports; multiplication charts/number chart/calculator; sentence frames; breaks if needed; a modified curriculum in the areas of English language arts, science, history, and math; supports for speech intelligibility; consultation between classroom teachers; and the speech pathologist regarding speech and language supports and strategies.

149. Dr. Johnson disagreed with District's offer of FAPE. In her opinion, Student's skills would regress in the setting of group instruction. She was also critical of the June 2017 IEP because it lacked an applied math goal and a social skills goal. By her recommendations, she attempted to balance Student's needs. She believed Student could make progress in a special day class for subjects other than English language arts and applied math, and it was important for Student to receive speech therapy, social skills intervention and physical education, so he could practice social skills.

150. Ms. Von Iderstein believed District's offer of specialized academic instruction was an appropriate level to support Student's access to the subjects it covered because he could participate in whole group and small group instruction, and, in her opinion, he had been successful in that setting and the offer met all of his needs. In her opinion, instructional time in a one-to-one setting was not offered because it was not appropriate. She opined Student did not need this instructional model to learn as evidenced by Student's progress on his goals and math scores. She denied that one-on-one instruction was more effective with a student, which contradicted other parts of her testimony, undermining her credibility on this issue. She also admitted that she utilized one-to-one instruction with Student to repeat concepts to him and to check for understanding, which he needed frequently.

151. In Ms. Von Iderstein's opinion, District's offer of specialized academic instruction was a sufficient amount of time for Student to make progress on his goals. Two periods of English language arts allowed for a greater amount of time to learn writing, and obtain whole group, small group and, if necessary, individual instruction, and would allow Student to socialize with peers. In her opinion, Student needed the supports of whole group, small group and individualized instruction, and the social aspect of a special day class to learn English language arts. Ms. Donnelly believed there was no "points for behavior chart" listed in the accommodations for 2017 IEP because Student behaved, was motivated to learn, asked questions, volunteered and demonstrated interest. He did not need that support.

152. In Ms. Haro's opinion, the two sessions of individual speech and one session of group speech was an appropriate amount for Student to make progress on his speech goals. Student had significant speech needs, but he made progress when he received three individual speech sessions per week. While she believed he needed individual attention, he also needed group speech so that he could use his skills with his peers in order to generalize his language use and speech, and work on his goals. In her opinion, two individual speech sessions was sufficient and three individual speech sessions per week was too restrictive. To justify not offering three sessions of individual speech per week, she explained she would not be able to facilitate generalization if Student received only individual attention. She also thought District's offer of extended school year speech was appropriate because over the summer it was more important to give individual focus to Student rather than providing a group session. The speech and language consultation services offered by District supported Student's speech and language in the classroom.

153. District offered Student appropriate gross motor skills goals and adapted physical education services in the June 16, 2017 IEP.

The Goals – Student’s Witnesses

154. Father did not believe Student’s goals were appropriate because they were not challenging enough. In his opinion, Student did not initiate contact with other students and exhibited minimal socialization, but he admitted at hearing that whereas Student used to interact only with adults, he was interacting more with both peers and adults, although, according to him, interaction with peers was limited.

155. Ms. Wong also opined on Student’s academic goals during her testimony. In her opinion, math goal 1 was not challenging enough because prior to November 2016, Student was counting combination of bills and coins up to two hundred dollars. She expressed no opinion about math goal 2 because she was not working with Student on multiplication and division. Reading Goal 3 was not challenging enough since according to her, by June 2017 Student was reading passages at this level and answering detailed questions. According to Ms. Wong, writing goal 4 was not appropriate because she was not certain if it was measuring punctuation. In her opinion, although Student was not using correct capitalization independently, punctuation should have been a separate goal. She also claimed that Student could “potentially” write more sentences than was called for in the goal, and the complexity of the sentences was not stated. She believed reading goal 5 was inappropriate because the source of the frequency words was unclear and she was uncertain if the words Student was required to read were familiar words. As to reading goal 6, Ms. Wong’s testimony was unclear. She did not opine that the goal was inappropriate, but that she had questions about the goal, including the source of the compound words and the benchmarks. In Ms. Wong’s opinion, reading fluency was an area of need for Student and there was no reading fluency goal. However, she admitted Student had a decoding goal and decoding fell within the area of reading fluency. She opined that Student’s writing goals should have been broken into separate goals, one for punctuation and one for content; and she would have added a

spelling goal.

156. Ms. Pliha opined that speech and language goals 10, 12 and 13 were all appropriate for Student. She would have added a vocabulary goal and a language formulation goal that included verb tense. She opined that the consonant clusters goal 11 was inappropriate because it was not challenging enough because Student had very few articulation errors, although she admitted he had a hard time pronouncing multi-syllable words. She would have written the goal more as a writing goal rather than an articulation goal. In her opinion, narratives goal 14 would be extremely difficult for Student and that she would have written the goal differently, her testimony was equivocal as to whether the goal was inappropriate. She claimed Student would not be able to meet the pragmatics goal 15 because he could not formulate questions and a social skills turn taking goal would have been more appropriate; she would have added a pragmatics goal for turn taking and eye contact because she had to frequently prompt him for eye contact. She would have added a vocabulary development goal because that would have supported Student's reading comprehension and receptive language comprehension. She also opined that Student needed a receptive language goal such as listening to a two or three sentence story.

The Goals – District's Witnesses

157. Ms. Von Iderstein prepared goals 1 through 9 for academics, self-advocacy and executive functioning. In her opinion, these goals were appropriate because they addressed Student's needs as determined by her assessments and her work with him during the school year. Goal 1 was a functional applied math goal which required Student to problem solve and use a higher level of thinking than his prior IEP goals. Writing goal 4 required Student to develop his own sentence with a sentence starter and express what he saw, whereas his prior goal just had him sort words he copied into a sentence. In Ms. Von Iderstein's opinion, Student did not require a

spelling goal because, although her testing indicated Student's scores in spelling had decreased, Student needed to first develop the foundational skill of writing in a complete sentence on his own, which his other goals addressed, before critiquing his spelling. In addition, spelling fell within the broader skill of decoding and phonics and Student had goals in that area. She focused on Student's ability to write sentences independently and there was no common core state standard just for spelling. Reading goal 5 supported reading comprehension, accuracy and automaticity. Automaticity improved Student's speed of reading because once he recognized sight words, he would not linger over a sight word while reading, which in turn, allowed him to focus on what he was reading. This goal was developed in collaboration with Dr. Johnson. The sight words addressed by the goal were at an appropriate level for Student since he had already moved from a first to second grade instructional level on reading high frequency words. Although the goal did not specify particular sight words, but the goal referred to high frequency, and among teachers there was consensus on what constituted high frequency words at a second grade level. Because Student required repetition to retain information, the goal targeted both new words and words he had not yet mastered, but also some of the words he knew because Student required repetition. Reading goal 6 supported decoding, writing and spelling. Once Student could identify and decode compound words, he would know how to write and spell the words. Development of Student's spelling skills was supported by developing Student's automaticity with high frequency words so he could use these words in his writing. Goal 8 addressed Student's failure to raise his hand and ask for clarification, but sat and waited until staff prompted him to ask or asked if he needed help.

158. In Ms. Von Iderstein's opinion, Student had no need for a social engagement goal. Socialization was addressed by way of the speech and language goals. As the 2016- 2017 school year progressed, Student was more comfortable and

engaged with others. By June 2017, he was engaging with peers on Tuesdays and Thursdays during lunch time, engaged in appropriate social play, and she saw Student engaged in limited reciprocal conversations with peers. Student had to first develop the foundational skills of starting and holding an appropriate conversation, which was targeted by pragmatics goal 15 and designed to address Student's interactions with peers and adults.

159. Ms. Haro thought Student's goals were appropriate and addressed all areas of Student's unique needs. Speech intelligibility goal 10 was based on Student's baseline which she determined through her work with Student and meant to target the phonological process of assimilation which Student exhibited most often. It was an appropriate challenge for him, was functional and measureable, and he could achieve it within a year. Speech and language goal 11 targeted Student's difficulty putting two consonants together and the beginning of words was an appropriate place for him to start attempting to master this task. Speech and language goal 12 was appropriate because it was based on the trials Ms. Haro conducted, and targeted Student's inability to understand and use regular past tense verbs as part of his natural language. Goal 13 was based on Ms. Haro's trials with Student and was designed to target Student's inconsistent use of linguistic structures by requiring him to use correct grammar, including vocabulary, in three sentences describing a picture scene. In her opinion, although Student's vocabulary was very low, Student did not need a separate vocabulary goal because using correct vocabulary was imbedded in the syntax goal 13. She reviewed vocabulary with Student when she showed him the picture scene to make sure he understood the vocabulary and used it correctly, although she only took data on Student's skill in using grammatically correct sentences. Narratives goal 14 was appropriate because Student was not using detail in describing an event, and a sentence frame containing transition words helped him learn how to tell a simple story others understood. She used sentence frames with Student because he needed it to

help him organize language. Goal 15 addressed pragmatics and addressed Student struggle with understanding use of “wh” words and speaking in a complete sentence. It was based on her trials and observations of Student during her work with him. Receptive speech was a need for Student and his goals supported oral comprehension; for example, vocabulary comprehension was supported through syntax goal 13, and goal 12 supported Student’s skill in understanding that different grammatical structures, such as past tense verbs, have a different meaning.

160. In Ms. Haro’s opinion, Student did not need a turn taking goal. She observed him talking with peers and he did not have issues with turn taking, although his utterances were shorter as compared to typical peers. Student’s goals supported his ability to have conversations by working on his language issues, including his ability to formulate complete sentences, which was part of goals 12 through 15. In her opinion, Student did not need a separate goal to address his eye contact because any issue Student had with eye contact was addressed by his pragmatics goal 15, which required Student to coordinate his eye contact with his language and speaking fluency.

161. Ms. Donnelly corroborated Ms. Iderstein’s and Ms. Haro’s testimony on goals. She believed Student’s goals were appropriate because they were specific to Student, based on the assessments, measurable, observable and challenging for Student.

The Additional Applied Math Goal

162. District staff developed the new applied math goal and sent it home to Parents after the June 2017 IEP team meeting. Ms. Donnelly became Student’s case manager for part of the 2017-2018 school year. She followed up with Parents and offered to have an IEP team meeting.

