

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

OAKLAND UNIFIED SCHOOL DISTRICT,

v.

STUDENT,

OAH Case No. 2018060529

STUDENT,

v.

OAKLAND UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017120075

DECISION

On November 30, 2017, Student filed a Due Process Hearing Request (complaint) with the Office of Administrative Hearings, naming Oakland Unified School District. On December 27, 2017, OAH granted the parties' request for a continuance. On March 15, 2018, and April 27, 2018, OAH granted Student's first and second motions to amend the complaint, resetting all timelines.

On June 13, 2018, Oakland filed a complaint naming Student. On June 15, 2018, OAH granted Oakland's motion to consolidate its complaint with Student's second amended complaint, and deemed Oakland's case as the lead case. On June 28, 2018, OAH granted the parties' continuance request, setting this matter for hearing beginning October 2, 2018. On September 4, 2018, Oakland filed a motion to amend its complaint. OAH granted this motion on September 10, 2018, maintained Oakland's case as lead, and confirmed the pending hearing schedule.

Administrative Law Judge Theresa Ravandi heard this matter on October 2, 3, 4, 9, 10, and 12, 2018, in Oakland, California.

David Mishook, Attorney at law, represented Oakland Unified School District. Geri Baskind, Oakland's Director of Legal Support Services for Programs for Exceptional Children, attended the hearing as Oakland's representative, aside from the afternoon of October 4, 2018, when Andrea Epps, Oakland's staff counsel attended.

Thomas Douvan, Attorney at Law, represented Student. Mother attended each day of hearing. Student was present the first day for her testimony.

At the conclusion of the hearing, the matter was continued at the parties' request to November 13, 2018, to afford them an opportunity to file written closing briefs. The record closed with the parties' timely submission of closing briefs, and the matter was submitted for decision.

ISSUES

OAKLAND'S ISSUES

Issue 1: Does Oakland's May 7, 2018 offer of an individualized education program provide Student a free appropriate public education in the least restrictive environment?

Issue 2: Are Oakland's academic, speech and language, psycho-educational, occupational therapy, and transition assessments, which were presented at the May 2018 IEP team meetings, legally compliant, such that Parent is not entitled to independent educational evaluations in those areas at public expense?

STUDENT'S ISSUES¹

Issue 3: Beginning January 1, 2017, through December 7, 2017, did Oakland deny Student a FAPE by failing to properly provide comprehensive assessments in all areas of suspected disability as follows:

- a. failing to conduct a neuro-psychological educational evaluation;
- b. failing to conduct a health assessment;
- c. failing to assess Student's behaviors;
- d. failing to assess prior to offering a change in placement from a non-public school at the October 17, 2017 IEP team meeting; and
- e. failing to assess pursuant to Parent's June and November 2017 requests?

Issue 4: Did Oakland deny Student a FAPE by failing to timely assess her pursuant to the December 2017 assessment plan?

Issue 5: Did Oakland deny Student a FAPE by failing to provide an appropriate educational program to meet her individual and unique needs from June 1, 2017, until the time of hearing, by failing to implement the April 2017 IEP as follows:

- a. failing to provide a non-public school placement;
- b. failing to provide speech and language services;
- c. failing to provide counseling services; and
- d. failing to provide social skills training?

Issue 6: Did Oakland deny Student a FAPE by failing to provide an appropriate educational program to meet her individual and unique needs from June 1, 2017, until the time of hearing, by failing to offer and provide the following:

¹ At the start of the hearing, prior to the introduction of evidence, Student withdrew her issue regarding production of education records, originally numbered Issue 9.

- a. an appropriate placement; and
- b. appropriate programming, including reading and comprehension services, vision therapy, and life skills training?

Issue 7: From June 1, 2017, through the time of hearing, did Oakland deny Student a FAPE by failing to prepare appropriate individual transition plans and by unilaterally implementing modifications to these plans without Parent consent?

Issue 8: Did Oakland deny Student a FAPE by failing to convene an appropriate and complete IEP team at the October 12, 2017 IEP team meeting as follows:

- a. improperly including its Director of Legal Services; and
- b. failing to ensure the attendance of an appropriate special education teacher?

Issue 9: Did Oakland deny Student a FAPE by failing to convene an IEP team meeting within 60 days of Parent signing the assessment plan on January 17, 2018?

SUMMARY OF DECISION

OAKLAND'S CASE

Oakland failed to timely complete and review Student's spring 2018 triennial assessments at an IEP team meeting on or before March 19, 2018. Oakland convened part one of Student's IEP team meeting to review the assessments 49 days late, on May 7, 2018. Oakland did not convene part two of this meeting until May 24, 2018, and did not provide Parent a complete IEP offer until June 12, 2018. Given the circumstances of this case, this delay substantively denied Student a FAPE.

