

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ESCONDIDO UNION SCHOOL DISTRICT.

OAH Case No. 2018041322

SECOND CORRECTED DECISION

Parents on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on April 30, 2018, naming Escondido Union School District.<sup>1</sup> On June 18, 2018, OAH granted Student's request to continue the due process hearing. Administrative Law Judge Judith L. Pasewark heard this matter in Escondido, California, on August 14, 15, 16, 22, 23, and 24, 2018.

Cara C. Lucier and Helen Ghio, Attorneys at Law, represented Student. Parents attended the hearing. Student did not attend the hearing.

Deborah R. C. Cesario, Attorney at Law, represented Escondido. Stephanie Baril, Attorney at Law, attended the first day of hearing. Kelly Prins, Assistant Superintendent of Student Support Services, and Meggan Lokken, Director of Special Education, attended the hearing on behalf of Escondido.

At the parties' request, OAH continued the hearing for the parties to file written

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<sup>1</sup> Escondido filed its response to Student's complaint on May 10, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200 (*M.C.*))

closing arguments. The record closed on September 10, 2018, upon receipt of closing briefs from the parties.

## ISSUES

1. Did Escondido deny Student a free, appropriate, public, education from August 16, 2017, through October 15, 2017, by failing to have an individualized education program in effect for Student at the beginning of the school year;
2. Did Escondido deny Student a FAPE for the 2017-2018 school year by failing to appropriately assess Student in the areas of academics, speech, language, and communication;
3. Did Escondido deny Student a FAPE for the 2017-2018 school year by failing to develop accurate present levels of academic achievement and functional performance in the areas of academics and adapted physical education in Student's October 16, 2017 IEP;
4. Did Escondido deny Student a FAPE for the 2017-2018 school year by failing to make a specific, written offer of FAPE at the October 16, 2017 IEP team meeting; and
5. Did Escondido deny Student a FAPE for the 2017-2018 school year by failing to accurately identify his assistive technology needs and offer appropriate assistive technology supports in the October 16, 2017 IEP?

## SUMMARY OF DECISION

Student is nonverbal and a child highly impacted with autism. Erroneously believing Parents had revoked consent to special education, Escondido refused to provide Student an interim IEP for the beginning of the 2017-2018 school year. Instead, Escondido chose to deny Student special education and related services until it completed its reassessments, and convened an IEP team meeting. In the meantime,

Escondido offered to place Student in a general education classroom, without supports and accommodations, other than a “safety plan” with adult supervision to prevent elopement during the school day. Escondido’s failure to provide an interim placement for Student constituted a denial of FAPE.

Parents failed to inform Escondido of outside services they were providing for Student, and withheld important information which would have assisted Escondido in its assessment of Student. Regardless of Parents’ lack of transparency, Escondido failed to explore the information Mother provided regarding Student’s ability to communicate by typing. This failure to consider reported skills, led to inappropriate assessments, which, in turn, resulted in inaccurate present levels of performance, which denied Student educational benefit.

## FACTUAL FINDINGS

### BACKGROUND:

1. Student is a 14-year-old boy who resided with his parents within the jurisdictional boundaries of Escondido. The family immigrated to the United States in 2009, and has relocated numerous times. Student initially qualified for special education and related services in 2009, under the category of autism. Student is non-verbal, with moderate maladaptive behaviors, which include eloping. Parents’ native language is Saurashtra, however all parental information provided to various school districts and assessors indicate Student’s primary language is English.

2. Prior to the family’s move to Escondido, Student’s most recent assessments and last agreed upon IEP were provided in January 2014, by Westwood Regional School District in New Jersey.

3. The 2014 New Jersey IEP offered an out-of-district placement in a special day class type program that provided Student a high degree of structure, reinforcement,

and supervision, a low student-teacher ratio, a low student-therapist ratio, and the opportunity for close monitoring and immediate feedback. Additionally, Student's need for behavior management and modified curriculum were appropriately accommodated in that setting. The New Jersey IEP provided Student with (1) a full-time one-to-one aide; (2) 90 minutes per week of individual speech and language therapy; and (3) 60 minutes per week of individual occupational therapy. The IEP team also determined that due to Student's significant communication needs, Student required an iPad2 with Proloquo2go software. Parents consented to this IEP.

4. Later in 2014, the family moved to Pleasanton, California. On September 23, 2014, Pleasanton Unified School District held an IEP team meeting for Student. The IEP team noted Student's present levels of performance included scattered pre-academic and academic skills. Student was non-verbal and communicated in the classroom with his iPad. Student demonstrated difficulty transitioning and exhibited limited attention and focus due to sensory deficits. Student presented behavioral concerns, as he was observed to dart multiple times during work sessions, pull hair, and squeeze staff arms and hands, mouth his iPad, and put things in his ears.

5. The Pleasanton IEP offered Student placement in a moderate/severe special day class with additional adult support and occupational therapy embedded as part of its curriculum. Group speech and language therapy was offered 90 minutes per week, along with 180 minutes per month of individual speech and language therapy. Group occupational therapy was offered for 60 minutes per week. These services supported 11 goals in the areas of academics, functional communication, speech and language, occupational therapy, living skills, and adaptive physical education.

6. Parents did not consent to the 2014 Pleasanton IEP. Instead, Parents began homeschooling Student with additional applied behavior analysis services. Subsequently, the family moved to Brentwood, Oregon; San Diego, California; and

Rancho Bernardo, California; before moving to Escondido in May 2017. In each of these residences, Parents continued to homeschool Student with additional applied behavior analysis services. In 2016, Parents enrolled Student in additional private educational/communications services from Alternative Teaching Strategy Center (ATSC) in San Diego, California.

#### MOVE TO ESCONDIDO

7. On August 14, 2017, Mother completed the enrollment process to enroll Student in the eighth grade in Escondido at Bear Valley Middle School for the 2017-2018 school year. On August 14, 2017, Mother signed a release for health and educational records to Escondido. She also provided Escondido with a copy of the unsigned 2014 Pleasanton IEP. She did not provide Escondido with a copy of the 2014 New Jersey IEP. Mother did not inform Escondido that Student participated in the program at ATSC or that she had reenrolled Student in ATSC for the 2017-2018 school year.

8. On August 16, 2017, Escondido prepared an assessment plan for Student. The assessment plan proposed evaluation areas in academic achievement, health, intellectual development, language/speech/communication development; motor development, social/emotional/behavior, adaptive behavior, special circumstances instructional assistance, and alternative augmentative communication. Mother signed the assessment plan on August 17, 2017.

9. The school year at Bear Valley commenced on August 16, 2017. Because Parents homeschooled Student since 2014, through four additional residences (and school districts), Escondido assumed Parents had revoked consent to special education and related services. Kelly Prins<sup>2</sup>, assistant superintendent of student support services,

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<sup>2</sup> Ms. Prins holds a Master's degree in special education and an administrative

testified she knew Student had an IEP, but thought Parents had revoked consent to services in Pleasanton. Parents, however, had not revoked consent to special education in writing; they had simply not provided consent to the 2014 Pleasanton IEP. Further, no one at Escondido asked Parents if they revoked Student's right to receive special education and related services. Erin Ascero<sup>3</sup>, the school psychologist who initially met with Mother on August 17, 2017, considered the 2014 Pleasanton IEP to be expired; Mother had homeschooled Student since 2014. Meghan Carlon, another school psychologist, and Escondido's assistive technology specialist<sup>4</sup> also met with Mother during Student's enrollment at Bear Valley. At hearing, Ms. Carlon confirmed Mother

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credential.

<sup>3</sup> Ms. Ascero holds a master's degree in educational psychology with a pupil personnel services credential in counseling/school psychology. She has been a school psychologist with Escondido for 10 years. Her duties include conducting psycho-educational and special circumstances instructional assistance assessments, creating positive behavior intervention and support programs, participation in IEP team meetings, and the development of goals. Ms. Ascero also assists in the development and monitoring of behavior, social emotional and academic general education interventions.

<sup>4</sup> Ms. Carlon is an educational specialist with a master's degree in school psychology. She holds a school psychology credential, and pupil personnel services credential. As Escondido's assistive technology specialist, Ms. Carlon is responsible for completing assessments in the area of assistive technology, specifically considering academics. She is responsible for consultations and training of staff, parents and students, as well as, monitoring assistive technology interventions.

provided only the 2014 unsigned Pleasanton IEP to Escondido. She also interpreted Mother's responses to questions as a revocation of special education and related services, and she noted on Student's registration information "declined services." Ms. Carlon asked Mother if Student received any outside services other than those from the regional center. Mother reported none, and Ms. Carlon recalled being surprised that Student had not receive any services. Specifically, Mother provided no information regarding Student's ATSC program. At some point, Escondido became aware of the 2014 New Jersey IEP. Escondido's faxination log contained record of a September 17, 2017 FAX sent to New Jersey requesting information regarding the 2014 New Jersey IEP and Student's service records.

10. With little information and an unsigned 2014 Pleasanton IEP, Escondido did not provide Student with interim special education placement and services. Rather, Escondido treated Student's enrollment at Bear Valley as a re-request for special education and related services, and offered Student placement in an eighth grade general education classroom, without special education supports or services, until assessments could be completed and an IEP team meeting held to determine Student's eligibility for special education and related services, approximately 60 days later. Parents did not send Student to school. On August 22, 2017, Ms. Ascero sent Mother a proposed behavior intervention summary form<sup>5</sup> which offered behavior assistance during Student's placement in general education. The behavior plan targeted Student's eloping from class and provided Student a full-day behavior technician.

11. Dr. Sharon Lerner-Baron<sup>6</sup>, a clinical psychologist, testified as an expert

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<sup>5</sup> A behavior intervention summary form is used for general education students and is also known as a safety form.

<sup>6</sup> Dr. Lerner-Baron holds a bachelor's, master's and doctorate degree in

witnesses on behalf of Student. She observed Student at ATSC on two occasions, once in an incidentally unrelated observation of Visual Communication Analysis (VCA) in December 2017, and once after being retained by Parents in April 2018. She also reviewed the 2014 Pleasanton IEP, Escondido's assessments, and the October 16, 2017 IEP. Based upon her knowledge of Student, even though more current than the commencement of the 2017-2018 school year, Dr. Lerner-Baron reported a general education placement, even for a short period, would be detrimental to Student. Student could not handle the sensory issues in a general education classroom. Student required de-sensitivity training. There were no accommodations. Dr. Lerner-Baron adamantly opined Student would not and could not learn in a general education placement.

12. Dr. Lerner-Baron further opined Escondido's safety plan was not adequate. The behavior plan targeted only one behavior, eloping. Student had more than one behavior. The plan was generic and assumed the antecedents and functions of Student's behavior, nor did the plan teach Student behavior expectations.