163. District scheduled another IEP team meeting for October 13, 2017, for the purpose of amending the June 2017 IEP to add an applied math goal to address

skills in solving word problems with addition and subtraction. Parents informed District that they did not want an IEP team meeting. Instead, Parents went to Talbert on October 13, 2017 and signed the IEP amendment adding the goal and interlineating that Father did not agree to the IEP goals, but that District could implement the goals. Parents also waived the presence of all IEP team members and the IEP team meeting.

164. At hearing, Ms. Donnelly opined that the math goal 18 was appropriate for Student because it was observable and measurable, challenging, and based on his functioning. It also served the purpose of being a reading and writing goal, which were part of Student's areas of need, and was supported by the placement and services offered at the June 2017 IEP. In Ms. Wong's opinion, goal 18 was "maybe" too basic if Student was working on the multiplication and division set forth in math goal 2, and she did not understand what it measured. Her testimony was equivocal and therefore unconvincing.

THE 2017-2018 SCHOOL YEAR-STUDENT'S EIGHTH GRADE YEAR

165. During the 2017-2018 school year Student was in eighth grade. The District 2017-2018 school year began on September 6, 2017. Student continued to attend Pliha for English language arts instruction for 90 minutes, Mondays through Fridays, beginning on September 7, 2017. He attended Talbert on the same schedule as he did during the 2016- 2017 school year, Mondays through Fridays, beginning at 10:00 a.m. and ending at 2:50 p.m. on Mondays through Wednesdays and Fridays, and at 1:20 p.m. on Thursdays.

At Pliha Center

166. Beginning in September 2017, Ms. Wong worked with Student for 90 minutes, two days per week, and Ms. Pliha provided three days of English language arts instruction per week, during which time she also addressed Student's speech and

language issues.

167. Ms. Pliha observed that eye contact had to be elicited from Student continuously, although he cooperatively provided it. She explained that it was important to maintain eye contact with him while teaching in order to support his comprehension and it was part of communication. She prompted Student ten times within 90 minutes for eye contact. Student required a great deal of repetition, which was a function of his processing deficits in order to make certain he heard, processed and remembered what was said. It was necessary to keep her utterances short, that she spoke slowly and made certain she had his attention through eye contact in all instruction she provided him. She thought Student's attitude was better prior to November 2016, in that he was more invested in the instruction and learning process and was more of a participant.

168. Ms. Wong described Student as friendly. He made jokes from time to time, although she did not believe all of his jokes were logical. She saw him flap his arms less than five times and cover his ears when he heard trucks back up and beep. Sometimes he was self-confident when interacting with others, and sometimes he tried to play mid- instruction. Student needed prompting for listening or "eyes on" during modeling for sentence structure, for verbal and written language and communication, and help to identify what support materials he needed for specific tasks.

169. At the time of hearing, Student was reading between 2.5 to 3.0 grade level for guided reading, stories and novels. He was not able to read novels before November 2016. He practiced at that same level for fluency, but it was necessary to have him repeat sentences to make sure he was attending to punctuation. For comprehension, he was at the same instructional level. Independence level was the ability to provide correct answers at 90 percent accuracy or greater, and instructional level was below 90 percent accuracy. Student could answer factual questions

independently, but for higher order thinking skills he required guidance and discussion as to what the question was asking. Since November 2016, his oral expression and length of utterance increased, mostly when he spoke about a preferred topic, but his utterances were not always sentences, and Ms. Wong had to question him to determine what he had said in order to model the sentence and have him repeat what he said.

170. According to Ms. Pliha, talking and formulating language was very difficult for Student, and he needed a lot of encouragement to talk. He responded to verbal praise, but in order to establish and maintain real effort from Student, the point system was more effective because it was visual. In her opinion, Student liked to learn, but he still needed the behavior plan because it was motivating to him. In her opinion, Student needed individual instruction in order to make progress because he had a severe language deficit and an auditory processing deficit, so acquiring language had been extremely delayed, which impacted his learning. His level of language development impacted his progress in reading and writing.

171. Between September 7, 2017 and the time of hearing, Pliha charged Parents \$85.00 per hour for academic instruction. Parents paid Pliha for Student's academic instruction from and after September 7, 2017. At the time of the hearing, Parents sent Pliha's monthly invoices and copies of Parents' cancelled checks to District for reimbursement pursuant to the settlement agreement through December 22, 2017. For each request for reimbursement submitted by Parents, District reimbursed Parents pursuant to the terms of the settlement agreement.

At Talbert

172. Student attended Ms. Donnelly's special day class for English language arts class and starting in January 2018 special day class for science. Student's classes had between 12 and 17 students comprised of students with a range of disabilities,

and two to four support staff. In both classes, students received both whole group and small group instruction. The English language arts class was divided into three groups by instructional level. Student was in the primary group. When Student arrived at 10:00 a.m., Ms. Donnelly or an aide worked with him and two other children in a group, the primary group, for reading and writing. Ms. Donnelly was evasive at hearing when responding to the question as to whether Student needed individual attention in class. She explained she used a round robin method to read, but she did not answer the question.

173. Student attended Ms. Von Iderstein's special day class for third period math, and fourth period history/social science until January 2018. For math, she provided small group instruction and one-to-one instruction for some or all the students, including Student. There were three students with similar math abilities as Student and she could group them together to provide small group instruction.

DOCUMENT PRODUCTION TO STUDENT'S COUNSEL

174. Student's counsel made a request for records from District around October 18, 2017. District complied with the request within the statutory time period with everything requested that District could locate. Because Student's counsel questioned whether all of the requested documents had been provided, District personnel looked for and found additional documents in December 2017 and at the end of February 2018. In the February 2018 production, goal progress data was produced for the March 2018 short term objectives on Student's 2017 IEP goals along with the December 2017 progress reports. District did not falsify or create the data sheets because Student's counsel was questioning the whereabouts of the documents.

STUDENT'S EXPERT – MS. PLIHA AND THE MARCH 2018 ASSESSMENT

175. In February and March 2018, Ms. Pliha assessed Student and prepared a

27- page speech-language and academic evaluation dated February 2018 to obtain some updated information on Student's current levels of functioning in the academic and speech areas. As part of her evaluation, she conducted a record review, testing and a comparison to Student's November 2016 scores on the tests she administered at that time. She administered the Comprehensive Test of Phonological Processing, Second Edition, which assessed the three aspects of phonological processing, the Peabody Picture Vocabulary Test, Fourth Edition Form A, the Expressive Vocabulary Test, Second Edition Form A, the Woodcock Johnson IV Tests of Achievement Form A, the Woodcock Johnson Tests of Oral Language, Form A and conducted a language sample assessment. In her opinion, in determining progress, a valid comparison required a comparison of the same tests.

176. On the Woodcock Johnson Tests of Achievement, some of the subtests showed he made some progress and in others he regressed, although it was usually within the standard error of measurement. Student showed growth in letter-word identification, passage comprehension, word attack, and sentence fluency, and on the reading and broad reading cluster scores. He showed a decline in the basic reading skills cluster and reading fluency cluster. In oral reading, Student showed significant gain. In her opinion, decoding was an area of growth for Student since he was now performing at a middle to upper second grade level in accuracy, as compared to when he first began attending Pliha. In her opinion, Student demonstrated no growth or regression on the math tests and clusters. On the math cluster of applied problems and calculation tests, and broad mathematics cluster, the standard scores of <40 did not change. On math calculation, his score showed regression because his standard score declined from 41 to 40. However, he improved in math facts fluency. In writing, Student evidenced significant regression on the written language cluster and standard score <40 in broad written language did not change.

177. In Ms. Pliha's opinion, overall, Student had poor phonological

processing and deficits in phonological processing were an auditory processing deficit. A deficit in one or more of skills involved in phonological processing was the most common cause of learning disabilities and was associated with mathematical calculation, oral and reading comprehension. Regarding his vocabulary skills, Student receptive and expressive skills were relatively low and showed evidenced regression on one subtest. He demonstrated some regression on the general language tests of the Woodcock Johnson Tests of Oral Language except on the phonological test of sound blending.

178. According to Ms. Pliha, Student's expressive speech skills minimally improved. His receptive speech skills were about the same, although articulation improved. Language formulation was Student's biggest challenge. On the language sample taken from Student, she determined his mean length of utterance was 3.44. Student's mean length of utterance fell within the range of children from 2.11 to 3.4 years of age, characterized by the emergence of complex sentences and embedding sentence elements. A higher mean length of utterance meant that more complex language was being used. Ms. Pliha explained that because the language sample was based upon a preferred topic, Student's mean length of utterance would be lower on a non-preferred topic. He still most naturally responded with one or two words if asked a question. When asked to expand, he struggled with the language. His most typical response is one or two words. She opined that Student's language formulation was simplified as a result of delayed language development and possibly disfluencies in his speech. Based on Student's language sample, she determined that he had a total disfluency rate of 35 percent. Dysfluencies present in speech at the 10 percent level was considered the threshold for a fluency disorder.

179. Ms. Kendzierski reviewed Ms. Pliha's 2018 report. She was critical of Ms. Pliha's mean length of utterance calculation because Ms. Pliha included in the utterance count, words or phrases that Student repeated. She credibly explained Ms.

Pliha incorrectly included 20 items that should not have been included in the utterance count. Ms. Kendzierski also found errors in Ms. Pliha's morpheme calculation. Student's mean length of utterance was 4.65, not 3.44. Between 2016, when his mean length of utterance was 2.78, and 2018, Student's expressive language had actually improved in terms of the complexity of his language, but he was far below what was expected for a student of his age.

180. Ms. Pliha recommended Student receive individual speech therapy, five times per week, 60 minutes per week. She opined Student's language was so deficient, and in order for him to make progress in academic areas, he needed this type of intensive therapy. She also recommended group speech therapy, one time per week, 60-minute sessions to practice his language with peers. She also recommended specialized academic instruction for three hours per day, five days a week, for reading, writing and math, one hour for each subject, for a total of six months.