In addition, Oakland's psychological and academic assessment reports were substantively deficient. Oakland failed to accurately document Student's academic percentiles which rendered its academic assessment report unreliable. Its psychological assessment failed to analyze whether Student met the eligibility criteria for having a specific learning disability. These assessment failures deprived Student's IEP team of

complete, relevant information as to her academic needs. Finally, Oakland's May 2018 IEP failed to provide a clear written offer of extended school year services. These procedural violations cumulatively undermine the substantive validity of Oakland's May 2018 IEP, which is deemed to not offer Student a FAPE.

STUDENT'S CASE

Student established that Oakland denied her a FAPE by failing to assess her health and behavior needs; failing to implement her April 2017 IEP non-public school placement, and the related services of speech and language and counseling; and failing to offer and provide an appropriate program and placement. These overlapping violations denied Student a FAPE from January 2017 through the time of hearing. Student did not prove her other contentions.

FACTUAL FINDINGS

JURISDICTION

1. Student is twenty-one years old and resides with Parents within Oakland's jurisdictional boundaries. At age 18, she assigned her educational rights to Parents. They continued to hold these rights through the time of hearing. Pursuant to Student's operative IEP from April 2017, she qualified for special education and related services pursuant to the eligibility category of intellectual disability and speech or language impairment. Following its spring 2018 triennial assessments, Oakland determined that Student no longer met the eligibility criteria of having an intellectual disability, but qualified for special education as a student with a specific learning disability and a speech or language impairment.

2. Student last attended school at Star Academy, a non-public school in San Rafael that specializes in teaching students with language-based learning disabilities. Pursuant to a settlement agreement and subsequent IEP's, she transferred to Star in

spring 2013 for the second semester of her freshman year, and remained there through a fifth year of high school, the 2016-2017 school year. Star awarded Student a Certificate of Achievement on June 30, 2017. As of the time of hearing, Student had not attended an educational program since receiving the certificate.

ELEMENTARY SCHOOL YEARS

3. In June of 2005, near the end of her first grade year, Oakland found Student eligible for special education under the categories of specific learning disability and speech or language impairment. As provided in her initial and subsequent annual IEP's, Student attended public special day class programs for second through eighth grade. During fourth grade, Student benefitted from Oakland's reading intervention clinic, which used methodologies espoused by Lindamood Bell Learning Processes.² In this case, Student seeks Lindamood Bell services as a remedy.

TRANSFER TO STAR ACADEMY, SPRING 2013 THROUGH THE 2014-2015 SCHOOL YEAR

4. Student attended Star pursuant to her IEP beginning in the spring 2013, the second semester of ninth grade. Student's academic performance was far below her grade level. Star's multisensory language specialists provided Student two hours per week of specialized reading and language instruction based on Lindamood Bell methodologies. Parent attributed Student's academic gains at Star to these interventions.

5. Student made good progress in Star's multi-sensory language and reading intervention programs and acquired many of the foundational skills needed for reading

² Lindamood Bell is a private agency that offers programs to assist students in building cognitive and sensory processing skills.

and writing. Student's annual spring 2013 and 2014 IEP's specified that Student's graduation plan was to participate in a curriculum leading to a certificate of completion as opposed to a regular high school diploma. These IEP's did not specify the criteria for earning a certificate of completion. While Student's classes and IEP goals reflected a non-diploma track, there was no evidence that Parent provided written consent to these IEP's.

6. Student's fall 2014 triennial reassessments showed concurrent deficits in intellectual and adaptive functioning. In January 2015, during 11th grade, Student's IEP team agreed to change her primary eligibility category to intellectual disability, and maintain her secondary eligibility of speech or language impairment. For Student's January 2015 IEP, Oakland used the new online system referred to as the Special Education Information System or SEIS. SEIS pre-populates and auto-checks various boxes such that the data entry person has to carefully inspect the IEP document for errors and manually correct pre-populated entries as needed. SEIS pre-populated Student's January 2015 IEP with a check mark in the box indicating that Student's graduation plan was to participate in high school curriculum leading to a diploma. Oakland witnesses established that this box was checked in error. Parent did not consent to this IEP, which continued to offer placement at Star with speech and language services.

Diagnosis of Epilepsy, March 2015

7. In March 2015, Student suffered a grand mal seizure while at school and was transported to the hospital by ambulance. At that time, Student was diagnosed with Juvenile Absence Epilepsy and prescribed various anti-seizure medications. Initially, Student's seizures lasted for 10-20 seconds, during which time her speech slowed or ceased, and she appeared to be absent and became unresponsive. Student was not aware she was having a seizure, but she knew something was not right and became very

tired. Faced with this new diagnosis, Student became increasingly depressed and withdrawn. By May 2015, Student was found eligible for regional center services as a client with epilepsy and an intellectual disability.³

April 2015 Annual IEP

8. During Student's April 24, 2015 annual IEP team meeting, the team discussed her medical diagnosis of epilepsy and its impact on her education. Student's seizure disorder negatively impacted her already-weak memory skills and her academic confidence. She was sometimes unable to work due to feeling sad. SEIS again pre-populated the annual IEP with Student's graduation plan checked as a diploma track. Oakland did not correct this error. During the meeting, Star informed Parent that Student had not been participating in classes that would lead to a diploma. Student's individual transition plan was attached to the IEP and noted that her course of study led to a certificate of completion, with her anticipated completion date being the end of June 2019, following her 22nd birthday. Her primary eligibility category remained intellectual disability.