13. On August 28, 2017, Mother sent Escondido a 10-day notice of unilateral placement. Given Student's diagnosis of autism and his need for significant support in the areas of communication, academics, fine motor, gross motor, sensory and behavior, Parents determined that a general education placement, even for a short period, would not be appropriate for Student. Student had been homeschooled for three years and never been in a general education setting. Student had sensory issues as well as behaviors beyond eloping. Parents feared for Student's safety. There were too many

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psychology. She is a licensed clinical psychologist with a private practice in La Jolla, California, serving children, adolescents and adults with a range of special needs, including autism. She also provides consultant services for Parents and Students regarding IEPs and due process hearings.



children in the general education classroom, and it was too noisy. Mother indicated Parents intended to unilaterally place Student in an appropriate school, and would seek reimbursement from Escondido. The letter further indicated Parents remained interested in Escondido services and requested to work with Escondido to support Student. Mother did not inform Escondido that Student would continue participation in the ATSC program.

14. On September 8, 2017, Ms. Prins sent Parents a prior written notice letter pursuant to title 34 Code of Federal Regulations section 300.503. The letter denied Parents' request for a non-public school placement. Escondido needed to complete Student's assessments and convene an IEP team meeting before Student was entitled to a free appropriate public education. Parents did not enroll Student in a non-public or private school, but continued to homeschool him.

15. Ms. Prins' September 8, 2017 letter also informed Parents that Escondido developed a *strong* behavior plan to implement while the assessments were pending which specifically addressed parental safety concerns regarding Student's eloping, which Mother provided to Escondido on August 22, 2017. The letter also indicated Escondido was *open to discussing* the creation of a diagnostic placement in an Escondido special education program that Student could be placed in while the assessments were pending. The letter did not contain a description of the diagnostic placement, nor did it offer any proposed dates to discuss or implement a diagnostic placement. Mother did not know what Ms. Prins meant by diagnostic placement. She did not inquire or respond to Ms. Prins.

## ESCONDIDO ASSESSMENTS

16. Escondido conducted assessments in all of Student's suspected areas of disability. Student raised issues only with regard to the areas of academics, speech, language, communication, assistive technology, and adaptive physical education.

## Academic assessment

17. Ramon Guzman<sup>7</sup>, an Escondido special education teacher, administered Student's academic assessment, and prepared a written academic evaluation summary, dated October 10, 2017. The evaluation included a record review, observations, and interviews. Parents did not make themselves available for interview, although Mr. Guzman and other Escondido staff attempted to contact Parents on three separated occasions for their interviews.

18. Mr. Guzman administered the Brigance Inventory of Early Development III-Criterion referenced. The assessment report indicated the assessment instruments and procedures used were valid for the purpose of Student's evaluation, were non-discriminatory, and administered by qualified personnel. The assessment further indicated the standardized tests administered were normed for Student's age. However, as discussed below, such was not the case for the administration of the Brigance. Student's language proficiency was considered in the administration of all instruments and procedures. When published norms were not appropriate, instruments were administered for the purpose of analyzing responses and information.

19. Mr. Guzman administered individual assessments of student achievement in the academic and cognitive areas of literacy, mathematics, science and daily living. He assessed Student in the teacher's lounge rather than in a separate, quiet, and secluded room. Observations of Student's testing behavior indicated he was very distracted by the objects around the room where he was tested. Student needed several verbal prompts from Mother and Mr. Guzman to sit down during the testing sessions. Once seated, Student was asked to respond to a few questions, and then given a break. At one point, Student stood on the table to attempt to reach objects above cabinets. Mr.

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<sup>7</sup> Mr. Guzman teaches a moderate/severe special day class.

Guzman got on the table with him to physically assist Student get down from the table and back to answering questions. During the time Student was able to focus, he was able to respond appropriately to the questions and could attend for approximately five-to-ten minutes. Mr. Guzman determined the results of the Brigance were a valid representation of Student's skill level because results were consistent with Student's day-to-day performance and behavior. The assessment took 30 minutes.

20. The literary skills assessments focused on Student's knowledge and appreciation for books, knowledge of letters, phonological awareness, early writing skills and early reading skills. Student exhibited strengths in the areas of identifying and matching upper/lower case letters and reading number/color words. His areas of weakness included identifying common community signs and printing personal information.

21. The mathematical and science skills assessment focused on Student's understanding of fundamental math and science concepts. Student demonstrated strengths in the areas of identifying shapes, sorting objects, understanding ordinal positions, identifying coins/dollars, and understanding weather concepts. His areas of weakness included understanding time, writing numerals in sequence, distinguishing between living/nonliving things, and identifying plants and animals. At hearing, Mother expressed her disagreement that the academic assessments focused on functional skills rather than academics.

22. The daily living skills assessments focused on Student's self-help and independent living skills. Student showed strengths in the areas of dressing/undressing, feeding, fastening/unfastening, toileting, and bathing. He exhibited a weakness in grooming.

#### Contentions Regarding Brigance

23. The Brigance is a standardized test normed for chronological ages up to

age seven. Student was 13 years old at the time of assessment. Mr. Guzman, however, used the criterion reference version of the Brigance, which is not normed to chronological age. Instead, the criterion referenced version identifies a child's developmental age skill level, and its assessment tools measures the child's performance compared to specific educational objectives. In doing so, the assessments assisted in identifying present levels of performance, as well as, Student's areas of strength and needs. Mr. Guzman used the criterion referenced version of the Brigance to assess all children who were moderately to severely disabled.

24. Dr. Lerner-Baron took issue with the use of the criterion referenced version of the Brigance. She noted Student's primary form of communication was by use of an AAC device, which was not used in the Brigance. She considered this to be discriminatory, the same as if sign-language was not provided where needed. The Brigance was normed for ages birth to seven. Even using the criterion referenced version, Escondido assumed Student functioned at a pre-school age. This assumption missed a lot of what Student was capable of doing, and skewed his present levels of performance. Student could already do significantly more than what was reported. Further, Escondido's use of "cut and paste" of full paragraphs from the 2014 Pleasanton IEP, invalidated Escondido's determination of Student's present levels of performance and subsequent IEP baselines. The testing environment was also inappropriate. The teacher's lounge was not a quiet room, free of objects and sensory interference. Student was not allowed to type his responses.

25. As a school psychologist, Ms. Carlon also weighed in regarding the criterion based Brigance. She was familiar with the Brigance and noted it was used in the pre-school setting or with nonverbal children to determine developmental age. Ms. Carlon reported that in assessing a child, it is not always necessary to establish a basal level based upon age, where it can be determined by observation and record review.

Ms. Carlon also explained the Brigance, as used, did not assume lower skills. If a child cannot demonstrate lower skills, the child is still tested for higher skills with the Brigance. As example, Student's math assessments also tested for his understanding of money and weather, which are higher skills. She opined that, based upon her discussions with Mother at that time, there was no reason to believe Student could use a keyboard to communicate. Mother had previously reported to Ms. Ascero that Student had not been exposed to a keyboard in a long time. Further, typing would have changed the test format of the Brigance. Ms. Carlon considered the Brigance a valid assessment, as it accurately reported Student's abilities on the day of the test. She could not say it was reliable, as the results did not determine if Student could perform consistently or not.

#### Speech and Language Assessment

26. A speech and language evaluation was conducted and a written report, dated October 10, 2017, prepared. The assessor did not testify at hearing. The assessment report indicated Student was homeschooled and had a prior 2014 IEP from Pleasanton which contained speech and language goals. The assessor's observations noted Student presented with a high level of energy and a highly unfocused demeanor during the assessment and observation sessions. He sat at the table and needed continuous prompts to attend to activities, therefore, formal assessment procedures were abandoned. The assessor conducted parent interviews; a review of records; observations during the speech and language assessments, as well as during the occupational therapy assessment; the attempted administration of the Goldman Fristoe Test of Articulation, Third Edition; and the Receptive One-Word Picture Vocabulary Test, Fourth Edition.

27. The Goldman Fristoe, intended to measure Student's articulation and phonology, was abandoned due to Student's difficulty following the testing procedures.

As reported in his 2014 speech assessment, Student was able to verbally produce 35 word/word approximations, however, Mother reported Student had since lost many of his verbal skills.

28. An oral-motor skill exam was not attempted due to Student's inability to follow directions combined with his agitated demeanor. Student did not drool, and his oral structures appeared to be within expected ranges.

29. Student did not use verbal speech as his primary means of communication. Based upon observations and Mother's report, Student's voice was within expected limits, and he did not display and disfluencies in his vocalizations.

30. The Receptive One-Word Picture Vocabulary test was also abandoned due to Student's difficulty following the testing procedures. Informally, the assessor gathered information regarding Student's communication skills. Receptively, Student followed familiar, naturally occurring directions; sometimes needing a visual prompt. He demonstrated understanding of common vocabulary words, i.e., body parts, and clothing, and visual verbs, i.e., roll and bounce. Student responded to his name. Mother reported Student could consistently demonstrate understanding of common household items and his understanding of size and shapes was emerging. Student did not demonstrate an understanding of nonverbal communication, such as vocal intonations, facial expressions or body language. His home program did not include use of visuals to support his receptive communication.

31. Expressively, the assessor noted Student was a multimodal communicator who primarily communicated through vocalizations, gestures/adapted signs, facial expressions and body movements or physical manipulations. His self-expression was used to communicate requests for preferred items and food, to fulfill basic needs, to make choices and to respond to greetings. The quality of his expressions was vague and he often required a familiar listener to interpret his message. To make a request, Student

grabbed or reached for an item or physically led his communication partner to the item. He did not make requests for items not in his environment.

32. Mother reported some additional information. Student used gestures for “help” and “all done.” To take a break, Student walked away from the activity. Student typed between 20 and 100 sight words which he used to make requests or label items or places in his environment. Mother did not report physical aggression or undesired behaviors. She also reported that Student used an iPad with Proloquo2go software in his previous school. He could use this device to make requests in full sentences, i.e., “I want xxxx.” She reported Student did not use an AAC device in his home school program. She did not discuss Student’s communication program at ATSC.

33. Pragmatically, Student’s communications were self-centered, perseverative in nature and limited to his current environment. Mother reported no interest in social interaction.

34. Based upon the informal assessments, record review and observations, the assessor concluded Student demonstrated an articulation disorder since his speech production errors reduced his intelligibility, significantly interfered with his communication, and attracted adverse attention. Student also exhibited expressive and receptive language disorders, which resulted in a significant adverse effect on his personal, social/emotional, academic and vocational needs.

#### Augmentative/Alternate Communication Assessment

35. Benjamin Bennett<sup>8</sup> conducted an AAC evaluation and prepared a report

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<sup>8</sup> Mr. Bennett is a speech and language pathologist and AAC specialist for Escondido, who provides speech and language therapy and diagnostic services, with a heavy emphasis on the autism spectrum disorders, for sixth to eighth grade students within the district. He provides AAC diagnosis and ongoing training using current

dated October 13, 2017. Throughout his testimony, Mr. Bennett presented as a competent and caring professional. Mr. Bennet observed Student, conducted parent, teacher and staff interviews, reviewed records, and utilized the AAC Assessment Genie and iOS Assessment application. Student was alert during the observations, which were conducted on two separate days to facilitate Student's best performance. His level of interest and attention appeared to be adequate for the assessment and did not affect the validity of the assessment or results.