181. According to Ms. Pliha, Student could only learn with individualized instruction. In order to stay present, attend and maintain attention, Student needed direct instruction. Because Student required time to process and respond, group instruction was not appropriate. In her opinion, Student needed individual instruction in order to make progress given his severe language deficit and auditory processing deficit, which impacted his learning. His level of language development impacted his progress in reading and writing. In her opinion, some of the testing she administered revealed Student had more capability than he could demonstrate because his language development was so impaired. Although he could practice speech skills interacting with peers, in order to acquire new skills, he also needed individual instruction from a licensed speech pathologist.

DISTRICT'S EXPERT – ROBYN MOSES

182. Robyn Moses was a licensed educational psychologist and a licensed

professional clinical counselor. She held a bachelor's degree in child development, a master's degree in educational psychology and counseling, and a pupil personnel services credential, which included counseling, school social work and psychology. She was the director of mental health services for another school district since 2012, was program director for the West Orange County Consortium for Special Education, which included District, between 2006 and 2012, and worked as a school psychologist between 1990 and 1999. Over the course of her career, she assessed students with a range of disabilities, predominantly in autism and mental health issues, developed behavior plans, helped develop IEP's, worked with students with autism and significant global disabilities, including intellectual disability. She conducted over 1000 assessments, and was qualified to make diagnosis under the Diagnostic and Statistical Manual of Mental Disorders, fifth edition.

183. She first became familiar with Student in 2016 when she consulted with District staff in connection with their assessment of Student, and in helping the IEP team understand Dr. Morris' independent evaluation report. Since then, although she denied assessing Student, she reviewed Student's records, including Dr. Johnson's report, and observed him in his classroom during lunch for an hour a few weeks prior to hearing. She did not observe him during academic instruction.

184. At hearing, Ms. Moses criticized Dr. Johnson's assessment, including some of her test selections, some interpretations of test results, and some of her observations. She agreed Student had both expressive and receptive communication deficits. His level of language was at the level of a five-year-old, and within that level, he had further deficits. However, she disapproved of Dr. Johnson administration of the Universal Intelligence test as her only measure of cognition because it gave a very selective view of Student's cognitive thinking because it did not assess Student utilizing verbal skills. In Ms. Moses' opinion, Dr. Johnson could not answer the referral question without more information about Student's cognitive abilities. Ms. Moses

disagreed that Student's scores on a verbal cognitive measure would have been invalid. In her opinion, best practice was to include a verbal measure of cognition along with a nonverbal measure, because a verbal measure gave a more complete view of Student's learning ability and needs to access the educational environment. Eligibility under intellectual disability or specific learning disability was not limited to one form of cognition. It was an overall measure, and it was inappropriate not to gather the information to interpret. Ms. Wagnon corroborated Ms. Moses' opinion at hearing. According to Ms. Wagnon, the Wechsler was a more comprehensive measure than the Universal Intelligence test, and Dr. Johnson should have administered a second cognitive assessment determine cognition.

185. Ms. Moses testimony on the administration of the instructions on the Leiter-R, the Test of Nonverbal Intelligence and the Wechsler Intelligence test was not reliable because she hesitated in responding and was equivocal in her responses, repeatedly qualifying them with the phrase, "I believe." Her testimony on this issue was not given any weight.

186. Ms. Moses disagreed with Dr. Johnson's administration of the ADOS. According to Ms. Moses, the ADOS 2 had five modules and Dr. Johnson should have administered module 3, instead of module 2. Modules 2 and 3 are both applicable to the children in the same age range. The discriminating factor for determining the module was the child's level of language. Module 2 was for children without functional communication, or flexible phrase speech, which is the ability to speak at a four-year old level and use at least two word phrases and have vocabulary for everyday items. Based on a review of previous assessments cited by Dr. Johnson in her report, Ms. Moses opined Student had this ability, so module 3 should have been used. She could not opine on the results, had Dr. Johnson administered module 3; however, because Dr. Johnson used module 2, Student was rated on skills he no longer exhibited because he already obtained functional language, and certain module 3 skills were not

tested at all.

187. Ms. Moses was also critical of the fact that Dr. Johnson did not have a co-assessor in the room during ADOS testing. She received training in administration of the ADOS over a period a few days and administered the ADOS about ten times. According to her, scoring on the measure was subjective and control of variability between raters was obtained through training and practice, familiarity with the test, and having a co-assessor in the room during administration. Ms. Moses's testimony on this issue was not persuasive because it seemed inconsistent with the instructions for administration.

188. Ms. Moses agreed with Dr. Johnson's selection of rating scales she chose to give teachers, other than the rating scales given to Ms. Wong. Based on her understanding that Ms. Wong never observed Student in a group setting or interacted with other children, it was inappropriate that Ms. Wong rated Student in a group setting on the SRS2. The SRS 2 scale asked questions regarding peer interaction and a one-on-one teacher could not answer these questions accurately. In her opinion, it was not necessarily inappropriate to have Ms. Wong fill out rating scales for the Behavior Assessment System, but the SRS was particularly loaded with social interaction, which required peer interaction. She acknowledged socialization was a major domain on the Vineland and District had Ms. Wong fill out a rating scale as part of its 2016 assessment. She was unaware that Ms. Wong observed Student with other students during breaks.

189. Ms. Moses did not agree with Dr. Johnson's finding that Student had autism spectrum disorder based in part on the ADIR-Revised because the score for restricted, repetitive stereotyped patterns of behavior was a point short. Ms. Moses opined that the behaviors Dr. Johnson claimed Student exhibited, such as putting his hands over his ears during a fire drill, did not indicate autism because isolated symptoms do not meet the criteria and all criteria have to be met. She considered

noise sensitivity to fire alarm to be a normal response. During Ms. Moses observation of Student, he exhibited no unusual noise sensitivity. According to Ms. Moses, the test did not allow Dr. Johnson to ignore the cutoff score. Ms. Moses was impeached on the issue regarding the cutoff score. Ms. Moses was never trained on the ADIR-Revised, was unaware if there was any training for this test and never administered it.

190. In Ms. Moses' opinion, a psychologist should not rely on one instrument for determining special education eligibility. Although Dr. Johnson stated Student met eligibility for autism, she did not describe or explain in her report how he met the eligibility requirements. Throughout the report, Dr. Johnson made reference to the DSM-V, and the only time she made reference to the Education Code eligibility requirements was in her conclusions and recommendations. Ms. Moses saw no connections between Dr. Johnson's findings and the Education Code eligibility requirements. Although she agreed there was some overlap of criteria, a DSM-V diagnosis of autism and special education autism eligibility have different criteria and serve different purposes, and often students meet criteria for one but not the other. A DSM-V diagnosis of autism merely triggered notice of a suspected autism disability, and nothing more.

191. In Ms. Moses opinion, Dr. Johnson did not use tools to obtain the data necessary to determine whether Student had an intellectual disability. According to Ms. Moses, a full scale cognitive score of 74 on the Universal Intelligence test could be indicative of a cognitive impairment, and Dr. Johnson never considered special education eligibility under the category of intellectual disability. Dr. Johnson administered testing to determine Student's adaptive functioning. The global adaptive composite score of 61 from Parents indicated functioning at a subaverage level and suggested Student had a cognitive impairment. In Ms. Moses' opinion, Dr. Johnson should not have deferred the determination of intellectual disability because this determination was necessary to understand how Student learned.

192. According to Ms. Moses, based on review of the assessments of Dr. Majors, Dr. Morris, and District in 2012 and 2016, Student made academic progress in his Talbert placement. She agreed Dr. Johnson's comparison of Student's 2016 and 2017 scores on the Woodcock Johnson Achievement test, reflected some progress, but claimed that the test was not designed to measure progress. Since some of Student's scores fell below what was measureable by this test, not all of his progress was reflected by this test. She clarified that the test was developmentally appropriate and that progress could be determined by comparing standard scores, but there was limited information derived solely from the score.

193. Ms. Moses compared Student's 2017 Wechsler Achievement composite standard scores obtained by Dr. Johnson to his 2016 scores obtained by District. Overall, the scores demonstrated an increase of ability, although this test did not necessarily measure lower level skills. Student's basic reading score increased, which she claimed was significant progress; written expression decreased, which she claimed also demonstrated progress; his mathematics scores increased, which she opined was significant improvement; math fluency and oral language increased, demonstrating improvement. Ms. Moses explained that the standard scores are based on a comparison with students of his age at the time of the test, and any standard score that was the same or higher indicated progress because Student learned enough to maintain his score as compared to other students.

194. Ms. Moses claimed she was familiar with the special day class at Talbert because she consulted with staff on general practices regarding students in that class and provided training to some of the staff members. She did not specify which special day class she was referencing. She claimed the classroom had a very small staff to student ratio; direct, small group, whole group, and one-to-one instruction using the core curriculum as a resource, with targeted interventions; classroom instruction was in briefer periods, including more breaks, more opportunities for reinforcement, repeated

rehearsal and practice to master learning and a variety of curriculum methodologies, including on-line instruction, textbook, and teacher lead instruction. According to her, the same types of instructional models were present in both math and English language arts instruction. Based upon her Student's records, review of records, she claimed she understood Student's capacity to acquire academic knowledge. Those same types of instructional supports present in math, would benefit him to learn English language arts in the special day class. In her opinion, the structure of the classroom, the curriculum, the training and methodologies used by staff were targeted toward Student's learning style, his ability to attend and needed supports in those areas. In her opinion, Student's improvement in math skills as evidenced on the Wechsler Achievement test and the Woodcock Johnson Achievement test scores in Dr. Johnson's report, indicate Student could learn English language arts in the special day class.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

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) ⁵ et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public

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

⁵ All references to the Code of Federal Regulations are to the 2006 version unless otherwise specified.

education 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, which meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the

opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) In a recent unanimous decision, the United States Supreme Court clarified FAPE as “markedly more demanding than a ‘merely more than the de minimus test’ . . .” (*Endrew F. v. Douglas School Dist. RE-1* (2017) 580 U.S. __[137 S.Ct. 988, 1000].) School districts must “offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (*Id.* at p. 1002.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the

basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In Student's case, Student, as the complaining party, bears the burden of proof, and in District's case, District bears the burden of proof.