9. Oakland continued to offer a non-public school placement at Star, with the same level of services, namely, 1710 weekly minutes of specialized academic instruction; 90 minutes per week of speech services; transportation; and extended school year with the same level of service minutes. On May 11, 2015, Parent signed consent to the IEP with exception to the transition plan. Pursuant to her written April 2015 IEP, Student was on a diploma track.

³ Regional Centers are private, nonprofit entities that operate pursuant to the Lanterman Developmental Disabilities Act (Welf. & Inst. Code, § 4500 et seq.) and provide specified services to help individuals with developmental disabilities to live at home to the extent possible and access the community. (Welf. & Inst. Code, § 4512.)

10. Throughout her first two and a half years at Star, Student showed good attendance, regularly participated in her classes, and consistently received grades of A's and B's. She made steady gains in reading fluency and comprehension, writing, math, and self-advocacy skills. During the spring 2015 semester of 11th grade, teachers began to note that Student shut down in class once or twice a week. These episodes were originally attributed to emotional reasons, but Student's new diagnosis of epilepsy pointed to a possible physical basis. From her freshman through junior year at Star, Student earned a total of 145 credits. Student's individual transition plans all reflected her goal of attending college.

TWELFTH GRADE, 2015-2016 SCHOOL YEAR

11. During the first semester of Student's senior year, teachers noted additional concerns. Student labored over decisions; recognized that it should not take her so long to complete tasks; and then became frustrated. She required more breaks, struggled to complete assignments, and was unable to work due to her emotional state, missing class for up to 45 minutes during the week. At the end of the fall 2015 semester, Star transferred Student from pre-algebra to a consumer math class due to her missed instructional time stemming from health issues. Student regularly attended school with the exception of six absences. She earned 30 credits and grades of A's and B's during fall 2015.

Student's Health Declines

12. Student's needs and presentation changed dramatically during the spring 2016 semester. She had frequent seizures at school, which resulted in fatigue and significantly impaired her academic progress. In addition to her physical health issues, Student began to receive private mental health services from Pathways to Wellness. In January 2016, she was diagnosed with major depression and anxiety, and began to take

anti-depressant medications. Parent informed Star of Student's psychiatric treatment. Student was prescribed numerous different trials of psychotropic medications including anti-psychotics. She experienced severe, adverse reactions to her psychotropic medication regimen, including paranoia, panic, restlessness, and memory issues, all of which manifested at home and school, as well as insomnia. Student had frequent school absences, and when present, she spent several hours each week meeting with a school counselor, and missing class time.

13. Student missed more than two weeks of school during the spring 2016 semester. She received incompletes in all of her classes due to physical and emotional issues, and earned no class credits for the final semester of her senior year.

June 2016 Annual IEP and Offer of a Fifth Year of High School

14. Student's next annual IEP team meeting was held on June 20, 2016, at the end of her senior year of high school. The IEP team discussed Student's inability to attend to learning due to the cognitive and emotional challenges associated with both her seizure disorder and depression, along with the many unsuccessful attempts to find the right medications to control both conditions. With the onset of her seizures, Student no longer volunteered to share her ideas with the class. She lost confidence in herself and her abilities, and remained depressed. By June 2016, Student's reading fluency was at the 10th grade level, and her reading comprehension was at approximately the seventh-grade level. Star was unable to accurately determine her reading comprehension level as she had experienced seizures during the academic testing. Due to health challenges and her withdrawal from the learning process, Student did not make expected progress or meet any of her annual goals.

15. As identified in her June 2016 behavior intervention plan, Student's target behavior was withdrawal. She often shut down physically or emotionally and was unable to participate in academic or social activities due to her seizure disorder and depression.

Star noted Student's level of need for behavior intervention as "serious." She was missing school 50 percent of the time, and then was unavailable for learning 50 percent of the time that she was present. Her triggers were depression, anxiety, seizures, fatigue, and hunger.

16. Student's health challenges and medical complications had negatively affected her attendance, and the IEP team therefore agreed Student should remain in high school for an additional year. Despite Student's adverse medication side effects, continued seizures, health-related absences, and withdrawal from learning, Oakland did not offer to conduct a health assessment or assess her behavioral needs. As of the time of the IEP team meeting in June 2016, Oakland was on notice that Student had health and behavior needs that were negatively impacting her ability to access her education. Based on her changed presentation and declining academic achievement and functional performance, Student's educational needs warranted reassessment.