36. Mother reported Student used an iPad both at home and while in public school. Student previously used the Proloquo2go program for approximately three years. Student did not use his iPad during his three years of homeschooling, but consistently utilized the iPad tablet at home to express his needs and wants outside the homeschool sessions. Although Mother testified she found the Proloquo2go program ineffective, she did not convey this information to Mr. Bennett. Mr. Bennett did not test Student to see if he could type. He explained he did not think Student could connect ideas with words. Student required fairly significant assistance from Mother when pressing the keys of the iPad, and was not interested in cooperating with assessment on the iPad or Proloquo2go. Student did not exhibit the ability to decode words, and decoding is necessary to create sentences independently.<sup>9</sup>

37. On the first observation in a quiet room at Bear Valley, Student was visibly

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technology to students pre-kindergarten through eighth grade. Mr. Bennett holds a master's degree in communication sciences, as well as, a teaching credential from Illinois.

<sup>9</sup> Even in the ATSC video of Student, presented to Escondido staff in April 2018, Mr. Bennett noted that Student was not able to decode. Student was copying words from a computer, and not all of his answers were correct.



agitated and attempted to elope, but was redirected by Mother. This behavior pattern continued throughout the observation. Mr. Bennett twice attempted to assess Student using the AAC Evaluation Genie, but discontinued it due to Student's impulsivity and agitation. Mr. Bennet noted that during the attempts, Student answered five-to-ten items before he lost interest, and answered each question correctly while engaged. During the assessment Student would attempt to swipe and tap icons, but he did not wait for instruction on which icon to press. He tapped the icons forcefully if there was no movement on the screen. Student was later observed using Mother's phone which he could navigate easily, and select buttons on the screen. At hearing, Mother expressed her concern with the observation and assessment, as Mr. Bennett had arrived late, and spent only 10 minutes with Student.

38. Student's second observation was completed at home. Mother again complained Mr. Bennett was late. This time, however, Student was calmer during the observation and played with his personal iPad watching Bollywood videos. He navigated the YouTube app with ease, handled his iPad with care, approximated spellings of familiar words, and selected buttons one-half inch in size.

39. Mr. Bennett utilized the Communication Matrix to determine how Student communicated to provide the framework for determining logical communication goals. Student exhibited scattered skills. He was at an emerging level and his skills had not yet reached the level of language. Based upon his findings, Mr. Bennett determined Student required the continued use of a dynamic display voice output device to access his school curriculum. His spontaneous speech was characterized by non-word vocalizations that required associated gestures. The benefit of an AAC device would not only increase his comprehension of needs and wants for his communication partners, but would also serve as a model to improve his oral language.

40. Mr. Bennett concluded Student had many of the skills necessary for

effective use of a speech generating AAC device. He displayed excellent visual identification skills, and had the fine motor skills for direct selection on an iPad. Student could navigate on the iPad without difficulty. He determined the iPad would be the best AAC device for Student, and the Proloquo2go program would best fit Student's needs for (1) expanding his expressive vocabulary; (2) providing a means to express telegraphic phrases; (3) having a voice for speech output; (4) making use of core vocabulary options; and (5) using a color coding scheme to provide visual cues for correct syntax. Additionally, Proloquo2go was easily and quickly programmable.

41. Based upon his observations and the occupational therapy assessment, Mr. Bennett determined Student did not need a full reassessment. The occupational therapist had reported Student could type. Mother indicated Student could use a keyboard and iPad, but only used the iPad. Mr. Bennett opined that additional assessment would not be valuable or useful. Student simply was not interested in participating further or using other devices.

42. During the home observation Mother discussed purchasing the Proloquo2go software with Mr. Bennett. Mother understood this conversation to mean Parents were required to purchase the Proloquo2go software and provide their own iPad for use at school. Mr. Bennett understood Mother wanted to purchase the Proloquo2go for use at home, and he told her there was currently a sale on the software. Mr. Bennett told Mother that Escondido would initially provide Student with loaner AAC equipment when he came to school, until the equipment could be ordered for him. In anticipation of Student attending Bear Valley, Mr. Bennett had the order placed for the equipment. Contrarily at hearing, Mother stated she was requested to purchase the iPad and Proloquo2go on her own.

#### Adaptive physical education assessment

43. Chris Numbers conducted an adaptive physical education evaluation to

assess Student's gross motor skills necessary for physical education. A written report dated September 8, 2017, was prepared. Mr. Numbers did not testify at hearing. The purpose of the assessment was to determine eligibility for adaptive physical education due to, among other things, (1) a significantly reduced performance level of three or more years or 1.5 standard deviations below the mean or (2) significantly reduced performance level because of a severe impairment which requires significant modification of activities and precludes safe or successful participation in the general physical education setting. The assessments consisted of observations, a review of records, and the Apache Motor Skills assessment. The Apache is a criterion/objective based standardized test of gross motor development which is used to assess motor skill patterns and movement skills of children ages 10 to 14 years (locomotor and object control). The information gathered is intended to assist in designing activities to maximize learning and increase the rate of skill acquisition.

44. Mother assisted transitioning Student to the assessment, as Student had difficulty focusing on the task and was very disinterested and overwhelmed. Student was unable to fully complete the assessments due to lack of concentration. Student had difficulty performing an action when given a command and most skills were completed out of sequence and not when directed to perform.

45. As observed in the testing, Student could kick a soccer ball, but lacked balance and coordination. He could catch a playground ball thrown underhand from a distance of two feet, but was apprehensive catching an overhand thrown ball. Student could throw a basketball underhanded, which was his preferred method of throwing. Student could dribble while stationary and while jogging. Student was unable to perform a sidestepping lateral movement, and unable to jump from a stationary position. Student could run, but lacked bilateral coordination and his arms did not coordinate with his legs. Based upon these results, Mr. Numbers concluded Student

demonstrated below average gross motor range compared to his typically developing peers, and he lacked the social/emotional skills necessary to participate in physical education in the general education setting.

46. Father testified regarding Student's athletic abilities. He strongly expressed that the adaptive physical education assessment was incorrect and did not accurately reflect Student's abilities. Father and Student engaged in daily physical activities which helped Student expend energy, get tired, and sleep better. Student played basketball. He liked to walk and jog, and could walk for two hours or jog for 45 minutes at a time. He used a trampoline at home. None of this was accurately reflected in the assessment report. Father questioned the motor skills tests. Student could kick a ball with Father, he could dribble and catch a basketball. Student might have been able to do the activities Father described, but he did not do them during the assessment and/or he did not do them with the physical dexterity needed for a general education physical education class.

#### OCTOBER 16, 2017 IEP

47. Escondido held Student's IEP team meeting on October 16, 2017. All required parties attended the IEP, including both Parents and their friend/advocate who participated in the IEP team discussions. Parents received copies of all assessment reports prior to the IEP team meeting.

48. Ms. Ascero attended the IEP team meeting as the school psychologist and presented the psychoeducational assessment report to the IEP team. The assessment was described as an *initial re-evaluation* for special education services. Student's medical history was discussed. The IEP team reported English as Student's primary language, and Mother confirmed this information. Prior to homeschooling Student used an AAC device for communication and currently used an iPad at home for leisure. Student could sometimes type words on his iPad to indicate his wants and needs. Parents did not

disagree with any of this information, and did not add any additional information or inform the IEP team of Student's participation in the ATSC program.

49. Ms. Ascero attempted to administer cognitive testing to Student, but Student was unable to complete the testing. The testing was impacted by Student's autism and nonverbal communication abilities. During her observation and assessment, Student exhibited a short attention span, and was "all over the office." Student presented with more behavior problems than mere eloping. Student required continual redirection and prompting from Mother. Based upon her observations, parental interview and ratings scales, and records review, Ms. Ascero determined Student demonstrated severe symptoms of Autism Spectrum disorder. This finding was adopted by the IEP team. The IEP team also determined that Student did not appear to meet eligibility criteria for intellectual disability at that time. Student required a high level of adult support in all areas throughout the school day, specifically in the school setting. The IEP team determined Student required 1:1 Special Circumstance Independence assistance for health, personal care, behavior, and instruction within the classroom; 2:1 assistance for all transitions and activities outside the classroom (one adult support provider walking with Student, holding his arm when needed, and one support provider within close proximity to assist in the prevention of elopement.)

50. Mr. Bennett reviewed the speech and language assessment report at the IEP team meeting, as the assessor was no longer an Escondido employee. Mr. Bennett opined the assessment report complied with state and federal law. Student's behaviors, as described in the report, were similar to his behaviors during the AAC assessment. As a speech and language pathologist, Mr. Bennett evaluated Student receptive, expressive, and pragmatic language skills somewhat as part of his AAC assessment. He generally found the speech and language assessment report consistent with his findings and observations. On one item, Mr. Bennett disagreed. The speech assessor recommended

text-based methodology. Mr. Bennett recommended visual-picture based strategies. Mr. Bennett found text-based communication inappropriate for Student at the time of the assessment, based upon what information was available. Parents had not informed him of Student's ATSC program.

#### Present Levels of Performance

51. Mr. Guzman presented the academic assessment report. Student exhibited relative strengths in the areas of daily living skills and relative weaknesses in functional academics. During the IEP team meeting, Mother and her advocate asked several relevant and considered questions, to which Mr. Guzman gave detailed responses describing his classroom and the daily classroom activities. For the 2017-2018 school year, there were eight children in the class, all with intellectual disability eligibility, although one child was also autistic and non-verbal. The moderate/severe classroom program activities were primarily functional. Students worked on academics for 45 minutes in the mornings.

52. Escondido members of the IEP team determined Student had scattered pre-academic and academic skills. These IEP team members determined Student followed one-step directions the first time asked 60 percent of the time; two-step directions independently 40 percent of the time. Student exhibited a willingness and ability to focus at the time of being asked. Student knew the letters of the alphabet and could match common consonant-vowel-consonant words to pictures independently when motivated and willing to work. These determinations of Student's present levels were taken verbatim from Student's 2014 Pleasanton IEP and not based independently on Escondido's recent assessments.

53. An Escondido occupational therapist presented the occupational therapy assessment results, and the IEP team determined Student exhibited delays in his fine motor and sensory processing development. The IEP team determined Student's range

of motion, muscle tone, sitting posture, grasp of objects, cutting skills, and ability to use a computer independently were within normal limits. His motor planning skills were poor, as he could not copy new motor movements like clapping or jumping sequences. Student's handwriting was often illegible; he had difficulty orientating his writing to lines, maintained poor space between letters, and wrote over mistakes, rather than erase them. Mother reported Student composed and wrote his own sentences, printed his last name, and copied numbers.