STUDENT'S ISSUE NO. 1: FAILING TO OFFER APPROPRIATE GOALS IN ALL AREAS OF NEED

5. Student contends District denied him a FAPE at the June 16, 2017 IEP by failing to develop and offer him appropriate goals in all areas of Student's need, specifically academics, social interaction, communication, behavior and adaptive skills. At hearing, when asked for clarification, Student's counsel stated he was challenging the appropriateness of all 18 of Student's goals with the exception of gross motor goals 16 and 17, and that he was challenging the failure to develop other goals based on the testimony about goals elicited from Student's witnesses. District contends the June 2017 IEP supported all areas of Student's unique educational needs with appropriate goals.

Legal Authority

6. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under Rowley if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir.

1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

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

8. The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler*, 213 IDELR 118 (OSERS 1998).)

9. The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges v. Spartanburg County School Dist. Two*, 57 IDELR 128 (D.S.C. 2011) (the use of percentages tied to the completion of discrete tasks is an appropriate way to measure student progress).)

10. A failure to offer an appropriate goal is a procedural violation of the IDEA. However, 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 a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23 Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1484, *superseded in part by statute on other grounds* ["...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."].) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

Analysis

11. The evidence established, of the 18 goals included in the June 2017 IEP, reading goal number 3 did not meet the legal standard for goals. Student did not prove he was denied a FAPE in the June 16, 2017 IEP, because District failed to develop other goals in the area of academics, social interaction, communication, behavior and adaptive skills.

12. At the June 2017 IEP team meeting, Student's areas of need were identified as math, reading, writing, self-advocacy, executive functioning, gross motor skills, speech/language, including personal narratives and pragmatics. Student's June

2017 IEP contained 18 goals to address the needs identified, specifically: four math goals (goals 1, 2, 7 and 18); three reading goals (goals 3, 5-6); one writing goal (goal 4); one self-advocacy goal (goal 8); one executive functioning goal (goal 9); six speech and language goals, including personal narratives and pragmatics (goals 10 through 15), and two gross motor goals (goals 16 and 17). Other than reading goal 3, the goals District developed were based on Student's present levels of performance, and the information obtained from members of the IEP team, including Dr. Johnson. The goals developed addressed each area of unique need identified by the IEP team.

13. Student's math goal 1 was appropriate. Although in Ms. Wong's opinion, goal 1 was not challenging enough, because Student was counting combination of bills and coins up to two hundred dollars prior to November 2016, Student failed to establish that counting money was the same skill targeted by goal 1. The more persuasive evidence established that goal 1 was a functional math goal which required Student to make change, and not just count money. It required Student to problem solve and use a higher level of thinking than required by his prior IEP goals. Student did not prove that the goal was not demanding enough just because it could be considered met if Student exhibited the skill in three opportunities.

14. Student failed to establish math goal 2 was inappropriate. Ms. Von Iderstein and Ms. Donnelly testified that goal 2 was appropriate and was based on Student's performance. Ms. Wong, the only other person questioned about goal 2, offered no opinion on its appropriateness.

15. Reading goal 3 was the only one of the 18 goals that was not appropriate because it was not challenging, and was identical to Student's prior reading comprehension goal. Ms. Wong credibly testified that the goal was not challenging because by June 2017 Student was reading passages at this level and answering detailed questions. In addition, goal 3 was identical to Student's 2016 IEP reading comprehension goal, which Student had almost met by the time of the June

2017 IEP. Although Student proved District procedurally violated the IDEA by failing to draft an appropriate academic goal in the area of reading, Student did not prove this procedural violation amounted to a denial of FAPE as explained below.

16. Student failed to establish that writing goal 4 was inappropriate. Ms. Von Iderstein persuasively explained that goal 4 required Student to develop his own sentences and express what he saw, whereas his prior goal required him to sort words and copy them. Although Ms. Wong was critical of goal 4 because she was not certain if the goal required Student to use correct punctuation, on its face, the goal clearly required Student to use correct capitalization, a skill Ms. Wong admitted Student did not demonstrate independently. Ms. Wong claimed punctuation should have been a separate goal, but there was no requirement that a goal target only one skill. Although Ms. Wong claimed to have been working on sequenced stories, Student failed to establish that the goal was not sufficiently challenging to render it inappropriate. In her testimony, Ms. Wong stated that Student could “potentially” write more sentences than was called for in the goal. She also failed to comprehensively explain whether Student could develop his own sentences and express what he saw with correct capitalization, which were the skills goal 4 targeted. Although Ms. Wong was unclear as to the complexity of the sentence, Student was required to develop by the goal, her testimony was insufficient to establish that the goal was immeasurable or otherwise legally inappropriate.

17. Student failed to establish that reading goal 5 was inappropriate. Ms. Wong was critical of goal 5 because the source of the second grade high frequency sight words was not stated in the goal. However, the evidence established the meaning of a high frequency sight words at a second grade level was commonly understood among educators to come from published lists and Student presented no evidence that the failure to state the publisher of the list made the goal unclear or that the published lists made a difference. The failure to state whether the words were new

words or familiar words did not render the goal inappropriate. Because Student required repetition to retain information, the goal targeted both new words, words he had not yet mastered, and some of the words he knew. This goal supported Student's reading comprehension, accuracy, spelling, automaticity and reading fluency.

18. Student failed to establish that reading goal 6 was inappropriate. Ms. Wong's testimony about goal 6 was unclear and insufficient to establish that the goal was inappropriate. She did not opine that the goal was inappropriate, but only that she had questions about the goal, including the source of the compound words and the benchmarks. Student failed to establish that the failure to state the source of the compound word made the goal inappropriate. Ms. Wong did not specify what issue she had with the benchmarks nor did Student establish that her issue with the benchmarks rendered the goal inappropriate.

19. Student failed to establish math goal 7, self-advocacy goal 8, or executive functioning goal 9 was inappropriate. Ms. Von Iderstein and Ms. Donnelly testified that Student's goals were appropriate. Student presented no evidence to rebut that testimony.

20. The June 2017 IEP contained six speech and language goals. Student failed to establish that any of the speech and language goals were inappropriate. Ms. Haro testified that goals 10, 12 and 13 were appropriate and Ms. Phila agreed. Ms. Haro and Ms. Phila did not agree as to goals 11, 14 and 15. Ms. Haro's testimony was more convincing than Ms. Pliha's testimony on these issues.

21. Student did not prove speech and language goal 11 was inappropriate. Ms. Haro consistently worked with Student between November 2016 and June 2017 and had extensive written documentation of the trials she conducted with Student leading up to the June IEP, which she persuasively testified provided the basis for the speech and language goals proposed. Although Ms. Phila's claimed that goal 11 was inappropriate because it was not challenging enough, her testimony was not

persuasive. She claimed Student had very few articulation errors, but she failed to explain how she knew this to be true as of June 2017. She did not work with Student between November 2016 and June 2017. Even so, when testifying about goal 11, she volunteered that Student had a hard time pronouncing multi-syllable words, but failed to explain why goal 11 did not support this deficit. The fact that Ms. Pliha would have written the goal to target writing as opposed to articulation did not render goal 11 inappropriate.

22. Ms. Haro's testimony was more persuasive than Ms. Pliha's as to the appropriateness of goal 14 for the same reasons stated regarding goal 11. According to Ms. Phila, this goal would have been extremely difficult for Student to meet, but she failed to explain how she knew this was the case as of the June 2017 IEP team meeting since she had stopped working with Student in November 2016. Although Ms. Pliha would have written the goal differently, her testimony was equivocal and unclear as to whether the goal was inappropriate.

23. As for speech and language goal 15, Student failed to establish that this goal was inappropriate at the time it was offered. In response to whether this was an appropriate goal, Ms. Pliha testified that Student "cannot" formulate questions and opined that a turn taking goal would have been more appropriate. However, she did not explain whether this was true as of June 2017, and she had not worked with Student during the 2016-2017 school year. Witnesses from both sides testified that Student needed group speech and language services, but Ms. Pliha did not address whether the failure of Student to agree to implementation of the group speech session affected the appropriateness of the goal at the time it was offered. In other words, to the extent Student claimed goal 15 was inappropriate because Student "cannot" formulate questions, Student did not prove that the failure to agree to implementation of group speech services did not affect Student's chance of meeting the goal within a year. In addition, Ms. Haro credibly testified that goal 15 addressed

Student struggle with understanding use of “wh” words and speaking in a complete sentence, and the development of the goal was based on her contemporaneous work with Student, goal trials and extensive data collection. Ms. Haro’s testimony was given more weight than Ms. Phila’s on this issue.

24. Student failed to establish that goal 18 was inappropriate. Although Ms. Wong thought goal 18 was “maybe” too basic if Student was working on the multiplication and division set forth in goal 2, her testimony was insufficient to establish the goal was inappropriate. Her testimony was equivocal and she failed to comprehensively explain her answer. She claimed she did not understand what the goal measured, but her testimony was not convincing.

25. Based on Ms. Wong’s testimony, Student contends that several additional goals should have been offered at the June 2017 IEP. Student did not prove District denied Student a FAPE by failing to develop a specific goal for reading fluency. Ms. Wong admitted Student had a decoding goal and decoding fell within the area of reading fluency. In addition, Ms. Von Iderstein credibly explained that reading goal 5 supported Student’s reading fluency by targeting Student’s automaticity in recognizing sightwords.

26. Student failed to establish that a separate spelling goal was required. Although Ms. Wong testified that she would have added a spelling goal, Student had a goal in the area of writing, specifically goal 4. Ms. Von Iderstein testified Student did not require a separate spelling goal because Student first needed to develop the foundational skill of writing a complete sentence on his own before critiquing his spelling, and there was no common core state standard just for spelling. She also testified that spelling was embedded within Student’s other goals, including goals 5 and 6, and Student offered no persuasive rebuttal to that specific testimony. Even if District procedurally violated the IDEA by failing to draft a specific goal in the area of spelling, Student failed to prove that failure was a procedural violation that amounted

to a denial of FAPE.