17. Student remained eligible for special education under the categories of intellectual disability and speech or language impairment. The June 2016 IEP specified that Student's graduation plan was to obtain a certificate of completion. The IEP team did not discuss, nor did the IEP specify, the criteria for earning a certificate of completion. Student continued to have a goal of attending college, which was noted in her individual transition plan. Oakland again offered the same level of programming and placement at Star, but increased its offer of individual and group speech services to 120 minutes per week. Parent did not provide written consent to the June 2016 IEP.

FIFTH YEAR SENIOR, 2016-2017 SCHOOL YEAR

Seizure Activity, Fall 2016

18. Student continued to attend Star for a fifth year of high school. Her prescribed medication did not control her seizure activity, which frequently occurred at

school. At times, Student's seizure activity resulted in periods of unconsciousness. When they passed, she was very tired. These episodes were upsetting to Student and interrupted her schooling. She often went home early. On September 6, 2016, Star called 911, and Student was taken by ambulance to the emergency room. She had been having trouble talking and walking and became non-responsive in excess of 15 minutes. Star documented seven incidents of seizure activity from September through November 2016.

September and November 2016 Offers of Mental Health Services

19. Oakland funded an independent mental health assessment, which was completed in August 2016. The assessor presented her report at an amendment IEP team meeting on September 15, 2016. She recommended mental health support given Student's continued depression and anxiety. Student had already been meeting with a school counselor. However, at this IEP team meeting, Oakland agreed to amend Student's IEP to add counseling services with Star's on-site counselor and to also include off-site educationally related mental health services. Parent initialed the box on the IEP addendum page indicating that she agreed to the contents of the amendment to the IEP dated June 20, 2016, specifically, the two additional counseling services.

20. Parent testified that she believed she was consenting to the underlying June 2016 IEP, by initialing the September 15, 2016 amendment. Oakland established that this was not the case. James Pierce, a non-public school program specialist for Oakland and Student's case manager for the 2015-2016 and 2016-2017 school years, testified at hearing about IEP consent requirements.⁴ Parent's consenting initials on the

⁴ Mr. Pierce holds a clear special education teaching credential for students with mild-to-moderate disabilities. He has been a non-public program specialist for Oakland since the 2015-2016 school year. He previously taught special education high school

September 2016 IEP amendment indicated her specific consent to the changes made to the underlying June 2016 IEP, not to the underlying IEP itself. Mr. Pierce's testimony was persuasive and corroborated by documentary evidence. The consent page for an IEP affords parents the option to check different boxes indicating that they consent to the IEP in whole or part, to note any exceptions, and then to sign and date to authorize and approve the IEP, whether in whole or part. There was no evidence that Parent signed the consent page to the June 2016 IEP.

INDEPENDENT NEURO-PSYCHOLOGICAL EVALUATION

21. At the September 2016 amendment IEP team meeting, developmental neuro-psychologist Carina Grandison, Ph.D., presented the results of her May 2016 independent neuro-psychological assessment of Student, which Oakland had funded at Parent's request. This independent evaluation did not relieve Oakland of its duty to assess Student's health and behavior needs. During the assessment, Student was emotional, easily overwhelmed, and unable to complete a self-rating scale. Her cognitive skills measured in the single percentiles, and she showed working memory and processing speed deficits. Her academic skills ranged from the third to sixth grade level, and her adaptive functioning was low with limited life skills, such as money management, use of public transportation, and community access. Dr. Grandison confirmed that Student was best understood as an adult with a mild intellectual disability, and recommended that her education emphasis shift from academic remediation to life skills, vocational preparation, and independent functioning. Parent believed this assessment did not accurately capture Student's potential given Student's medication side effects at that time.

22. The IEP team reconvened on November 2, 2016, to complete the _____
classes for 13 years.

amendment IEP discussions. As consented to in September 2016, Oakland added 90 minutes per week of school-based counseling to Student's IEP services page with a start date of November 2, 2016. Beginning in fall 2016, Oakland provided Student two 50-minute sessions per week of educationally related mental health services through the Ann Martin Center. The September 2016 amendment IEP service page additionally captured the increased June 2016 IEP offer of 120 weekly minutes of individual and group speech and language services. Student's operative IEP remained the April 2015 IEP with the addition of the two counseling services and increased speech and language minutes.