54. Mr. Bennett presented the speech and language and AAC assessment reports. The IEP team discussion focused on articulation and language. Mr. Bennett addressed Mother's confusion and explained the speech and language therapist was not concerned with Student's voice, as it related only to the actual physiological function. Likewise, there was no concern regarding fluency as it pertained to the presence of a stutter. Articulation, on the other hand, was important as it addressed pronunciation of sounds. Further, as Student was primarily non-verbal, Mr. Bennett was more concerned with language, which included vocabulary and comprehension of receptive language, as well as, Student's ability to utilize expressive language, both verbally and non-verbally. During the IEP team meeting, Mr. Bennett and Mother maintained a dialogue in which they exchanged information and described Student's abilities to communicate at home. Based upon the assessment reports, and parental interviews, the IEP team determined Student exhibited significantly delayed communication skills. Student followed familiar, naturally occurring directions, though sometimes a visual prompt was needed. He demonstrated understanding of common vocabulary nouns and visual verbs. At hearing, Mother expressed her belief that since Student was nonverbal, group speech and language services were useless. Parents wanted all speech services to be individual. However, they did not express these concerns at the IEP team meeting. Parents indicated that Student typed between 20 and 100 sight words. The IEP team determined

Student required the use of a dynamic display voice output device in order to access his school curriculum.

55. Mr. Bennett discussed Student's ability to utilize AAC devices. Based upon his observations, and the information provided by Mother, Mr. Bennett discussed Student's ability to type and use the iPad. Mr. Bennett informed the IEP team that Student had some really good skills with abstract symbols, but had difficulty requesting new actions and objects. He would benefit from reintroduction of the device he had previously used, with the applications he was used to and had a history of using. Mr. Bennett indicated in the IEP team meeting that Mother had expressed an interest in purchasing the Proloquo2go program, but the sale on the product was over. Mother stated she had not had the time to check it out.

56. Margaret Perkins<sup>10</sup>, a private speech and language pathologist and AAC provider testified on behalf of Student. Ms. Perkins has provided services to students in special education and children with autism are a large part of her caseload. Ms. Perkins provided an informative introduction to what it means to be nonverbal, as well as, a description of the relationship between communication and behavior for nonverbal

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<sup>10</sup> Ms. Perkins holds a master's degree in speech and language pathology, and a bachelor's degree in speech and hearing sciences. She has been a licensed speech and language pathologist for 35 years, holds certification from the American Speech-Language-Hearing Association, Assistive Technology Profession Rehabilitation Engineering, and Assistive Technology Society of North America. Ms. Perkins operates SoCal AAC Therapy, which provides AAC evaluations and therapy for individuals with complex communication needs. She previously worked for school districts, including Escondido, and has testified in due process hearings on behalf of both students and school districts.



children who use non-symbolic and unconventional communication. Increased communication reduces maladaptive behavior. An evaluator can use checklists and inventories to determine symbolic intent. Symbolic intent turns to communication. It is how one learns language.

57. Ms. Perkins testified regarding Escondido's assessments, and the October 16, 2017 IEP. In general, she found Student's functioning to be at a higher level than anticipated by Escondido reports. Ms. Perkins, however, did not meet Student until April 2018, and did not assess him until July 2018, well after Escondido's assessments and IEP in 2017. Ms. Perkins also had the benefit of observing Student in his program at ATSC. As example, her perception of Student's ability to type and text, her understanding of Student's communicative intent, and her awareness of Student's technology skills were largely influenced by the information gained at ATSC. As such, the bulk of her assessment may be compelling, but is chronologically immaterial to this matter, especially as Parents did not disclose Student's ATSC attendance to Escondido at the time of the IEP team meeting.

58. The IEP team discussed the adaptive physical assessment report prepared by Chris Numbers. Mr. Numbers acknowledged Student exhibited a definite strength in his running. The downfall, however, was Student did not run on command, and was not easy to redirect. Focusing was also a challenge, and it was apparent Student would be unable to follow commands during class time. Mother questioned the assessment environment, as Student was unfamiliar with the area and there was a lot going on with other general education students in the area. Mr. Numbers explained Student's performance was out of sequence a lot, i.e., lateral movement, left to right, and he was unable to follow commands. Further, although Student could run, his bilateral coordination was not rhythmic or coordinated. His age equivalency for locomotor skills was at age 10 or under. Mr. Numbers determined, based upon Student's present levels

of performance observed during the assessment and the assessment results, Student appeared to perform in the below average gross motor range compared to his typically developing peers. Student lacked the gross motor and social/emotional skills necessary to participate in the general physical education setting. The entire determination of Student's present levels in adaptive physical education contained in the October 16, 2017 IEP were taken verbatim from the 2014 Pleasanton IEP present levels determined by Cindy Chase in Pleasanton, not Chris Numbers.

59. Additionally, the description of Student's vocational present levels in the IEP document indicated he participated in many vocational activities throughout the day, such as wiping down tables, putting away supplies, vacuuming, calendar, and food prep. This statement was not based upon current observations by Escondido staff, but also taken verbatim from the 2014 Pleasanton IEP.

60. Ms. Ascero also discussed her functional behavior assessment report, which identified Student's propensity to elope when frustrated or excited, and proposed behavior intervention plan, which sought to replace his elopement with a request for a break using his AAC device or picture communication. Ms. Ascero based much of her assessment report on Mother's input which related few, if any behaviors, which might impede his education. She did not question Mother's responses which were in contrast to her own reported observations.

61. Parents participated in these discussions and asked relevant questions regarding how the assessments were administered. The IEP team meeting record does not reflect any parental questions or concerns regarding the assessments. They did not express any disagreement with the determination of Student's present levels of performance, nor did they inform the IEP team of Student's participation in the ATSC program.

62. As a result of the IEP team discussions, Escondido identified Student's

needs in the areas of (1) social/emotional/behavior - requesting a break; (2) adaptive physical education; (3) fine motor; (4) social/emotional/behavior – transitions; (5) prevocational training – following a task schedule; (6) mathematics – money; (7) functional communication; and (8) English language arts receptive communication – sight word identification. The IEP team crafted seven goals to support these areas of need.

### Goals<sup>11</sup>

63. Each of the seven goals were individually reviewed and discussed in depth with the IEP team. Mother and her advocate asked questions for clarification or descriptions of how the goals would address Student's needs. All of their questions were addressed. The transcript of the IEP team meeting reflects a constructive exchange of ideas.

64. Escondido crafted an adaptive physical education goal addressing Student's need for cardiovascular endurance. Student's baseline indicated he demonstrated cardiovascular endurance through continuous movement for four minutes. The goal sought to have Student increase his endurance to a minimum of six minutes.

65. Escondido crafted an academic goal in the area of mathematics addressing Student's need to develop money skills. Student's baseline indicated he could identify different coins and dollar bills. The goal sought to generalize and increase Student's money skills to have him identify an item to purchase and ask for the correct amount of money to purchase the item.

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<sup>11</sup> Student's issues for hearing contained contentions regarding the areas of academics and physical education only, therefore the goals crafted to address other areas of needs are not discussed in this decision.

66. Escondido crafted an academic goal in the area of English Language Arts, receptive communication addressing sight word identification. Student's baseline indicated he could identify number words and color words. The goal sought to increase Student's ability to identify 50 sight words with 80 percent accuracy.

#### Offer of FAPE

67. Based upon the review of assessments and discussions by the IEP team, Escondido made the following offer of FAPE:

- 1) Specialized academic instruction focusing on life skills and functional academics provided for 393 minutes per day, five days per week;
- 2) Special circumstance 1:1 aide assistance during all class time each day and 2:1 aide assistance during transitions and activities outside the classroom each day;
- 3) Occupational therapy consultation services for 300 minutes per year;
- 4) Adaptive physical education in a group setting for 200 minutes per week;
- 5) 20 minutes per week psychological service consultation with staff regarding aide service and behavior intervention plan;
- 6) Speech and language therapy, for 50, 20 minute sessions yearly. The IEP indicates both individual and group services will be provided, but does not indicate how this will be allocated between the 50 annual sessions;
- 7) Additional accommodations including use of sensory strategies throughout the day, short breaks between assignments, access to break area, and visual supports;
- 8) Extended school year and services;
- 9) Behavior intervention plan; and
- 10) A determination Student required assistive technology devices and services, and was currently using an iPad to communicate, which was being supplied at

home.

68. Based upon this offer of FAPE, Escondido offered Student placement in a separate classroom program for students with moderate to severe disabilities on the Bear Valley campus. Transportation was not provided, as Bear Valley was Student's school of residence. Parents observed the moderate/severe special day class at Bear Valley and found it to be inappropriate. To them, Student performed at a substantially higher level than all of the other students in the class. According to Parents, he could do so much more.

69. Parents did not consent to the October 16, 2017 IEP. On November 10, 2017, they sent Escondido a 10-day notice of unilateral placement. Parents came to the conclusion that Bear Valley could not provide Student with a FAPE, and they intended to unilaterally place Student in an appropriate school and seek reimbursement from Escondido. Parents indicated they remained interested in school district services, but did not believe Escondido offered Student an appropriate placement at that time.

70. On December 15, 2017, Escondido's attorney sent Parents a letter of prior written notice indicating Escondido's belief the October 16, 2017 IEP offered Student a FAPE, and denying Parents' request for non-public placement and services. The letter also requested that Parents contact Escondido by January 9, 2018, to clarify their objection to the IEP, whether they objected to placement only or both placement and services. On January 8, 2018, Parents provided written consent to eligibility and implementation of adaptive physical education services only. Student did not utilize the adaptive physical education services available from Escondido.

#### ADDITIONAL TESTIMONY

71. At hearing, Mother expressed her beliefs that the assessments were not appropriate. She commented that English was not Student's native language, although she told each of the school districts and assessors that English was Student's primary

language. She objected to the assessment environments as inappropriate; Student was agitated or tired during the assessments. The assessors would not allow Student to type. Specifically, she felt the academic assessments did not accurately report what Student could do. Mr. Guzman did not test Student's ability to add and subtract; he did not test Student's knowledge of letters, and he did not test Student's ability to make complete sentences by typing. Student could do all of these things. Mother expressed her dislike for Proquolo2go. Although Student had used it in the past, she felt it was ineffective. Student could do more.

72. Mother's concerns transitioned to the October 16, 2017 IEP. If the assessments were inaccurate as she believed, then Escondido's determination of Student's present levels of performance were also flawed. She was distressed that Escondido simply cut and pasted full paragraphs from Student's 2014 Pleasanton IEP and adopted them as their own.

73. After declining Escondido's offer of placement in the general education classroom, Mother continued to homeschool Student with additional services from ATSC. At that time, Mother utilized the Keeping it Simple Publishing's homeschool program, which was created by Dalia Shkedy. Ms. Shkedy was also the director of ATSC. As of November 1, 2017, Parents enrolled Student in the World Class Learning Academy homeschool program, which was operated by Gary Shkedy, Ms. Shkedy's husband.

74. Mother's testimony was taken over three, non-consecutive days, and she had the benefit of hearing each witnesses' testimony before completing her own. Although her testimony was precise during her initial direct examination, her memory faded during cross-examination. On subsequent days of testimony, Mother sometimes contradicted her previous testimony. At times, her responses made no sense in relation to the question asked. Mother provided no explanation of why Parents consistently failed to inform Escondido about Student's ATSC program. Her only response was that

Escondido did not ask her.