27. Student failed to establish that goals in turn taking, eye contact, vocabulary development, concept development, and a receptive speech goals were required. Based on Ms. Pliha's testimony, Student contends that several additional goals should have been offered at the June 2017 IEP team meeting. Regarding a turn taking goal, Ms. Haro's testimony was more convincing. Ms. Haro did not observe that Student had issues with turn taking. This was corroborated by the information obtained as part of District's 2012 assessment and Student's present levels of performance at the time of the May 2016 IEP. Ms. Haro's testimony was also more persuasive than Ms. Pliha's testimony regarding an eye contact goal. Student did not need a separate goal to address his eye contact because his pragmatics goal 15 required him to coordinate his eye contact with his language and speaking fluency. Ms. Pliha's testimony was also unconvincing on the issue of vocabulary development/concept development goals and a receptive speech goal. She based the proposal of a concept development goal on a recent occurrence she described at hearing rather than relating it to Student's needs at the time of the IEP at issue. In addition, Student had six goals in the area of speech and language, and although vocabulary was not a skill that was separately measured, the use of correct vocabulary was imbedded in goal 13. Receptive speech was also supported by goals 12 and 13. Ms. Haro's testimony on these issues was persuasive and Student offered no persuasive rebuttal on these points.

28. Student failed to establish that a separate socialization goal was required. To the extent a goal to address interactions with peers was required, District offered pragmatics goal 15. Student elicited testimony from Ms. Kendzierski that social interactions and pragmatics were variations of the same thing. According to District witnesses, Student's June 2017 IEP pragmatics goal 15 addressed Student's interactions with peers and adults. The purpose of the group speech session was to

generalize Student's language use and his speech and work on his goals, including his pragmatics goal 15, with his peers. Student's goals supported his ability to interact with peers by targeting his speech and language issues, including his ability to formulate complete sentences, which was part of goals 12 through 15. Student failed to establish that a separate socialization goal was required. Ms. Von Iderstein's testimony as to how Student could meet his 2016 IEP socialization goal was credible. Although there were significant issues with Ms. Von Iderstein's contemporaneous goal data collection, Student failed to prove that Ms. Von Iderstein falsified her data collection or that Student did not meet his socialization goal by the time of the June 2017 IEP. The evidence supporting District's position on this issue was more compelling than the evidence supporting Student's position. For example, the more persuasive evidence established that once Student became acclimated to the Talbert environment and familiar with people, he became more outgoing and self-confident and engaged more frequently with peers. He participated more often and engaged more frequently with peers in appropriate social play.

29. Student failed to establish that goals in the areas of behavior or adaptive skills were required. Student presented no persuasive evidence establishing District failed to offer any goals necessary to address behavior or adaptive skills in order to provide FAPE. Goals 8 and 9 addressed self-advocacy and executive functioning. None of Student's witnesses challenged those goals.

30. While Student proved reading comprehension goal 3 did not meet legal standards, Student failed to prove this procedural violation denied Student a FAPE. There was no debate that Student had global deficits. It would have been impossible to formulate goals for every single skill within each area of need. District is correct that there is no requirement in the law to develop innumerable goals for students; but rather, at least one goal, in each area of need. Student failed to prove that he was not offered at least one goal in each area of need sufficient to measure Student's

educational progress. To the extent District failed to offer Student an appropriate goal, Student failed to prove that failure significantly impeded Parent's opportunity to participate in the decision making process. Parents meaningfully participated in the IEP process, had the opportunity to ask questions and provide input, including input from Dr. Johnson who attended the June 2017 IEP team meeting by telephone. Student did not prove that District's failure to offer an appropriate reading comprehension goal, or Student's criticisms of any other goal or the lack of a particular goal resulted in a loss of educational opportunity or cause a deprivation of educational benefits.

STUDENT'S ISSUE 2: FAILING TO INCLUDE AUTISM ELIGIBILITY

31. Student contends that District's offer of multiple disabilities eligibility was an appropriate category of eligibility, but that multiple disabilities eligibility should have been based upon autism rather than intellectual disability. Student did not otherwise dispute Student's other eligibilities for special education. District contends Student met the eligibility criteria for multiple disabilities and disputes Student's claim that he qualified for special education as a child with autism. District contends that there were no services or supports denied to Student because his eligibility designation did not include autism.

Legal Authority

32. A child shall qualify as an individual with exceptional needs if the results of the assessment demonstrate that the degree of the child's impairment requires special education. (Cal. Code Regs., tit. 5, § 3030 (b)(4) (2014).)

33. As long as a child remains eligible for special education and related services, the IDEA does not require that the child be placed in the most accurate disability category. Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability listed in the IDEA and who, by

reason of that disability, needs special education and related services and is regarded as a child with a disability. (20 U.S.C. § 1412(a)(3)(B); Ed. Code § 56301(a).)

34. A properly crafted IEP addresses a student's individual needs regardless of his eligibility category. (See *Fort Osage R-1 School Dist. v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 [category "substantively immaterial"]; *Hailey M. v. Matayoshi* (D. Hawaii, Sept. 7, 2011, No. 10-00733) 2011 WL 3957206, p. 3). "The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself." (*Pohorecki v. Anthony Wayne Local School Dist.* (N.D. Ohio 2009) 637 F.Supp.2d 547, 557. A student's eligibility category may have consequences for funding, the availability of outside services, statistical reporting, and other purposes, but if an IEP delivers a FAPE, the accuracy of the category under which it is delivered is not an issue for judicial review under the IDEA. (See *B.B. v. Perry Township School Corp.* (S.D.Ind. 2008, July 11, 2008, Nos. 1:07-cv-0323; 1:07-cv-0731) 2008 WL 2745094, p. 8 [nonpub. opn.].) The United States Department of Education has advised that "a child's entitlement is not to a specific disability classification or label, but to a free appropriate public education." (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759.)

35. In *Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, the parties disputed the appropriate eligibility categories for a student whose disability was difficult to characterize. In reasoning directly applicable here, the Court of Appeals declined to settle the dispute, declaring that the student's eligibility category was "beside the point." In *Heather S.*, the school was dealing with a child with several disabilities, the combination of which made the student's condition unique from that of other disabled students. The court held that the IDEA charged the school with the duty to develop an appropriate program, "not with coming up with a proper label with which to describe Heather's multiple disabilities." (*Id.* at p. 1055; see also *Aaron P. v. Department of Educ.* (D.Hawaii, Oct. 31, 2011, No. 10- 00574) 2011 WL 5320994, p. 28;

C.H. v. Northwest Indep. School Dist. (E.D.Tex., Sept. 30, 2011, No. 4:09-cv-117)) 2011 WL 4537784, p. 6; *Casey K. v. St. Anne Community High School Dist. No. 302* (C.D.Ill., Aug. 14, 2006, No. 04-2128) 2006 WL 2361881, p. 9, fn. 11; *J.W. v. Contoocook Valley School Dist.* (D.N.H. 2001) 154 F.Supp.2d 217, 228.)

36. Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance. (Cal. Code Regs., tit. 5, § 3030 (b)(6) (2014).)

37. Autism means a development disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030 (b)(1) (2014).)

Analysis

38. Student failed to establish by a preponderance of evidence that he was denied a FAPE because District failed to offer eligibility for special education under the category of autism in the June 2017 IEP.

39. At the time of the June 2017 IEP, Student had been assessed for autism by District in 2012 and autism had been ruled out. Student had at least two private psychoeducational evaluations, one by Dr. Majors in 2014 and another by Dr. Morris in 2016, and neither of them found autism.

40. District's 2016 assessment did not include an analysis of whether Student met special education eligibility for autism. Autism was not a suspected area of disability at the time of Student's triennial assessments in 2016. Student's deficits were not indicative of autism. Any impairment Student had in social functioning,

attention, communication and adaptive behavior was consistent with the level of Student's overall intellectual and communication functioning and apraxia, and was not indicative of autism.

41. The isolated comments in Ms. Kendzierski's speech and language assessment were insufficient to support the conclusion Student should have been found eligible for special education as a child with autism at the time of the June 2017 IEP. She credibly testified that Student did not demonstrate any hallmark signs of autism and his inconsistent behavior was reflective of his lower cognitive level. However, these observations were made by a speech pathologist within her area of expertise. The comments would not establish a basis for eligibility under the category of autism.

42. The information contained in Dr. Johnson report regarding her observations at Talbert were insufficient to support the conclusion Student should have been found eligible for special education as a child with autism at the time of the June 2017 IEP. Student's Talbert teachers did not observe the types of behaviors reported by Ms. Kendzierski. For example, Ms. Haro denied Student had issues with eye conduct or personal space. In Mr. Petrilla's class, Student was social, demonstrated no perseverative conduct, and had no issues with transitions. Ms. Donnelly observed that Student had an interest in what others were doing and asked questions and could not recall any issue with eye contact. Ms. Von Iderstein denied Student was egocentric or had issues with personal space. He looked at her in the eye when he spoke to her.

43. Student's reliance on *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F. 3d 1105, is misplaced. In that case, the district suspected autism and thought about assessing Student for autism, even conducting an observation for that purpose. Student's issue in this case is quite different. Student was eligible for special education as a child with multiple disabilities. The issue in this case is whether District denied Student a FAPE by failing to find autism as the basis for Student's eligibility

instead of intellectual disability. The IDEA does not require that the child be placed in the most accurate disability category. Nothing in the IDEA requires that children be classified by the label of their disability.

44. In this case, Dr. Johnson presented her findings in a report in June 2017 and District offered to assess Student for autism. Dr. Johnson's failure to make a determination as to whether Student was intellectually disabled, undermined her opinion that Student qualified for special education under autism. Throughout her testimony, Dr. Johnson attributed many of Student's issues to autism, as opposed to intellectual disability and repeatedly took issue with the fact that District categorized him as intellectually disabled as opposed to autistic. Yet, Dr. Johnson admitted that she never ultimately made a determination as to whether Student was intellectually disabled. She admitted she never conducted a differential diagnosis of intellectual disability, which was necessary for the accuracy of the assessment results. She agreed that autism and intellectual disability could be comorbid conditions. In fact, she could not state that Student was not intellectually disabled, acknowledging that Student was on the borderline of intellectually disabled based on her assessment. She was also impeached on her denial that there were symptoms of intellectual disability, which looked like autism. The more persuasive evidence established that at the time of the IEP at issue any putative signs of autism were readily explainable by Student's intellectual disability and communication deficits.

45. Student met the eligibility criteria for intellectual disability which was part of the basis of the multiple disability category offered by District at the June 2017 IEP. District's assessments and the testimony of District's witnesses, including Ms. Wagon, established that Student had significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affected Student's educational performance. Based on the results of the 2016 District assessment results, Student's

global functioning, including cognitive and adaptive functioning was within the intellectual disability range.