Psychotropic Medication Reactions

23. In November 2016, Tiffany Ordonez, a new psychiatric nurse practitioner at Pathways, began treating Student.⁵ Ms. Ordonez continued to treat Student through the time of hearing. She confirmed Student's diagnoses of anxiety disorder and major depressive disorder. In November 2016, Ms. Ordonez switched Student to a different anti-depressant because of her continued symptoms and seizure activity. While taking this new medication, Student displayed increased seizure-like behavior including periods of non-responsiveness and immobility. She started convulsing, and went to the hospital several times. Medical testing confirmed that Student's new seizure activity was unrelated to her epilepsy. Student's epileptic seizures were medically controlled as of January 2017. Given the emergence of psychogenic seizures, Ms. Ordonez again switched Student's medication. Parent kept Star and Oakland apprised of Student's medical struggles. Between December 2016 and September 2017, Ms. Ordonez drafted

⁵ Ms. Ordonez was licensed by California and practicing on a probationary status related to a 2014 discipline issue in Ohio. Pathways was her first job as a psychiatric nurse practitioner, and she had full prescription privileges.

five letters regarding Student's condition, which Parent shared with Oakland. In June and October 2017, Ms. Ordonez participated in two IEP team meetings to provide direct updates.

Fifth Year Senior, First Semester Performance

24. Student again received incompletes for all of her classes during fall 2016 because of absences caused by ongoing health problems. She was absent from school 33 times, tardy six times, took frequent breaks from class to meet with her counselor, and often went home early. Student did not make expected progress on her goals or meet any of her objectives. Most goal reports showed no progress due to absences and emotional unavailability. By the time of her second goal reporting period in December 2016, Student made no to minimal progress across the board.

25. Student's adverse reactions to her medication trials intensified as the school year progressed. Her whole world changed. She had spontaneous periods of confusion and memory issues, and periods of amnesia and dissociation. She wandered and tried to run away. Parent spoke with Star on a near-daily basis to keep staff informed of Student's medication plan and symptoms. Oakland is attributed this knowledge. At hearing, Student testified about her medication side effects. There were times when she did not recognize her teachers or Parents and was scared and tried to hide. She sometimes forgot what had happened earlier in the day; missed a lot of school; and slept excessively. During her testimony, Student frequently could not answer questions, as she could not recall events or details.

April 2017 Annual IEP

26. Student's IEP team met for an annual and transition IEP team meeting on April 18, 2017. The team discussed Student's medication-induced side effects, which continued to include periods of dissociation, delusions, and hallucinations. Student's

declining health challenged her every day, in every area of her education. She did not meet any of her annual goals for the 2016-2017 school year. Her behavior, specifically being out of class due to emotional and physical dysregulation, continued to impede her learning. Star questioned its ability to continue to serve Student, and expressed that she might need a one-to-one aide due to recent incidents requiring restraints.

27. The IEP team discussed possible day treatment options and Student's need for therapeutic and behavioral support, and agreed that a comprehensive campus would not meet her needs. Sheila Reilly, Star's Head of School, testified at hearing. She attended the April 2017 IEP team meeting and informed the IEP team that Student required a different program than that offered at Star; not a higher level of care, but a therapeutically enhanced program with a mental health orientation and focus. Star's updated behavior intervention plan noted Student's need for the plan as "extreme." Still, Oakland did not offer to assess Student in the areas of health and behavior to identify the impact of her needs on her ability to access her education.

28. Student's teachers, counselor, and speech-language pathologist continued to implement her behavior intervention plan, individual transition plan, and goals, which included academics, social communication, social thinking and problem solving, self-advocacy, career and job planning, and organization and coping skills, to the extent Student was able to participate. Star continued to provide Student life skills training through its life skills and transition classes. The IEP team agreed that Student required extended school year to provide program consistency and to meet her goals. Star's academic year, including extended school year, ran 200 days. Star committed to serving Student through the end of the 2017 extended school year and presenting her with a certificate of completion in June 2017, but determined that going forward, its program would not be appropriate for her. The IEP team did not discuss the criteria for earning a certificate of completion. Oakland agreed that Student required significant support to

continue her education, but believed she could receive this level of support from one of its public programs.

29. Student remained eligible for special education given her intellectual disability and speech or language impairment. The April 2017 IEP identified her graduation plan as obtaining a certificate of completion. The IEP noted that Student required a highly structured educational setting that provided a comprehensive program with skill acquisition and low student-to-staff ratio. As such, Oakland continued to offer a non-public school placement at Star. However, Oakland did not make an offer of services. The final April 2017 IEP document included two separate offers of services. The "Offer of FAPE-Services" page dated April 18, 2017, listed the services Student had been receiving, but did not reflect an offer of any future services. Rather, this service page noted that Student's specialized academic instruction ended April 2016; extended school year instruction was for June 2015; and speech and language services for the regular and extended school year, and counseling, would end in June 2017. At hearing, Mr. Pierce clarified that the dates on the IEP were not in error but rather reflected that Oakland was not making a program offer at that time. Oakland planned to update its offer of services once Student's new placement and program were discussed and determined through the IEP team process. As detailed below, an additional IEP team discussion as to the April 2017 offer of services never occurred.