75. Admittedly, Mother was experiencing medical issues during the hearing, and was visibly tired. She explained that English was not her native language, and she feigned not understanding special education, even though she admitted she was represented by counsel as early as September 2017.

#### ALTERNATE TEACHING STRATEGY CENTER:

76. ATSC is a non-public agency operated by Gary and Shkedy, certified by the California Department of Education to provide behavior intervention implementation. The program exclusively relies on a methodology referred to as visual communication, or VCA. ATSC's website<sup>12</sup> states,

"We provide one on one teaching at our center in individual classrooms for each student. Each student is taught using a unique curriculum that is specifically designed for them in order to succeed. If the student is nonverbal, we typically start by focusing on communication skills which include reading and typing. All students are taught academics in order to strengthen their communication skills. Our focus is on engaging the students in order to maximize the amount of time they are learning."

The website goes on to explain ATSC's focus is to build self-esteem. The program is represented as a scientific method in which extensive data is taken and strategies modified to each child. Keyboarding is an essential skill for all visual learners. Visual

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<sup>12</sup> Pursuant to stipulation of the parties, the ALJ viewed ATSC's website.

learners do not learn sequentially; ATSC uses a non-linear dimensional approach.

77. VCA is a strategy targeted at children with autism who are visual learners who think in pictures. The program founders claim VCA has shown remarkable success with children who have failed to progress using standard applied behavior analysis practices and allows them to “think in pictures.” The program utilizes behavior modification to teach new behaviors, which is critical to the success of the learning process. ATSC’s strategies make extensive use of task analysis, chaining, multi-trial, and errorless learning. Social stories as part of reading comprehension programs are also incorporated to ensure the effectiveness of the story.

78. Jose Javier Montes Castro<sup>13</sup>, a special education teacher in Imperial Beach, California is an enthusiastic supporter of VCA as an innovative alternate methodology for some children with autism. He provided the most lucid description of the VCA teaching methodology. VCA works on self-motivation and assists students to become more independent. The methodology has lots of programs. Data is very specific and collected via computer. Like applied behavior analysis, VCA relies on data collection to seek redirection of behaviors. Applied behavior analysis is externally based and systematically and repetitively targets specific behaviors. VCA is internally self-motivated and focuses on relationships and communication. It is not linear and uses many forms of communication. Certification of training is not required for VCA.

79. VCA is provided via computer and keyboard in a small room, free of

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<sup>13</sup> Mr. Montes is a moderate/severe special education teacher in San Diego county. He holds a bachelor’s degree in teaching, multiple subjects. He has been an autism specialist for Imperial Beach, as well as an applied behavior analysis interventionist. He also developed programs for non-verbal students utilizing the Picture Exchange Communication System.



distractions, with the assistance of one aide. The keyboard provides a “help button” which provides a visual prompt. The prompt gives the correct answer which may blink or fade out. Mr. Montes uses VCA in his special education classroom as one of several methodologies to address academics and communication. It is utilized for periods of one to one-and one-half hours per day as a supplement or support to his adaptive curriculum. It is a supplemental program and not aligned with state common core standards by grade level. VCA is designed to emphasize independence, not mastery or generalization.

80. Mr. Montes observed Student at ATSC and reviewed Escondido’s academic assessment and IEP. While Mr. Montes’s testimony in this area may have been accurate, it is given no weight as Parents did not provide Escondido with any information regarding Student’s program or performance at ATSC until January 2018, well after Student’s assessments and IEP were conducted.

81. Mr. and Mrs. Shkedy, the owners of ATSC, testified at hearing pursuant to subpoena.<sup>14</sup> Dalia Shkedy, the Director of ATSC, presented as an exuberant witness at hearing. Ms. Shkedy testified she had a background in the Israeli military and possessed master’s degrees in language and human development, but all information regarding her education was classified. She indicated she received behavioral training, but claimed further explanation was also classified. She did not answer the question asked, but skillfully provided what information she wanted to communicate. As example, although she was the director of ATSC, Ms. Shkedy deftly deflected most questions regarding ATSC to her husband.

82. Ms. Shkedy’s testimony was circular, looped, evasive, and often contradictory. As Director of ATSC, Ms. Shkedy supervised its teachers and has worked

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<sup>14</sup> The Shkedys were accompanied to the hearing by their attorney.

with eight teachers since 2017, all of whom possess bachelor's degrees. Only one, however, is a credentialed teacher. The credentialed teacher provides consultation, but does not work with students. ATSC is a behavior intervention program, yet Ms. Shkedy professed no familiarity with traditional behavior interventions.

83. Ms. Shkedy, emphasized that ATSC was "all about behavior." One can improve behavior through communication. Everything in life is related to communication. Children with autism walk a different path. For nonverbal children, keyboarding skills provide independence. Much of their individual programs are based upon trial and error. ATSC works on developing communication skills independently, and parents work on generalizing the skills in the community. Reading body language is also a large part of the program. One must look at the basic needs of the child, i.e., hunger, thirst, to determine body language to change behavior. Ms. Shkedy considers academics to be a "language," however, when asked at hearing, she indicated she did not understand what was meant by common core curriculum and did not know what language arts were.

84. Ms. Shkedy considered VCA to be research based, as data is collected as part of the program. Intense World Theory research has also researched VCA.<sup>15</sup> She also considered VCA to be peer reviewed based upon a presentation at San Diego County Department of Education for Special Education Local Plan Area directors within the county. San Diego County Department of Education, however, does not approve methodology or treatment programs. It simply negotiates the hourly rates for such non-public programs on behalf of the county. Escondido does not have a contract with ATSC.

85. Gary Shkedy presented as a far more hostile witness than his wife. Mr.

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<sup>15</sup> According to Ms. Prins' testimony regarding googling information about Intense World Theory, the research is based upon experiments on rats.

Shkedy is the chief financial officer for ATSC. He is also the chief administrator. While he handles the financial aspects of ATSC, Ms. Shkedy created the program and is responsible for all data collection and analysis.

86. Mr. Shkedy, however, also operates the World Class Learning Academy, a private satellite program, which is described in its enrollment agreement as an educational program registered as a private school with the State of California. While Ms. Shkedy testified that ATSC does not require enrollment in the World Class Learning Academy, the World Class Learning Academy enrollment agreement states parents are required to enroll their child in ATSC for the full number of teaching days for a minimum of two hours per day of related services, and parents are required to utilize the Keep It Simple homeschool programming, software, training, and remote satellite supervision to teach their child.

87. After declining Escondido's offer of placement in the general education classroom, Mother continued to homeschool Student with additional services from ATSC. Mother indicated that although she enrolled Student at Bear Valley, she also maintained Student's enrollment with KIS and ATSC to keep Student's spot open. Parents still intended to have Student attend ATSC even if he attended school at Bear Valley. While ATSC was certified to implement behavior plans, Mother did not describe Student's program as a behavior plan, but rather a communication plan which worked on academics via the KIS program. As of November 1, 2017, Parents enrolled Student in the World Class Learning Academy. Payment for Keeping it Simple is billed separately from ATSC. "Remedial Academic Tutoring" is the private payment billing code utilized by ATSC for all non-Special Education Local Plan Area referred students.

88. Student submitted a video of Student attending ATSC, which was viewed at the hearing. The video filmed Student at various times since 2016, and was edited to provide an example of the benefits of ATSC. The video showed Student utilizing a

computer screen and keyboard, and typing responses to visuals, both pictures and words. Specific computer screens were not visible, nor was it apparent what Student was working on. Escondido staff members were initially provided the video in April 2018. Ms. Prins, who viewed the video, noted that teaching communication can be a behavior intervention for maladaptive behaviors. However, she believed the video depicted Student working on academics, without the benefit of a special education teacher. Further, the video did not differentiate whether Student received visual prompts, answered correctly, or could generalize what communication forms he had learned. The visuals gleaned from the video simply presented a severely impacted young man with autism, and provided assessment information only in hindsight.

#### REIMBURSEMENT REQUEST:

89. Parents requested reimbursement for related services provided by ATSC, and submitted the following proof of payment:

August 22, 2017	880.00
September 2017	1540.00
October 2017	2750.00
November 2017	2110.00
December 2017	2150.00
January 2018	2400.00
February 2018	1800.00
March 2018	3600.00
April 2018	1800.00
May 2018	3000.00
June 2018	480.00 <sup>16</sup>

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<sup>16</sup> Parents made four payments in June 2018, however only one payment was

90. Parents also submitted proof of payment for Keeping it Simple Publishing, which provided the academic software used as part of the ATSC program as follows:

September 2017	200.00
October 2017	200.00
November 2017	200.00
December 2017	200.00
January 2018	200.00
February 2018	200.00
March 2018	200.00
April 2018	200.00
May 2018	200.00
June 2018	200.00

91. Parents requested mileage reimbursement for one round trip; home to ATSC for each day of attendance for the period of August 16, 2017, through June 5, 2018, at the rate of \$0.55 per mile. Parents submitted a detailed report of mileage claimed in the total amount of \$3018.40.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>17</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20

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made prior to June 5, 2018, for \$480.00.

<sup>17</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided herein.

U.S.C. § 1400 et seq; 34 C.F.R. §300.1 (2006) et seq.<sup>18</sup>; Ed. Code, § 56000 et seq.; Cal Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE

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<sup>18</sup> All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

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.)

4. 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 enacting the IDEA, 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 Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.*, at p. 951, fn. 10.)

5. In *Endrew F. v. Douglas County School District* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988], the Supreme Court reconsidered the meaning of the phrase “some educational benefit” for a child not being educated in a general education classroom. The court rejected the contention by the school district that the IDEA was satisfied by a program providing “merely more than *de minimis*” progress, as well as parents’ contention that school district’s must provide an education that is substantially equal to one afforded to children without disabilities. “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.*, 580 U.S., 137 S. Ct. at p. 1001.) The Court retained its earlier holding in *Rowley* that any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. While *Endrew F.* does not require an IEP to maximize educational benefit, it does require that “a student’s educational program be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is

appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." (*Id.*, 580 U.S. \_\_\_, 137 S. Ct. at p. 1000.)

6. In so clarifying "some educational benefit," however, the Court stated that it would not attempt to elaborate on what appropriate progress will look like from case to case. "It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (*Id.*, 580 U.S. \_\_\_, 137 S. Ct. at p. 1001.) *Endrew F.* does not create a new legal standard for what constitutes a FAPE, but is a clarification of *Rowley*. (*K.M. v. Tehachapi Unified School Dist.* (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807,\*\*16-18.)

7. The Ninth Circuit further refined the standard delineated in *Endrew F.* in *M.C.*, *supra*, where the court stated that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities to enable progress to commensurate with non-disabled peers, taking into account the child's potential. (*M.C.*, *supra*, 858 F.3d at p.1201.) The Ninth Circuit has also affirmed that its FAPE standard before the *Endrew F.* decision comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

8. An educational agency in formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child's potential. (*Rowley*, *supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F. 3d 1025, 1033.)

9. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the



identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on each issue presented.

10. The statute of limitations for special education due process claims requires a party to file a request for a due process hearing within two years from the date the party knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (f); 20 U.S.C. § 1415(f)(3)(C).) The statute does not apply to claims filed by a parent who was prevented from requesting the due process hearing due to either of the following: (1) specific misrepresentation by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or (2) withholding of information by the local educational agency from the parent that was required to be provided to the parent. (Ed. Code, § 56505, subd. (f); 20 U.S.C. 1415 (f)(3)(D).) Student enrolled in Bear Valley on August 17, 2017, and filed his complaint on April 30, 2018, therefore all claims fall within the two year statute of limitation.

#### ISSUE ONE: FAILURE TO PROVIDE AN IEP FOR STUDENT AT THE BEGINNING OF THE SCHOOL YEAR.

11. Student contends Escondido denied him a FAPE when it failed to offer him an interim an IEP at the beginning of the 2017-2018 school year. Escondido contends it had no obligation to provide Student an interim IEP placement at the beginning of the school year, as Student's IEP had expired, and Parents had revoked consent to special education and related services.

12. A school district's obligation to provide special education and related

services do not expire; and terminate only upon one of three conditions; (1) the student ages out on his/her 22nd birthday; (2) the student graduates with a regular high school diploma; or (3) the student's parents revoke consent to the provision of special education and related services in writing. (34 C.F.R. § 300.101(a); 34 C.F.R. § 300.102(a)(3)(i); 34. C.F.R. § 300.300(b)(4)(iii).

13. Parents may revoke consent for the continued provision of special education and related services under the IDEA at any time. (34 C.F.R. § 300.9(c).) If the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency will not be considered in violation of the requirement to make a FAPE available to the child because of the failure to provide the child with further special education and related services and is not required to convene an IEP team meeting or develop an IEP for the child for further provision of special education and related services. (34 C.F.R. § 300.300(b)(4)(iii) & (iv).)

14. Further, a student's special education rights do not evaporate based upon a school district's belief a parent has no intention of returning to the district or has predetermined Student will remain privately placed. An offer of placement must be made to a unilaterally placed student even if the district strongly believes that the student is not coming back to the district, or parents have indicated that they will not be pursuing services from the district. The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in the district's preferred course of action. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.) Re-enrollment in the public school is not required to receive an IEP. It is residency, rather than enrollment, that triggers a district's IDEA obligations.

15. A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 56334, subd. (c).)

16. While the IDEA generally requires completion of an evaluation and formulation of an IEP prior to placing and providing services to a student with a disability, there may be some circumstances in which a student may receive services under an interim IEP before the normal process is completed. (*Letter to Saperstone* (OSEP 1994) 21 IDELR 1127; *Letter to Boney* (OSEP 1991) 18 IDELR 537 (Part B of the IDEA neither requires nor forbids the use of interim IEPs for children with disabilities).)

17. When a student with exceptional needs transfers from an educational agency within California but not within the same special education local plan area, within the same academic year, the new district shall provide the pupil with a FAPE, including services “comparable” to those described in the previously approved IEP, in consultation with the parents, for not more than 30 days, by which time the new district shall either adopt the previously approved IEP or develop, adopt, and implement a new IEP that complies with federal and state laws. (Ed. Code, § 56325, subd.(a)(1); 20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R. § 300.323(e).)

18. The IDEA, its implementing regulations, and the Education Code are silent on the specific procedure by which a district is to provide FAPE to a child with a disability who moves into the district during the summer. In its Comments to 2006 IDEA Regulations, the United States Department of Education addressed whether it needed to clarify the regulations regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The Department of Education declined to change the regulations, reasoning that the rule requiring all school districts to have an IEP in place for each eligible child at the beginning of the school year applied, such that the new district could either adopt the prior IEP or develop a new one. (71 Fed. Reg. 46682 (2006).) When a student transfers to a new school district between school years, the new district is not required to implement a former district’s IEP or give the student services that are “comparable” to those offered by a former district; it need only develop

and implement an IEP reasonably calculated to provide the student a FAPE based on the information available to the district. (See, *Student v. Clovis Unified School Dist.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2008110569; see also, *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrman v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrman*).) The new public agency also has the option of adopting the IEP developed for the child by the previous public agency in the former district. (*Questions and Answers on Individualized Education Programs, Evaluations, and Revaluations* (OSERS 09/01/11) 111 LRP 63322; see also, *Eagle Mountain-Saginaw Indep. School Dist.* (SEA TX 2012) 60 IDELR 178.)

19. Neither Part B of the IDEA, nor the regulations implementing Part B of the IDEA, establish timelines for the new public agency to adopt the child's IEP from the previous public agency or to develop and implement a new IEP. However, consistent with title 34 Code of Federal Regulations sections 300.323(e) and (f), the new public agency must take these steps within a reasonable period of time to avoid any undue interruption in the provision of required special education and related services. (*Questions and Answers on Individualized Education Programs, Evaluations, and Revaluations, supra*, 111 LRP 63322.) The IDEA does not state when the receiving district must begin providing the student FAPE, but the district must begin to do so as soon as possible based on the circumstances. (See *Christina School District* (SEA DE 2010) 54 IDELR 125; *Letter to State Directors of Special Education* (OSEP 2013) 61 IDELR 202 (whenever possible, school districts should attempt to complete evaluations and eligibility determinations for highly mobile children on an expedited time frame so they can receive a FAPE); *N.B. v. State of Hawaii Department of Educ.* (D. Hawai'i July 21, 2014, Civil No. 13-00439 LEK-BMK) 2014 WL 3663452 (enrollment triggers the obligation to provide a FAPE to a transfer student).)

20. Escondido's argument relied heavily on its contention that Parents never

intended to enroll Student in Bear Valley. However, as indicated above, residency, not enrollment triggers a school district's special education obligations. Here, Student resided within the jurisdictional boundaries of Escondido; therefore any obligation for special education clearly fell upon Escondido. Mother enrolled Student at Bear Valley on August 14, 2017, and provided Ms. Ascero and Ms. Carlon with a copy of the 2014 Pleasanton IEP. While no consent was provided to the Pleasanton IEP, it was sufficiently clear that Student was eligible for special education and related services based upon the content of that IEP. Regardless of whether Mother provided staff with the last agreed upon 2014 New Jersey IEP, it was uncontroverted that Student was a severely impacted child on the autism spectrum, with significant behaviors who had previously been deemed eligible for special education and related services. Parents elected to homeschool Student and did not seek special education services from any school district for a period of three years until they enrolled Student in Escondido. While Escondido staff assumed Parents revoked Students right to special education, there was no evidence to support such an assumption. Parents did not revoke consent to special education and related services and no evidence of a written revocation of special education rights was presented at hearing. Escondido was obligated to provide Student with special education and related services in the same manner as any other special education student transferring from another school district into Escondido.

21. While it had been three years since Student had attended a public school, and Escondido had no current information regarding Student, completion of reassessments was unnecessary for an interim placement. The primary purpose of an interim placement is diagnostic in nature, intended to provide the new school district with current information regarding the student. Instead of providing Student an interim IEP, Escondido chose to deny Student special education and related services until it completed the reassessments, a period expected to last 60 days before an IEP team

meeting was convened. In the meantime, Escondido offered to warehouse Student in a general education classroom, without supports and accommodations, other than a "safety plan" with adult supervision to prevent elopement during the school day. A general education placement for a homeschooled, severely impacted and nonverbal student with autism, with significant behaviors and sensory issues, was massively inappropriate. As reported by Dr. Lerner-Baron, placement in a general education setting would be detrimental to Student because he would not and could not access his education that setting.

22. Had Escondido offered placement in its moderate/severe special day class as an interim placement, or even as a "diagnostic placement," as later suggested by Ms. Prins, Escondido would have at least offered Student a placement in which he could obtain some educational benefit in a smaller and safer environment, as was proposed in the 2014 Pleasanton IEP. At that point, Escondido would have complied with special education law and had an offer of placement and services in place for the beginning of the 2017-2018 school year. Escondido's failure to offer Student a special education placement and services at the beginning of the 2017-2018 school year constituted a denial of FAPE for the period of August 16, 2017 through October 15, 2017.

#### ISSUE TWO: FAILURE TO APPROPRIATELY ASSESS IN THE AREAS OF ACADEMICS, SPEECH, LANGUAGE AND COMMUNICATION.

23. Student contends Escondido's assessments failed in their essential purpose of providing the baseline data that the IEP team needed to offer Student the chance to make appropriate progress in light of his circumstances under *Endrew F.* Student contends Escondido's assessments were inappropriate and incomplete, and therefore failed to yield accurate information on what Student knew and could do academically and functionally. Escondido contends all of its assessments were appropriate and met statutory requirements.

24. To provide a child with special needs a FAPE, a school district must evaluate the child, and his/her disabling conditions. The IDEA and its accompanying regulations contain an extensive set of procedural requirements designed to ensure that the initial evaluation , as well as any subsequent reevaluations, achieve a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1110 (*Timothy O.*).

25. In evaluating a child for special education eligibility, a district must assess the child in all areas related to a suspected disability. Anything less would not provide a complete picture of the child's needs. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f)., (*Timothy O. supra*, 1111; see also *S.P. v. East Whittier City School Dist.* (9th Cir. June 1, 2018) \_\_\_ Fed.Appx.\_\_\_, 2018 WL 2453865.) The assessments must be designed not only to determine whether the child has a disability, but also to "gather relevant functional, developmental, and academic information about the child," that can be used to determine the child's individual educational needs. The assessors must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining whether the child is eligible for special education. (34 C.F.R. § 300.304(b)(1). No single measure, such as a single general intelligence quotient, shall be used to determine eligibility or educational programming. (Ed. Code, § 56320, subds. (c), (e).)

26. An assessment must be conducted "by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.) An assessor must also be knowledgeable of the student's suspected disability. (Ed. Code, § 56320, subd. (g).) An assessment must be administered in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b)(3).) An assessment must be provided and administered in the language and form

most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible; and used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b).) Assessments must also be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) The determination of what tests are required is made based on information known at the time. (See, *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1158.)

27. The assessor must prepare a written report that includes, 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (Ed. Code, § 56329, subd. (a)(3).)

28. Student contention that the assessments were invalid, because they were not conducted in language and form most likely to yield accurate information is disingenuous. Although Student's native language is not English, at all points in time, and in all information collected by three separate school districts, Mother represented that English was Student's primary language. Even Student's private experts assessed Student in English and Parent's preferred program at ATSC is conducted Student's program in English.



29. Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not hindsight. "An IEP must take account what was, and what was not, objectively reasonable... at the time the IEP was drafted." (*Adams, supra*, 195 F3d at p 1142), citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

30. Escondido subtly maintained throughout the hearing, and more pointedly in its closing brief, that Parents were purposely deceptive in their interactions with Escondido, and had no intention of enrolling Student at Bear Valley. Escondido takes the position of "don't blame the messenger"; if Escondido's assessments failed to obtain Student's actual present levels of performance, it was primarily due to Parents' failure to provide all relevant information to Escondido staff and assessors. By failing to candidly report Student's history to Escondido, Parents self-fulfilled the prophecy that Escondido's assessments would be short-sighted. There is much to support this contention, primarily in Parents' illogical and unexcused refusal to acknowledge Student's outside participation in the ATSC program or provide any information about his progress or current abilities using AAC and assistive technology devices. Parents' intentions, counterproductive or not, are not the issue in determining whether Escondido fulfilled its statutory obligations to appropriately and completely gather that relevant functional, developmental, and academic information about the child, necessary to provide Student with a FAPE. While Parents withheld significant information about Student, they also provided other information sufficient to require Escondido to further explore and assess to determine Student's unique needs. Had Escondido fully complied with its statutory duties, and Parents continued their ruses, the outcome on this case would have been significantly different.

31. Escondido cannot be held responsible for what it genuinely did not know about Student or what it learned in hindsight, in April 2018. Mother's memory lapses at

hearing, marginalized her testimony regarding what information she actually provided to Escondido and/or when she actually provided it. However, Escondido had a significant amount of information about Student irrespective of the information Parents withheld from Escondido. For example, each of Escondido's witnesses expressed that he/she had no reason to believe Student could communicate through typing. This contention was not supported by the evidence, as the information contained in many of Escondido's own documents and reports noted Mother reported Student could type up to 100 words, used a keyboard in the past, and could generate sentences through typing, in addition to using gestures for expressive language. This information should not have been ignored, regardless of whether Escondido knew the extent of Student's abilities as exhibited at ATSC.

#### Academic Assessment and Speech and Language Assessment

32. The academic assessment was flawed. Review of Student's prior IEP, and Escondido observations of Student's distractibility and behaviors indicated environmental safeguards were advisable to ensure Student's maximum participation and production of accurate information. Rather than limiting sensory interference by conducting the assessment in a small, quiet room, Mr. Guzman administered the assessment in a noisy school lounge, with interesting objects available to interfere with Student's already limited attention. As a result, Student was very distracted by objects in the room, stood on the table, and needed to be physically assisted to get off the table and return to the assessment. Mr. Guzman did not consider adjourning the assessment to another more sedate location or reattempting the assessment at another time.

33. Student could not establish that the Brigance was not administered pursuant to protocol, however the contention is ultimately immaterial. While the standardized version was age-normed, the criterion version was normed to developmental age. Student was tested in academic areas including language arts,

reading, math, science, and daily living skills. Dr. Lerner-Baron considered Escondido's assessments discriminatory, because the assessor failed to consider Student's typing ability as his primary form of communication. She concluded Student should have been allowed to type his answers or, alternatively, Escondido should have utilized another assessment tool which allowed typing to glean more accurate assessment results. It is noted Dr. Lerner-Baron had the luxury of hindsight in her determination that Student could type. While she certainly had more information regarding Student's typing and had actually observed him doing so, Escondido had also been put on notice that Student could type. Escondido, however, based upon informal observations, made no further attempt to assess Student's typing skills as a means of communication. Escondido cannot circumvent its assessment responsibility by way of informal observations, nor can the subjective opinion of staff members dispel such reported information. (see *Timothy O, supra*, 1121.)

34. Mr. Guzman failed to consider the possibility of another type of assessment, instead he testified he gave the criterion-based Brigance assessment to all moderate/severe students he assessed. This statement suggests a predetermination of Student's academic abilities, rather than a thoughtful determination made on an individual basis. Admittedly, Parents did not cooperate or provide parental interviews, thereby limiting the development of the assessment information. The problem remains: *Andrew F's* call for an appropriately ambitious IEP, cannot be developed with an insufficiently ambitious assessment. Student was home schooled by Mother for three years. Without her parental input regarding Student's academic progress over the last three years, Mr. Guzman had no current information about Student's academic abilities. He should have first attempted to assess Student at a higher level, and, if appropriate, made a determination based upon those attempts, that Student was unable to sufficiently complete the assessment before he defaulted to the criterion based

Brigance. Ms. Carlon attempted to side step the issue, by indicating the Brigance did in fact test Student on higher levels and by noting Student presented some skills on an elementary school level, such as his identification of money. These scattered skills alone should have suggested further investigation was needed. Student was treated like “all of Mr. Guzman’s moderate/severe students,” and his unique needs ignored.

35. The speech and language assessment had several of the same problems as the academic assessment.<sup>19</sup> The assessment was conducted in a distracting environment. Student was highly unfocused to the extent that all formal assessment procedures were abandoned. As a result, the assessment relied on the parent interviews, record review, and observations. Rather than postpone the assessment and attempt the formal assessments on another day in another environment, the assessor opted to primarily rely on the previous district’s 2014 speech and language assessment and her observations. Mother provided additional information regarding Student’s previous use of Proloquo2go, and his ability to type sight words, which he used to make requests or label items. This information was not pursued further.

36. The assessor’s reliance on observation as the basis for her assessment was misplaced. Observation is a tool used in an assessment. It is not an assessment itself. Similar to the findings in *Timothy O*, an informal observation cannot overcome Escondido’s statutory obligation to formally assess Student for a known disability. Doing so would allow a school district to disregard expressed and informed concerns about Student’s disabilities, not based upon the thorough and reliable standardized testing the

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<sup>19</sup> The speech and language assessor did not testify at hearing to explain and defend her assessment and relied on Mr. Bennett to interpret the speech and language assessment. Although the most genuine witness at hearing, Mr. Bennett’s defense of the assessment at best was lukewarm.

IDEA requires. (Timothy O., *supra* , 1122.)

37. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim*, *supra*, 464 F. 3d at 1033.)

38. 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.*, 267 F.3d 877,892.) To constitute a denial of a FAPE, procedural violations must result in one of the following: the loss of educational opportunity; a serious infringement of the parents' opportunity to participate in the IEP process; or a deprivation of educational benefits. (*Ibid.*)

39. A loss of an educational opportunity occurs, for example, when there is a strong likelihood that, but for the procedural error, an alternate placement would have been better considered. (*Doug C. v. Hawaii Dep't of Educ.* 720 F. 3d 431 at p. 1047 (9th Cir. 2010) citing *M.L. v. Fed. Way Sch. Dist.*, 394 F. 3d 364 (9th Cir. 2005).) However, to succeed on a claim that a child was denied a FAPE, because of a procedural error, the individual need not definitively show that his educational placement would have been different without the error. (*Id.*)

40. In this matter, Student's academic and speech and language assessments were flawed from their inception. Escondido was aware Student had previously qualified for special education and related services as a child with autism. The assessors' assumptions led them to believe Student's disability was moderate to severe, with maladaptive behaviors and sensory issues that were evident upon meeting him. Rather than accommodate Student by testing him in a quiet environment, the assessors tested him in an environment which contributed to his sensory issues and behaviors, thereby making accurate assessment less likely. Escondido's failure to explore or further consider

Student's typing as a form of communication clearly limited the scope of information to be presented to the entire IEP team, thereby limiting its ability to appropriately consider Student's educational needs and supports. Without testing Student's ability to communicate through typing, the assessors were left to assume Student could not perform academically, could not receptively respond to questions and simple directions, and lacked expressive language skills. Ultimately, Escondido's assumptions may have been correct, but the results of appropriate testing would have confirmed Student's then current skills. Escondido's assessments were not conducted in a manner designed to obtain an accurate determination of Student's skills in light of his disabilities. Moreover, Escondido's failure to further explore the pertinent information regarding Student's typing as his mode of communication skewed the data collected to determine Student's present levels and current skills. Such failures resulted in a loss of educational opportunity for Student and denied the IEP team the complete and correct information it needed to craft an IEP appropriately ambitious in light of his circumstances. The failures of the academic and speech and language assessments denied Student a FAPE.

#### AAC Assessment

41. Student contends the AAC evaluation failed to determine his communication needs and failed to yield accurate information regarding his present levels of performance. At hearing, Mr. Bennett presented as a competent witness. Unlike other Escondido assessors, Mr. Bennett appropriately utilized a quiet room for Student's assessment and adjourned the assessment to another date due to Student's agitation and attempt to elope. The assessment was continued in a more familiar environment in the home and formal assessment reattempted. After two attempts to assess using the AAC Evaluation Genie, Mr. Bennett abandoned the test. Unlike other assessors, Mr. Bennett still reported Student scores on the parts of the assessment attempted, which indicated Student was capable of responding correctly.

42. Mr. Bennett was aware from Mother's disclosure that Student could type, but he did not test Student's typing abilities. Instead, based upon his observations, he noted that Student required fairly significant assistance from Mother when pressing the keys of her iPad. Mother reported Student did not use the iPad for academics, but he was aware Student had previously used Proloquo2go in school. Mr. Bennett observed that Student showed no interest in using the iPad software. Student was observed randomly swiping icons on the iPad, but he did not wait for instructions on which icon to touch.

43. Mr. Bennett successfully administered the Communication Matrix assessment, and determined Student had many of the skills necessary for effective use of a speech generating AAC device. With the exception of assessing Student's keyboard typing skills, Mr. Bennett's AAC assessment was appropriate. The failure to further test Student's typing skills was not a substantive denial of FAPE, as the assessment contained sufficient information on which to determine Student's ability to utilize AAC and assistive technology devices with related software. The assessment sufficiently identified AAC/AT equipment on which Student had demonstrated success, and were an appropriate fit for his needs.

### ISSUE THREE: PRESENT LEVELS OF ACADEMIC ACHIEVEMENT, FUNCTIONAL PERFORMANCE, AND ADAPTIVE PHYSICAL EDUCATION

44. Student contends Escondido's use of "cut and paste" baselines from the 2014 Pleasanton IEP failed to identify Student's 2017 present levels of academic achievement and functional performance. Escondido contends that any perceived discrepancy in Student's baselines were at worst, harmless error, as Student's present levels were accurate.

45. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information

about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b); Ed. Code, § 56341.1, subds. (a), (d).) IEP teams must give careful consideration to the child's present levels of achievement, disability and potential for growth. (*Andrew F.*, 137 S. Ct. at 999).

46. The "cut and paste" techniques used by Escondido to determine Student's baselines are merely symptoms of poorly executed assessments which failed to utilize all relevant information pertaining to Student's abilities. Logically, it is imperative that the assessments and related information gathered by a school district provide valid and current information regarding Student's skills and abilities. Present levels of performance are the basis for the starting point, or baseline for goals developed for Student's educational programming.