46. Student failed to establish that Student's cognitive functioning results on the Wechsler Intelligence test were unreliable because there were oral instructions. Ms. Wagnon credibly testified that although the Wechsler contained oral instructions, her test administration of the nonverbal subtests included nonverbal instructions and visual prompting. Her testimony was persuasive that the visual components and visual demonstrations in the nonverbal instructions accounted for any language deficits and auditory processing issues.

47. The Wechsler Intelligence test was a more comprehensive measure of intelligence than the Universal Intelligence test administered by Dr. Johnson. Ms. Moses criticism of Dr. Johnson administration of the Universal Intelligence test on the basis that it did not assess all areas of cognition was persuasive. Dr. Johnson should have included a test which included verbal and nonverbal information, and then interpreted the information obtained. At hearing, Dr. Johnson attempted to justify her failure to administer a second measure, by relying on District's test results on the Wechsler Intelligence administered to Student in 2016. However, that assessment was a year-old, conducted prior to the time Student attended Talbert, and most significantly, Dr. Johnson was critical of its administration and interpretation of the results.

48. Although Student had higher cognitive scores on the Leiter-R, administered by Dr. Majors, and the Test of Nonverbal Intelligence, administered by Dr. Morris, or the Naglieri administered by Ms. Wagnon was insufficient to establish that Student qualified for special education under autism as opposed to intellectual disability. None of those tests were comprehensive measures of intelligence and there was no evidence as to how the Leiter-R or the Test of Nonverbal Intelligence was administered since Dr. Majors and Dr. Morris did not testify. Dr. Johnson's opinion that

the results of the Naglieri were a more valid measure than the Wechsler of Student's cognitive ability was contradicted by her own testimony. She volunteered that it was only a brief measure, was criticized by experts, was out of date, and should not have been used to determine intellectual impairment. In addition, Ms. Wagnon credibly explained that although Student's scores were higher on the Naglieri than on the Wechsler Intelligence test, Student's Naglieri score was nonetheless indicative of subaverage general intellectual functioning because the score fell very close to two standard deviations below the mean.

49. The evidence failed to establish that Student's educational needs were not met because District did not find autism to be the basis for Student's eligibility for special education as a child with multiple disabilities. Dr. Johnson testified that the basis of Student's eligibility was important because District's had lower expectations of him having determined he was intellectually disabled. To support her opinion, she made a general reference to Student's goals during her testimony. However, the evidence did not support her opinion. She failed to identify any specific goal during her testimony and none of Student's witnesses who testified about the goals persuasively addressed this issue. There was no corroborating evidence convincingly connecting the failure to offer autism eligibility to a failure by District to offer Student an appropriate program. In fact, Dr. Johnson denied that her recommendations would have changed if she had determined Student was intellectually disabled or not determined he was autistic. In other words, her program recommendations as to what District's offer lacked were not tied to autism eligibility. This testimony undermined Student's position that he was denied a FAPE *because* of District's failure to offer autism eligibility. Student failed to establish by a preponderance of evidence that his special education multiple disabilities eligibility should have been based upon autism, rather than intellectual disability.

STUDENT'S ISSUE 3: FAILING TO OFFER AN APPROPRIATE PLACEMENT

50. Student asserts that District denied him a FAPE by failing to provide him with an appropriate placement, specifically by failing to offer Student any individual specialized academic instruction in English language arts and applied math. District contends that its offer of placement in Talbert's special day class for his academic classes, where Student would receive whole group, small group and some one-to-one instruction, was appropriate.

Legal Authority

51. To determine whether a school district offered a student a FAPE the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

52. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed, by looking at the IEP's goals and goal achieving methods at the time the plan was implemented and determining whether the methods were reasonably calculated to confer an educational benefit. (*Adams, supra*, 195 F.3d at p.1149.)

53. 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 Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106, abrogated in part on other grounds by *Schaffer v. Weast*, *supra*, 546 U.S. 49, 56–58.)

54. A school district must deliver each child's FAPE in the least restrictive educational environment appropriate to the needs of the child. (20 U.S.C. § 1412(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).)

55. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) "the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

Analysis

56. Student proved District's offer of placement in the June 2017 IEP denied him a FAPE. Specifically, Student established that the appropriate placement consisted of some intensive one-to-one instruction without the presence of peers for English language arts. Student did not prove he required individual instruction for math

outside the Talbert special day class.

57. Here, all agree, given Student's multiple disabilities, Student could not be appropriately educated in the general education environment. Therefore, a detailed analysis of each of the *Rachel H.* factors is not necessary to determine that full time general education was not an appropriate placement.

58. The weight of evidence established that the IEP team failed to offer an appropriate placement to Student reasonably calculated to enable Student to make progress appropriate in light of his circumstances. District knew at the time of the June 2017 IEP team meeting that Student had an auditory processing disorder and severe speech and language deficits. District knew that Student missed every few words or syllables in a conversation. During the January 2017 meeting, Father told District that Student missed every few words or syllables of words in a conversation, and he lost interest because he did not understand. At hearing, Ms. Von Iderstein agreed she had observed this. Father worked with Student one-on-one on a daily basis, also informed District that Student required a one- to-one environment and that Student benefitted from repetition. Besides Father's experience and educated opinion, District was also in possession of three psychoeducational assessments recommending one-to-one instruction for Student, specifically, Dr. Majors, Dr. Morris and Dr. Johnson. Dr. Major's assessment also contained information about Student's lack of progress prior to 2014 in a District special day class.

59. The weight of the evidence established that overall Student made academic progress in English language arts and math between November 2016 and June 2017; however, certainly for English language arts, that progress was achieved as result of mostly one-to-one instruction at Pliha and Talbert. There was no dispute that all of Student's English language arts instruction at Pliha was in a one-to-one setting. At Talbert, Ms. Von Iderstein both admitted Student made progress in English language arts and, at one point in her testimony, claimed that all of his English

language arts instruction at Talbert was in an individual setting. At the time of the June 2017 IEP District was aware of the progress Student made since returning to Talbert, and that Student had only made that level of progress with one-to-one instruction.

60. Student could not make progress appropriate in light of his circumstances without intensive one-to-one instruction beyond what was offered by District's Talbert special day class. District witnesses were unpersuasive that the contrary was true. The majority of instruction in Talbert's special day class was whole group and small group instruction. Although District's special day class had some opportunity for a limited amount of individual instruction, one-to-one instruction was provided on an ad hoc basis within the classroom. Student had no guarantee that he would receive any given amount of one-to-one instruction in the Talbert special day classroom at the same level he required it in order to make progress. The evidence established that the level of individual instruction offered by the Talbert special day class placement was inappropriate in duration, intensity and setting. At the time of the June 2017 IEP, Student was "prompt dependent" concerning academic behavior and he required intensive one-to-one instruction to learn. Although Ms. Von Iderstein made efforts to minimize or contradict the admissions made in District's 2017 academic assessment, those efforts were not successful. The assessment not only documented Student's prompt dependence which resulted in one-to-one instruction, but also noted that Student did not raise his hand for help in class and merely waited until staff approached him. This evidence was corroborated by some of Ms. Von Iderstein's and Ms. Donnelly's responses on the Adaptive Behavior Assessment System administered by Dr. Johnson. Student's overall profile should have caused the IEP team to doubt Student's ability to make progress in a classroom which did not offer a specific amount of dedicated one-to-one instruction.

61. Ms. Von Iderstein was repeatedly asked about one-to-one instruction. Her testimony was inconsistent, evasive, and implausible. When asked if Student

performed better when he received one-to-one instruction, she hesitated and then gave an evasive response. She also denied she could express an opinion on the issue, because that was essentially asking who was the better teacher. Her response seemed to imply that if she admitted Student required one-to-one instruction, Pliha instructors were the better teachers, so she did not want to make that admission. Although she initially claimed she could express no opinion on the issue, she later contradicted her testimony, stating that group instruction was always more effective. However, she failed to explain how this opinion squared with her admitted conduct in the classroom of providing one-to-one instruction to Student. In most cases, she had difficulty answering these questions and responded with palpable hesitation in giving many of her answers, appearing to force a response that conformed to District's position in the case. The inconsistencies in her testimony and the manner in which she testified undermined her credibility on this issue. Similarly, Ms. Donnelly was not forthcoming in her testimony regarding one-to-one instruction. Some of her testimony appeared evasive and rehearsed, which negatively affected her credibility.

62. The testimony of Student's witnesses was more persuasive than District's witnesses on the issue of one-to-one specialized academic instruction. Student's witnesses, specifically Ms. Wong and Ms. Pliha, credibly testified as to the reasons why Student required individual instruction for academics in order to learn. Dr. Johnson corroborated their testimony. Ms. Pliha and Ms. Wong were most familiar with Student, having worked with him for several years on a one-to-one basis. Ms. Pliha, besides being a speech and language pathologist had many years of experience as a teacher. Although Ms. Wong did not have a credential or a special education certificate, she held a master's degree in education/elementary school education and had several years of experience as a teacher in the area of English language arts. In contrast, District's teachers only knew Student for a short time and had very little experience as teachers. Both Ms. Wong and Ms. Pliha opined that after working with

Student since 2014, Student required one-to-one instruction in order to learn. Ms. Wong, Student's teacher in the months leading up to the June 2017 IEP credibly explained that group instruction would not have been appropriate at that time without Student first receiving one-to-one instruction outside the presence of his peers' instruction.