30. The final April 2017 IEP included a second service page. This one was undated and entitled, "Interim Special Education Services." Witnesses did not testify regarding this service offer which specified that Oakland was authorizing "temporary placement" in the listed services "pending action at the next IEP team meeting." The services listed were the same as noted above with the same ending dates, minus any reference to extended school year.⁶ At the time of the April 2017 IEP team meeting,

⁶ This form noted that it was to be used for students transferring from another

Parent did not consent to the IEP which included the change to a certificate of completion track.

31. Because of Student's severe side effects to her psychotropic medications and lack of any therapeutic response, Ms. Ordonez began to titrate Student off her medications over the spring of 2017. During this process of gradually ceasing all psychotropic medications, Student continued to experience depression, altered mental states, bizarre behaviors, and physical reactions. In late spring, Star called 911 as Student was unresponsive and convulsing; an ambulance rushed her to the hospital. At hearing, Ms. Ordonez confirmed that Student had been experiencing a medication-induced psychosis. That Student's health and behavior challenges were medically derived did not discharge Oakland of its duty to assess her educational needs in these areas.

Parent's Request for a Diploma Program

32. Following the April 2017 IEP team meeting, Parent requested a program that would provide Student the chance to earn her high school diploma. Oakland did not believe this was appropriate based on Student's individual transition plan and needs for independent living, vocational, and self-advocacy skills, and post-secondary growth. However, in response to Parent's request, Mr. Pierce contacted approximately 20 non-public schools. None of the schools were willing to take a student over the age of 19 years who was trying to earn a high school diploma.

33. Oakland witnesses testified that students who receive a certificate of completion automatically matriculate to a young adult transition program, either community-based or classroom-based. Oakland's actions in Student's case stood in _____
Special Education Local Plan Area or from another state, and cited Education Code section 36325 regarding transfer students and the provision of comparable services for a period not to exceed 30 days.

contrast to its stated standard practice. Oakland researched numerous non-public school options, and as discussed below, referred Student to a non-public school at Parent's request, formally offered a diploma track program at one of its public high schools, contacted Star in January 2018 to see if it would allow Student to return, and proposed an independent study diploma program. Further, at Student's prior annual IEP team meeting in June 2016, when Oakland was offering a fifth year of high school, its position with regard to Student's situation was captured in the team notes: "Changing a student's placement is a thoughtful transition process. A transition IEP will be held where the team will share ideas and put a plan into place for how to set up a successful transition back to a public setting." This did not occur in April 2017 on the eve of Student's completion of her Star program, nor at the subsequent amendment IEP team meetings in May, June, or October 2017, as discussed below.

Oakland Technology High's Counseling-Enriched Special Day Class

34. Student's IEP team met again on May 9, 2017, to discuss placement options upon Student's completion of extended school year and her program at Star. No changes were proposed to the April 2017 IEP, though Oakland informed Parent that Oakland Technology High School's counseling-enriched special day class was a possible option for Student to pursue a diploma track. On June 1, 2017, Parent visited the "upper campus" of Oakland Tech, where its counseling-enriched special day class is located. The upper campus is a small campus with approximately 20 classrooms, and is physically separate from the main comprehensive campus. At any given time, no more than 100 students are present. The pace of academics is slower. Classes are staffed by a credentialed special education teacher and instructional assistants, and supported by an on-site therapist. The student-to-adult ratio is no more than three-to-one.

June 2017 Amendment IEP Team Meeting

35. During extended school year, Student's IEP team met again on June 23, 2017, to update her present levels of performance, goals, behavior intervention plan, and individual transition plan. Star's proposed individual transition plan noted that Student was on a diploma track, had completed 180 credits with 70 pending, and listed an anticipated completion date of June 28, 2019. Although Oakland was considering placement at Oakland Tech, no changes were made to the April 2017 IEP offer.

36. At this meeting, Parent asked for a functional behavior assessment because of Student's attempts to elope at school during periods of disassociation. Parent also requested an occupational therapy assessment because of her concerns about Student's short-term memory deficits. On June 27, 2017, Parent requested in writing that Oakland conduct a functional behavior assessment, occupational therapy assessment, and an assistive technology assessment. Oakland did not respond.

Receipt of Certificate of Completion

37. For the spring 2017 semester, Student again received all incompletes in her classes due to absences caused by ongoing health problems. She did not earn any credits for her fifth year of high school. According to her grade report, she was absent from school 39 times during the final semester, for a total of 72 absences during the 2016-2017 school year. Individual class absences were even greater. Star prepared many incident reports throughout the 2016-2017 school year documenting Student's physical and mental health struggles. By June 2017, Student was no longer taking psychotropic medications. By the end of the month, she was no longer exhibiting psychotic features and showed much improvement. Star's goal was to help Student remain in a learning environment through the end of the year and then award her a certificate of completion.