47. Without parsing each goal developed for Student, it remains clear that the IEP team was deprived of necessary information due to the failures of Escondido's assessments of Student, as reported in legal conclusions 19 through 33 above. In line with similar findings in *Timothy O.*, the Escondido IEP team developed Student's IEP on assessment results, which likely underestimated Student's abilities. As a result, there is sufficient reason to believe that alternative services would have at least been more seriously considered during the IEP process had Escondido properly assessed Student. Escondido argued that any perceived discrepancies in its determination of Student's present levels was harmless error, as their determinations were ultimately correct. That position is unpersuasive as it precluded discussion of all relevant information in determining Student's present levels. An IEP team meeting is a collaborative process. It cannot utilize only unilaterally preferred information any more than it can predetermine the components of the IEP itself. As a result, the October 16, 2017 IEP, resulted in a loss



of educational opportunity for Student, and deprivation of his educational benefits.

48. Student's contentions about adaptive physical education were largely misplaced. The adaptive physical education goal contained in the IEP contained a verbatim baseline filched from the 2014 Pleasanton IEP. This was a sloppy and lazy move on Mr. North's part, as the adaptive physical education assessment was conducted appropriately and contained sufficient information to conclude Student required assistive physical education. Beyond the "cut and paste," Parents' contentions relating to Student's present levels were based upon Father's descriptions of Student's physical abilities at home and in the community. Unfortunately, Parents provided none of this information to Escondido. Further, Father's descriptions did not apply to the physical coordination, agility, and comprehension skills assessed, which are necessary to participate in a general physical education class. Ironically, adaptive physical education was the only service to which Parents provided consent to implementation, yet failed to utilize when offered. The adaptive physical education goal was appropriate based upon the information Escondido actually knew at the time of the IEP. Thusly, on this issue, Escondido's "cut and paste" techniques was harmless error, and did not rise to the level of a denial of FAPE.

#### ISSUE FOUR: FAILURE TO MAKE A SPECIFIC WRITTEN OFFER OF FAPE

49. A determination of whether Escondido failed to make a specific, written offer of FAPE at the October 16, 2017 IEP team meeting is moot, as it has already been determined the assessments and IEP failed to provide Student a FAPE.

#### ISSUE FIVE: ASSISTIVE TECHNOLOGY

50. Assistive technology is different from AAC. AAC may utilize assistive technology to support a student's means of communication. Assistive technology is a support to assist Student access his education. Escondido did not conduct an assistive

technology assessment, but relied upon Mr. Bennett's observations of Student's disinterest in assistive devices. Mr. Bennett's AAC assessment observed, and the occupational therapy assessment tested, Student's fine motor skills, which determined Student's ability to use assistive technology. Mr. Bennett's AAC assessment recommended the use of specific assistive technology such as the iPad to support Proloquo2go software. A specific assistive technology assessment would have more precisely addressed Student's ability to utilize a keyboard; however, use of other assistive technology had not been reported by Parent. The failure to assess in the area of assistive technology was a procedural violation, which, standing alone did not result in the denial of FAPE.

## REMEDIES

1. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); 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] (*Burlington*).) 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.)

2. An ALJ may order a school district to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (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. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Puyallup, supra*, 31 F.3d at p. 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid, supra*, 401, F.3d at p. 524.)

3. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed.2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the districts proposed placement does not provided a FAPE).) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S. Ct. 36, 1126 L. Ed. 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

#### REIMBURSEMENT

4. Student's requested remedy for reimbursement of ATSC expenses creates a dilemma on several levels. Rather than seek a traditional private placement for Student, Parents decided to continue with home schooling. Parents selected World Class Learning Academy to oversee Student's home academic program. Parents did not

request reimbursement for the direct expenses incurred for home schooling.

5. Instead, Student seeks reimbursement for outside services provided by ATSC as supplemental behavior/communication services necessary for Student to access his education. There is no doubt ATSC supports Student's home schooling program, as World Class Learning Academy is operated by Gary Shkedy, and ATSC is operated by Dalia Shkedy, his wife. Further, the terms of responsibility contained in Mr. Shkedy's contract require that parents enroll their child in Ms. Shkedy's ATSC program, and ATSC requires parents to purchase software from Keeping it Simple Publishing, which was also developed by Ms. Shkedy. Parents have requested reimbursement for ATSC only.

6. The interrelationships of the Shkedy enterprises on their face do not meet the smell test of legitimacy. Neither Parents, nor the Shkedys themselves, were able to promote substantial validity of these programs at hearing. To the contrary, the testimony of these parties continued to contradict their legitimacy. No one was able to definitively describe the nature of the services provided at ATSC. Parents considered it an academic support at times and a behavior support at other times. Witnesses who observed Student at ATSC described him as participating in academics, not speech or communication. Mr. Shkedy's invoices for ATSC billing to Parents indicated Student was receiving academic tutoring. His explanation that this was a billing code intended to segregate private clients from school district referrals, was not heartening. Credentialed teachers and/or behavior experts were not provided to Student. The Shkedy's definitions of peer reviewed research was likewise disturbing. Ms. Shkedy, while genial in her testimony, was illusory to the point of appearing simpleminded at times. She marginally established that her program used academics to strengthen a student's communication skills, and everything was related to communication, including behavior.

7. Were it not for the testimony of Mr. Montes, Student's entire request for reimbursement would be denied. Mr. Montes was able to present a legitimate

description of Visual Communication Analysis, as an alternative methodology for providing supplementary support for academics and communication, and intended to promote independence. VCA is a data driven program, similar to applied behavior analysis, which can be an appropriate methodology where applied behavior analysis has proven unsuccessful with a student. Such a student does not think in a linear fashion, but thinks in pictures. As a credentialed special education teacher and autism specialist, Mr. Montes has utilized VCA in his classes to improve communication skills and teach new behaviors.

8. Ms. Perkins described the relationship between communication and behavior for nonverbal children who use non-symbolic and unconventional communication. It is still within memory when applied behavior analysis was considered unconventional and families were forced into due process hearing to obtain such services from a school district.

9. Making a decision in a due process hearing is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. As a business venture of Ms. Shkedy, ATSC raises significant questions regarding its operation. At issue, however, is the underlying use of VCA, as an alternate methodology, despite its non-acceptance by Escondido. ATSC is a non-public agency certified by the California Department of Education to provide behavior intervention implementation. As such, it must be accepted that ATSC possesses the minimum requirements and credentials for operation as a non-public agency. The evidence supported a finding that VCA is a methodology utilized in behavior and communication therapies which may be effective for Student. Based upon the only evidence presented at hearing (Parents' testimony), Student has made progress using VCA. (See *C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159.)

10. Escondido found Student had areas of need in social/emotional/behavior

and functional communication. Goals were created to support these areas. Likewise, ATSC using VCA, addressed these areas of unique needs. The program supported his educational need, and therefore Parents are entitled to reimbursement for services obtained from ATSC for the period of August 16, 2017, through June 4, 2018, representing Student's last day of attendance at ATSC for the 2017-2018 school year. Reimbursement for this period is based upon the cancelled checks introduced by Parents in the amount of \$22,000.00. Said sum represents reimbursement for the period of August 16, 2017, through June 5, 2018, based upon Student's attendance records submitted as part of his request for transportation reimbursement which was sufficient proof of payment.

11. Student is also entitled to reimbursement for transportation costs of one-round trip from home to the ATSC program, each day of attendance. Student provided sufficient evidence to award reimbursement for transportation in the amount of \$3018.40<sup>20</sup>.

12. In calculating their total request for reimbursement, Parents included payment for KIS Publishing, which was utilized in the ATSC program. ATSC required Parents to purchase KIS software to participate in ATSC, in the same manner World Class Learning Academy required Parents to enroll Student in ATSC. Student did not establish that the KIS software supported anything other than academics. Therefore, reimbursement for KIS Publishing is denied.

#### INDEPENDENT EDUCATIONAL EVALUATIONS

13. Student requested independent educational evaluations in areas of academics, speech and language, and communication.

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<sup>20</sup> Transportation amount has been corrected.

14. Parents have the right to an independent educational evaluation at public expense if they disagree with an evaluation obtained by the school district, unless: (1) the school district demonstrates in a due process hearing that its own evaluation of the child was appropriate; or (2) the school district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. (20 U.S.C § 1415 (b)(1); 34 C.F.R § 300.502 (b)(1); 34 C.F.R. § 300.502 (b)(2).)

15. Remedies may be reduced or denied if the actions of the parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R § 300.148 (d)(3).)

16. This decision has determined Escondido's academic, and speech and language assessments were inappropriate. As such, Student special education law provides for independent educational evaluations in those areas; however the equities of this decision must also be considered. It is uncontroverted that Parents failed to disclose Student's participation in ATSC and withheld significant information which would have assisted Escondido in conducting appropriate assessments. Parents' lack of transparency was also evident in Mother's testimony. As reported throughout this decision, Parents steadfastly failed to be candid with Escondido staff and assessors. While Escondido's failure to appropriately assess Student cannot be excused, there was a still a definite, causal relationship between Parents' lack of candor and the final assessment results which made Student's assessments virtually worthless. Additionally, Student has matriculated from Escondido and is now the resident of a different local education agency. In considering the equities of this case, had Student remained a student within the boundaries of Escondido, this order would have ordered new district assessments in lieu of independent educational evaluations. The failures of Escondido's assessments, however, are no longer relevant to the creation of an appropriate IEP at Escondido. Independent educational evaluations remain the only practical remedy available in this matter to correct the flawed assessments. (*Los Angeles Unified School*

*Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 821-822 [Court ordered school district to fund independent evaluation on grounds of equity even though student no longer lived in the school district].) Now, consideration of equitable remedies and mitigation must be applied to an award of independent educational evaluations at public expense. Nowhere is it cited that the intent of the IDEA is to punish a school district for a denial of FAPE. Under law, Escondido's conduct cannot be excused, nevertheless Parents' should not be rewarded for the substandard assessments which they were equally responsible. Nor should they be awarded maximum cost of the "Cadillac" or "gold standard" assessments at public expense. Therefore, given their unreasonable withholding of information, Parents are awarded a sum not to exceed \$1500.00 representing a reasonable, mitigated cost for assessments in the area of academics and speech and language.

## ORDER

1. Within 60 days of this order, Escondido Union School District is ordered to pay Parents, the sum of \$22,000.00, representing reimbursement for Student's fees and enrollment at Alternative Teaching Strategy Center for the period of August 16, 2017 through June 5, 2018.

2. Within 60 days of this order, Escondido Union School District is ordered to pay Parent's the sum of \$3018.40, representing the total amount of reimbursement owing to Parents for one-round trip transportation from his residence to Alternative Teaching Strategy Center.

3. Escondido Union School District is ordered to pay to Parents a sum, not to exceed \$1500.00 for independent education evaluations in the areas of academics and speech and language. Said sum shall be reimbursed to Parents within 60 days of presentation to Escondido Union School District of invoices and proof of payment for assessments. All requests for reimbursement for independent education evaluations shall be submitted on or before June 30, 2019.



4. All other requests for reimbursement and relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d) the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In this matter, Student prevailed on all issues except Issue Five which was moot.

## RIGHT TO APPEAL DECISION

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

Dated: November 29, 2018

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/s/

JUDITH L. PASEWARK

Administrative Law Judge

Office of Administrative Hearings