63. The evidence established that Student required intensive instruction in a one- to-one setting for English language arts. If he did not receive one-to-one instruction, Student would not make progress or would regress in reading and writing. Dr. Johnson's testimony was convincing in explaining that it was not appropriate for Student to be educated in a group environment because of his learning disabilities, language impairment, and challenges in acquiring and retaining information. Student's auditory processing disorder had a significant impact on him if educated in a group setting because of his difficulties in perceiving information and his need for cues for appropriate auditory processing. He could not differentiate some sounds that he should differentiate and it would take him longer to understand what he was supposed to do if he did not have focused attention by an aide. In a group, while other children were attended to, he would lose instructional minutes and make more errors. Although math facts could be memorized, the same was not true for reading and writing, which were more complex. Dr. Johnson did not believe Student could make the kind of progress Student made in math in English language arts. Her testimony was persuasive that reading instruction required many more cues given Student's deficits in language and auditory processing, to understand and apply the information. She gave as an example the fact that decoding was a relative strength for Student, but explained that Student was very challenged in the areas of reading fluency and written expression, which was consistent with his language impairment and auditory processing impairment. Math calculations were not affected by these challenges. Although Ms. Moses opined that Talbert's special day class was an

appropriate placement and Student's improvement in math skills indicated Student could learn English language arts in the special day class, her testimony was not persuasive on this issue. As compared to Dr. Johnson, Ms. Moses did not demonstrate familiarity with Student during her testimony. She never assessed Student and only observed him for an hour during lunch. Her testimony was given less weight than Dr. Johnson's testimony on this issue.

64. Student failed to prove that Student required one-to-one individual instruction in applied math. Student received all of his math instruction at Talbert between November 2016 and June 2017. Overall, Student made progress in math in the Talbert special day class while receiving whole group, small group and some individual instruction. Student's mathematics composite and math fluency composite scores increased between District's 2016 and Dr. Johnson's 2017 administration of the Wechsler Achievement test. Student's subtest scores on the same test during that period improved in all areas, including math fluency, math problem solving, and numerical operations. The only area math in which Student's score did not improve was in multiplication, but that area only decreased by one point.

65. Dr. Johnson admitted that Student made academic progress in math between November 2016 and May 2017. A comparison of Student's scores on the Woodcock- Johnson Achievement test between Ms. Pliha's administration of the test in November 2016 scores and Dr. Johnson's May 2016 administration showed an increase in calculation and math facts fluency. Dr. Johnson attempted to draw a distinction between applied math and other types of math, but her testimony was insufficient to prove that Student was unable to make progress in applied math without individual instruction beyond that offered by District in the Talbert special day classroom. She contended Student did not make progress in applied word problems on the subtests between November 2016 and May 2017, but later appeared to contradict that testimony.

66. District's offer of placement was deficient because District failed to include any dedicated individual instruction outside of the classroom for English language arts. Student proved District denied Student a FAPE.

STUDENT'S ISSUE 4A: FAILING TO OFFER APPROPRIATE SOCIAL SKILLS INTERVENTION

67. Student contends District denied him a FAPE by failing to offer him appropriate social skills services. District claims its offer of speech services supported Student's communication needs and addressed Student's social skills needs.

Legal Authority

68. Social skills services are a related service which is "required to assist a child with a disability to benefit from special education..." (34 C.F.R. § 300.34(a).)

Analysis

69. Legal conclusion 28 is incorporated by reference.

70. Student did not prove he was denied a FAPE because District failed to offer social skills services in the June 2017 IEP.

71. Although Student was initially shy and more isolated at the beginning of the school year because he did not know anyone and arrived late, by June 2017, he was engaged with his peers. Student met his 2016 IEP socialization goal. Mr. Petrilla credibly testified that Student was positive and outgoing and interacted with other students in the class. He was social, demonstrated a sense of humor and had friends. Mr. Petrilla's testimony was credibly corroborated by Ms. Von Iderstein and Ms. Donnelly. In Ms. Donnelly's science class, Student interacted with peers, had an interest in what others were doing and asked questions.

72. Ms. Von Iderstein documentation of specific examples of Student engaging with peers in her 2017 assessment, was persuasive. Student played with

peers in a game of paper airplane races and independently initiated support for another peer by helping him in class, shared his pencils, and worked with the peer in a sustained interaction. Student was also able to comment and join in on typical peer conversations during small group activities and teacher facilitated social events. After the Thanksgiving and Winter breaks, Student started to interact more with peers and by June 2017, he was engaged with peers on Tuesdays and Thursdays during lunch time, engaged in appropriate social play, and engaged in limited reciprocal conversations. During his testimony, Father confirmed that Student was now interacting with peers, whereas he had previously interacted with adults.

73. District's June 2017 IEP present levels of performance document that Student was friendly and was observed to consistently greet, give farewells and use polite niceties. He initiated with peers and adults, however his initiations were often "what is your favorite type" questions or single response questions. Student's speech and language difficulties impacted his ability to formulate questions and interact with his peers. To address interactions with peers, in the June 2017 IEP, District offered Student both individual and group speech services, and a pragmatics goal to address Student's interactions with peers and adults. The purpose of the group speech session was to generalize Student's language use and his speech and work on his goals, including his pragmatics goal 15, with his peers. The group speech services addressed Student's interactions with peers.

74. Student relies on various scores from Dr. Johnson's report to support his claim that social skills services should have been offered. Student's arguments are not persuasive. Dr. Johnson failed to comprehensively or persuasively explain at hearing all of the scores Student relies upon in his closing argument. For example, in the area of social skills on the Behavior Assessment System for Children administered by Dr. Johnson, Parent, Ms. Wong and Ms. Von Iderstein scores fell within the average range. Although Dr. Johnson's report highlights the fact that Parent, Ms. Donnelly and Ms.

Wong, but not Ms. Von Iderstein whose score fell in the average range, had clinically significant scores for developmental social disorder, Dr. Johnson failed to comprehensively explain the relationship of the various scores.

75. Some of the responses the raters gave on the scales conflicted with other evidence. For example, Dr. Johnson noted in her report that on the Adaptive Behavior Assessment, Ms. Von Iderstein reported that Student sometimes seeks friendships with others in his age group, sometimes plays with toys, games, or other fun items with others, and sometimes engages in a variety of fun activities instead of only one or two. However, Dr. Johnson also reported that Ms. Von Iderstein responded that Student never keeps a stable group of friends, and never offers assistance to classmates or teachers. Besides being somewhat inconsistent, some of these responses conflicted with other more persuasive evidence. For example, Mr. Petrilla credibility testified that Student had a group of friends he “ran with.” District’s 2017 academic assessment also documents assistance to a peer. Similarly, on the Social Responsiveness Scale there are inconsistencies in the responses and the relationship of the various responses was not established. Dr. Johnson noted that Parent’s, Ms. Wong’s and Ms. Von Iderstein’s reports indicated Student’s social awareness was typical of his peers, but that scores in social awareness neared clinical significance for Ms. Wong and Ms. Von Iderstein. It appears that many of the responses from raters related to Student’s social communication which was addressed by District’s offer of speech services.

76. In addition, to the extent that Ms. Johnson relied on ratings from Ms. Wong to formulate her opinions regarding peer interactions, Dr. Johnson’s opinions were not convincing. For example, Ms. Moses credibly testified that the Social Responsiveness Scale was loaded with questions regarding social interaction with peers. Although there was some evidence Ms. Wong had the opportunity to observe Student with peers, Pliha provided minimal opportunity for Student to engage in social

interaction and Student had limited access to peers in the common area during breaks. Student failed to convincingly establish how often and for how long Ms. Wong observed Student in the common area and to what degree the ratings depended on Ms. Wong's peer interaction observations.

77. Student's reliance on Dr. Johnson's interpretations of her observations of Student at Talbert regarding Student's social interactions were not persuasive. She appeared partisan in her testimony regarding Student having autism, which negatively affected her testimony and conclusions regarding Student's peer interactions.

STUDENT'S ISSUE 4B: FAILING TO OFFER APPROPRIATE BEHAVIOR SERVICES

78. Student contends that District should have offered behavior services to address Student's alleged withdrawal and inattention. District contends that Student exhibited no behaviors which required behavior intervention beyond the supports offered in Student's June 2017 IEP.

Legal Authority

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

Analysis

80. Student did not prove he was denied a FAPE because District failed to offer behavior services in the June 2017 IEP.

81. Student did not require behavioral interventions as a related service. Some of Student's special day classes were staffed with some behavioral trained aides or teachers. The special day class was a smaller setting with a smaller student to adult ratio. Student's IEP provided for accommodations which helped to address some of Student's attention issues. Student did not establish that Student was withdrawn or fidgeted with his pencil such that it required behavioral intervention beyond what was offered in Student's June 2017 IEP. He could successfully participate in physical education and other mainstreaming activities without requiring behavior interventions. Student's reliance in his closing brief on Ms. Segal's 2012 assessment report and Dr. Majors' 2014 assessment report to justify the need unspecified behavioral interventions in 2017 was not persuasive. The weight of evidence established that Student did not engage in maladaptive behaviors. Dr. Johnson's recommendation for behavior intervention supervision fell short of proving by a preponderance of evidence that District was required to offer behavior intervention as a related service to provide a FAPE to Student.

STUDENT'S ISSUE 4C: FAILING TO OFFER APPROPRIATE SPEECH AND LANGUAGE THERAPY

82. Student contends District denied him a FAPE by failing to offer an appropriate amount of speech therapy in the June 16, 2017 IEP. Specifically, Student contends that the speech therapy offered was insufficient. District contends that the offer of speech services was appropriate.

Legal Authority

83. Speech and language services are a related service which is "required to assist a child with a disability to benefit from special education." (34 C.F.R. § 300.34(a) and (b)(15).)

Analysis

84. Student proved District's offer of speech services in the June 2017 IEP denied him a FAPE by failing to offer an appropriate amount of individual speech services.

85. Student had an auditory processing disorder and severe speech and language deficits, including apraxia of speech. Between 2012 and 2016, Student's mean length of utterance declined from 3.0 to 2.78. Student's score of 2.78 was at stage two and correlated to a very young child. Student's speech and language scores from the 2016 District assessment were some of the lowest scores obtainable and Student's intelligibility level was significant because it was so low. The documentary evidence and testimony from numerous witnesses established that Student's speech and language issues negatively impacted his learning.

86. The evidence established that Student made progress in the area of speech after he began attending Talbert. As of June 2017, Student met all but one of his six speech and language goals. That Student made progress was corroborated by the fact that by 2018 his mean length of utterance had increased to 4.65. Ms. Wong also agreed Student's oral expression improved and length of utterance increased after November 2016.