38. On June 30, 2017, Star awarded a Certificate of Achievement to Student "in honor of completion of high school." She was 20 years old. According to Ms. Reilly, this

was the same as a certificate of completion, and Star uses the terms interchangeably. Despite having tried to inform herself, prior to testifying, of the prerequisites for earning a certificate of completion from Star, Ms. Reilly admitted at hearing that there were no set requirements. None of Student's IEP's from 2013 through 2017 specified the necessary prerequisites to receive a certificate of completion, such as years of attendance, completing certain courses, earning a set number of credits, or having finished a set amount of seat time or attained a certain age. Student's IEP teams never had this discussion, let alone reached an agreement as to the requirements. At the time Student received her certificate of completion, her operative April 2015 IEP called for a diploma track.

THE 2017-2018 SCHOOL YEAR

39. Oakland did not offer or provide Student a non-public school placement for the 2017-2018 school year, as required by her operative IEP. Following her June 30, 2017 receipt of a certificate of completion, Student did not attend any educational program. At the time of hearing, Student wanted to return to school and continue her education. By the start of the 2017-2018 school year, Student was emotionally and physically able to participate in an educational program, though she continued to struggle with depression and anxiety. Oakland did not believe Student required a non-public school or any higher level of programming.

40. Oakland did not offer any placement or program as of the start of the 2017-2018 school year. Additionally, Oakland did not provide Student with her operative IEP services of daily specialized academic instruction, weekly speech and language services, or weekly school-based counseling. Student did continue to receive weekly educationally related mental health services at the Ann Martin Center through the time of hearing.

41. On September 17, 2017, Parent signed consent, in part, to the April 2017 IEP, as well as the June 2017 amendment IEP which updated Student's present levels of performance, goals, behavior plan, and transition plan. Parent's consent was with exception to the outdated services page, which reflected no continuing services. Parent's belated signature operated to approve Student's receipt of her certificate of completion. This was the last consented to and implemented IEP. As such, Student's operative IEP as of the time of hearing was the April 2017 IEP with the services and programming outlined in the September 2016 amendment IEP: a non-public school placement with 1710 minutes per week of specialized academic instruction (5.7 hours per day); 120 weekly minutes of group and individual speech and language services; 90 weekly minutes of individual school-based counseling; weekly educationally related mental health services; transportation; and extended school year with the same levels of instruction and speech services as the regular school year.

October 2017 IEP Amendment Meeting and Offer of Oakland Tech

42. Oakland sent Parent a notice of IEP team meeting for October 12, 2017, to discuss placement for the 2017-2018 school year. This notice informed Parent that Mr. Pierce would serve as the administrator. The notice identified Ms. Baskind as Oakland's Director of Legal Services, and indicated that she would attend as an "other," meaning an additional participant with knowledge of Student.⁷ On October 12, 2017, Oakland convened Student's IEP team as scheduled to discuss placement for the 2017-2018 school year. Parents, Student's aunt, Student, and her therapist from Ann Martin

⁷ Ms. Baskind has served in her current capacity since March 2015. Prior to that, she was a client services coordinator for the Community Alliance for Special Education where she advocated for special education students and their parents for approximately 15 years. She has a juris doctorate degree but is not a licensed attorney.

attended, with Ms. Ordonez appearing by phone. Student's educationally related mental health therapist was one of her special education providers. Mr. Pierce attended and served the role of a special education teacher in place of Oakland Tech's special education teacher who was not available. Ms. Baskind attended and served as the administrator.

43. At the start of the meeting, Parent objected to having Ms. Baskind attend as an additional member of Student's IEP team, or as the administrator. She also objected to Mr. Pierce, Student's case manager, attending as Student's special education teacher. Ms. Baskind reviewed Student's records and was familiar with her educational profile and programs. In her role as Oakland's Director of Legal Support Services, she supervises the special education department staff; is responsible for authorizing expenditures for special education students; and is knowledgeable about Oakland's educational placement offerings and curriculum, including the programs of numerous non-public schools. As such, Ms. Baskind was qualified to serve as Oakland's administrator.

44. During the IEP team meeting, Ms. Ordonez confirmed that Student was back to her normal baseline of functioning that she exhibited prior to her psychotropic medication trials. Parent provided a letter from one of Student's former teachers at Star who had worked with Student for over three years. The letter confirmed that Student's vision for her future had always included earning a diploma. During the meeting, Parent requested placement at Bayhill High School, a certified non-public school for students with learning differences. She also requested intensive remediation, and compensatory education for missed services.