87. Student's ability to make this progress was based upon three 50-minute sessions a week of individual therapy, as agreed upon in the October 2016 settlement agreement, not two sessions offered in the June 2017 IEP. Notwithstanding Ms. Haro's testimony to the contrary, the weight of evidence proved that District should have offered at least three 50-minute sessions of individual speech therapy each week, in addition to one 50-minute session a week of group therapy, at the June 2017 IEP in order for Student to make progress in light of his particular unique circumstances.

88. Ms. Haro's attempts to justify District's offer of two 50-minute individual speech sessions a week, as opposed to three 50-minute individual speech sessions was

not persuasive. Although she could not facilitate generalization in a third individual speech session, she offered no explanation as to why she could not perform this task in a fourth speech session in a group setting. There was no evidence that justified the implication of Ms. Haro's testimony that Student should be limited to a total of three 50-minute speech sessions a week. There was no persuasive evidence that justified District reducing the level of speech services Student received at the June 2017 IEP. Ms. Pliha persuasively corroborated Student's need for more than two 50-minute individual speech sessions per week. Accordingly, the June 2017 IEP was not reasonably calculated to meet Student's needs in a critical area of speech.

DISTRICT'S ISSUE: DISTRICT'S JUNE 16, 2017 IEP OFFER

89. District contends that its offers of placement, services, accommodations and supports made at the June 16, 2017 constituted a FAPE. Student contends he was denied a FAPE in the June 2017 IEP for the same reasons set forth in Student's case.

Legal Authority

90. The Legal Conclusions regarding Issues 3 and 4c are incorporated by reference.

91. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

92. The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 524 [127 S. Ct. 1994].) "[T]he informed

involvement of parents” is central to the IEP process. (*Id.*) Protection of parental participation is “[a]mong the most important procedural safeguards” in the Act. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 882.)

93. Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(b) (2006); Ed. Code, § 56304; 56340-44.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child’s problems, attends the IEP meeting, expresses 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 Educ.*, *supra*, 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

94. The IEP team is required to include one or both of the student’s parents or their representative, a regular education teacher if a student is, or may be, participating in the regular education environment, a special education teacher, a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) It is only necessary for a general education teacher who has instructed the child in the past or who may instruct the child in the future to be present at the IEP team meeting. (*R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 938-940.) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).)

95. An IEP is a written document for each child with a disability that includes: 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; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

96. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

97. In making changes to a child's IEP after the annual IEP team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purposes of making those changes, and

instead may develop a written document to amend or modify the child's current IEP. (34 C.F.R. § 300.324(a)(4).)

Analysis

98. The elements of District's offers of placement and services at the June 16, 2017 IEP were discussed in detail above, and are incorporated here by reference. Student proved the June 2017 IEP was not reasonably calculated to meet Student's educational needs in two areas and as a result denied Student a FAPE. District failed to offer an appropriate placement and appropriate speech and language services in the June 16, 2017 IEP. Therefore, District failed to prove its claim that the June 16, 2017 IEP constituted a FAPE. As a result, District is not entitled to implement the IEP without parental consent.

REMEDY

99. Student prevailed on Issues 3 and 4c in Student's case. As a remedy, Student requested three hours of individual academic instruction and three hours per week of compensatory speech and language therapy at Pliha through the June 2019 annual IEP team meeting. Student also requested reimbursement to Parents in the sum of \$2,675 representing the 30 minutes per day of academic instruction they funded at Pliha from September 2017 through December 2017, and for the 30 minutes per day of instruction at Pliha after January 2018 to the date of the decision pursuant to the terms of the settlement agreement.

100. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special

education administrative due process matter. (*Forest Grove School Dist. v. T.A* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.)

101. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School Dist.* *supra*, 31 F.3d at p. 1497.) The award must be fact-specific and “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. Dist. of Columbia*, *supra*, 401 F.3d. at p. 524.)

Placement/educational therapy

102. District’s offer of placement in the June 2017 IEP was not reasonably calculated to meet Student needs because it failed to offer any individualized specialized academic instruction outside the classroom. The evidence established, including the recommendations of Student’s experts, that as part of Student’s IEP,

District should have offered two hours per day of one-on-one English language arts specialized academic instruction outside the classroom for the regular school year, and one hour per day for the 2017 extended school year.

103. Student attended Pliha where he received educational therapy during the 2017- 2018 school year, beginning on September 7, 2017, five days per week for 1.5 hours per day at a rate of \$85.00 per hour. At the time of the hearing, Pliha billed Parents \$8,032.50 for educational therapy it provided between September 7, 2017 and December 22, 2017. District reimbursed Parents \$5,335.00, for one hour per day of instruction for this time period. District did not reimburse Parents for the additional one-half hour of instruction he received through December 22, 2017. Accordingly, Parents are entitled to reimbursement of \$2,697.50 for Student's educational therapy at Pliha, representing the 30 minutes per day at \$85.00 per hour District did not reimburse them.

104. After December 22, 2017, Student continued to receive educational therapy at Pliha for 1.5 hours per day at a rate of \$85.00 per hour. District agreed to reimburse Parents for only one hour per day of that instruction, as stay put pursuant to terms of the October 2016 settlement agreement. Parents did not provide invoices from Pliha for the time period after December 22, 2017. However, District's June 2017 IEP should have offered two hours per day of individual specialized academic instruction through the date of Student's June 2018 IEP, rather than the one hour per day District agreed to reimburse. Therefore, Student is equitably entitled as compensatory relief to District funding for the additional one hour per day of services. District's school calendar established that 91 school days remained between December 22, 2017 and the date of this Decision. Accordingly, to the extent Parents paid out-of-pocket for educational therapy at Pliha after December 22, 2017 and District did not reimburse Parents, Parents are entitled to reimbursement from District for 1.5 hours per day, not to exceed 91 school days, at an hourly rate not to exceed \$85.00 through

the date of this Decision. Reimbursement amounts shall be based upon Parents' presentation to District of invoices for these services from Pliha and receipts for payment.

105. In addition to the 1.5 hours discussed above, from June 16, 2017, through the date of Student's June 2018 IEP, District should have offered and provided an additional 30 minutes per day of individual specialized academic instruction in English language arts for each day of the 2016-2017 and 2017-2018 regular school years. The school calendar established that there were 167 regular school days between June 16, 2017, and the date of this Decision. Accordingly, as compensatory education, Student is entitled to 83.50 hours of District-funded individual specialized academic instruction in English language arts.

106. For the 2017 extended school year, District should have also offered one hour per day of individual specialized academic instruction. The June 2017 IEP did not include any individualized academic instruction for 2017 extended school year. District's school calendars did not include the extended school year. Student's June 2017 IEP specified that the extended school year was June 27, 2017 to July 27, 2017. Excluding the fourth of July, there were 22 school days between June 27 and July 27, 2017. Accordingly, as compensatory education for District's FAPE denial, Student is entitled to 22 hours of District-funded individual specialized academic instruction in English language arts.

107. In summary, as compensatory services relating to educational therapy, District shall fund up to 105.50 additional hours of educational therapy at the rate of \$85.00 per hour, which Student may use up to December 30, 2019. The compensatory hours shall be provided by a non-public agency of Parents' choosing and may be used whether or not school is in session. The compensatory award is based on the number of days school was in session from June 16, 2017 through the day of this Decision, including 2017 extended school year. Computation of the award is based upon

District's 2016-2017 and 2017-2018 school calendars, the information in Student's June 2017 IEP regarding the extended school year, the settlement agreement, and the documentary and testimonial evidence regarding reimbursement and Student's attendance at Pliha.

108. In addition, as an equitable remedy, if the parties do not reach an agreement on Student's educational program at his 2018 annual IEP, Student's stay put shall include individualized specialized academic instruction for two hours per day for each regular school day in the subjects of reading and writing, and for one hour per day during the extended school year.

Speech therapy

109. District's offer of speech services in the June 2017 IEP was not reasonably calculated to meet Student's needs in a critical area of speech, resulting in a denial of FAPE. The June 2017 IEP offered Student two 50-minute individual speech sessions per week and one 60-minute group speech session per week during the regular school year. District should have offered Student one additional 50-minute session of individual speech therapy per week for the regular school year, for a total of three hours per week. The evidence established that at the time of the June 2017 IEP, one 50-minute session of group speech therapy per week and three 50-minute sessions of individual speech therapy per week was an appropriate amount of speech therapy to address Student's speech and language deficits. Although Student's June 2017 IEP did not offer it, because of the settlement agreement's stay put provisions, District provided Student with three 50-minute individual speech sessions per week since June 16, 2017. Therefore, Student is entitled to no additional speech therapy as a remedy. However, three 50-minute sessions a week of individual speech therapy and one 50-minute session a week of group speech therapy shall constitute Student's stay put if the parties do not reach an agreement on Student's 2018 annual IEP.

ORDER

1. District shall reimburse Parents for educational therapy provided to Student at Pliha in the total sum of \$2,697.50 for period of time between September 7, 2017 and December 22, 2017.

2. To the extent Parents paid for educational therapy at Pliha after December 22, 2017 and District has not reimbursed Parents, District shall reimburse Parents for 1.5 hours per day, not to exceed 91 school days, at a rate of \$85.00 for educational therapy Student received between December 22, 2017 and the date of this Decision. Reimbursement shall be based upon Parents' presentation to District of invoices from Pliha and receipts for payment. Parents shall submit invoices and proof of payment to District within 30 days of this Decision and District shall pay Parents within 45 business days of receipt.

3. In the event of a dispute over specialized academic instruction and speech and language services at Student's 2018 annual IEP, Student's stay put shall be:

- A. Individualized educational instruction for two hours per day for each regular school day in the subjects of reading and writing, and for one hour per day during the extended school year; and
- B. Three 50-minute sessions a week of individual speech therapy outside the classroom during the regular school year.

4. As compensatory education, District shall directly fund 105.50 hours of educational therapy. The compensatory hours shall be provided by a non-public agency of Parents' choosing, subject to District's applicable policies and procedures for non-public agencies. These services may be used whether or not school is in session and shall expire if not used by Student before December 30, 2019.

5. District's requested remedies are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party on Issues 3 and 4c in Student's case, and on District's issue in District's Case. District was the prevailing party on Issues 1, 2, 4a and 4b in Student's case.

RIGHT TO APPEAL

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

DATED: May 25, 2018

/s/

LAURIE GORSLINE

Administrative Law Judge

Office of Administrative Hearings