45. Oakland offered placement at Oakland Tech. Oakland made this offer without any discussion of Student's related service needs. Although this was an amendment IEP team meeting to propose changes to the underlying April 2017 annual

IEP, Oakland did not update its underlying offer of services, which identified the location for all services as a non-public school, with all services having terminated in June 2017, or prior. Parent declined the offer. On October 19, 2017, Oakland sent Parent a prior written notice in response to her various requests at the October 2017 IEP team meeting. Oakland informed Parent that Bayhill had no space for a senior, but Oakland was willing to refer Student as a junior. Oakland refused to provide intensive remediation, but agreed to provide compensatory speech and counseling services.

46. On November 3, 2017, Mr. Pierce referred Student to Bayhill at Parent's request. Bayhill's Assistant Director Donna Austin immediately responded that Bayhill was not appropriate for Student given her level of need. Ms. Austin testified at hearing. In addition to its academic program, Bayhill contracts with counselors and other related service providers to address the needs of its students. For example, it contracts with licensed speech-language pathologists at the rate of approximately \$140 per hour. Bayhill had previously declined Parent's application for Student in May 2017 and recommended that Student attend adult school to earn a diploma and take courses to gain employment skills. In early 2018, Ms. Austin reconsidered Student's application at Parent's request but had concerns with Student's low academic levels. As of the time of hearing, Bayhill had not accepted Student.

47. On November 27, 2017, Parent sent Oakland a follow-up letter to her June 2017 email request for comprehensive and formal assessments in the areas of occupational therapy, transition, and assistive technology. This time she also requested an independent psycho-educational evaluation in the area of neuro-psychology. Ten days later, on December 7, 2017, Oakland sent Parent a prior written notice denying her request for an independent evaluation as Oakland had not conducted its own psycho-educational evaluation of Student since 2014.⁸ Oakland agreed to assess Student in the

⁸ Whether Oakland appropriately responded to Parent's request for an

areas of occupational therapy, assistive technology, and transition needs, and proposed additional assessments as Student's triennial was due in January 2018. Along with the prior written notice, Oakland provided Parent an assessment plan and a copy of her procedural safeguards.

December 2017 Triennial Re-assessment Plan

48. Oakland's December 7, 2017 assessment plan proposed to assess Student in the areas of academic achievement by an educational specialist; health by a nurse; intellectual development, social and emotional functioning, and adaptive and behavior needs by a school psychologist; language, speech, and communication development by a speech-language pathologist; motor development by an occupational therapist; and post-secondary transition by a transition specialist, with Student's assessment team to review records and observe Student. Student had filed her initial request for due process in November 2017 and received Oakland's assessment plan during the resolution period.

49. Parent did not provide immediate consent. Even if she had only considered the plan for a 15-day period, a minimum period contemplated by law, Oakland would not have received Parent's consent until the day prior to its two-week winter break. Instead, Parent provided Oakland with written consent on January 17, 2018, the week after the winter holiday. She noted on the signed plan that she was requesting a "comprehensive occupational assessment." Parent explained at hearing that a comprehensive occupational therapy assessment would include an assessment of sensory processing and memory issues, not just motor development. Oakland was required to complete Student's assessments and review them at an IEP team meeting within 60 days of Parent's consent, on or before March 19, 2018.

independent neuro-psychological evaluation was not an issue for hearing.

50. The assessment plan was in Parent's primary language of English, written in a manner that was easy to understand, and explained what each assessment would measure. For example, the assessment plan specified that in the area of health, the nurse gathered health information and testing to determine how health affected school performance; and that for intellectual development, the assessments measured how well a student thinks, remembers, and solves problems. The assessment plan identified Ms. Baskind as a contact person for any questions; reminded Parent that she had legal protections and referred her to the attached Notice of Procedural Safeguards; and explained that she would be invited to an IEP team meeting to review the results, and that special education services would only be provided with her consent.

Continued Placement Discussions

51. Ms. Baskind contacted Star in approximately January 2018 to see if it was willing to have Student return. Star declined. In approximately March 2018, given Parent's objection to Oakland Tech, Oakland suggested an alternate placement at Sojourner Truth Independent Study, one of its independent study programs. Oakland informed Parent it would modify the independent study program so Student could meet several times per week with a credentialed special education teacher and also access her IEP counseling and speech services. Parent visited the program but did not believe it would offer Student sufficient academic support or address her social deficits and need for socialization. Oakland did not officially offer Sojourner Truth through the IEP team meeting process.

Scheduling the assessments

52. Eight months after Parent's first request for assessments in June 2017, and forty-one days after receiving Parent's consent to assess, school psychologist Laura Nachtman contacted Parent on February 23, 2018, to schedule Student's psychological

evaluation.⁹ She was the first assessor to contact Parent to schedule testing sessions. Student was not available for testing the last few days of February, so Parent and Ms. Nachtman agreed to dates the first week of March 2018. All other assessments were also scheduled for the first two weeks of March 2018. Parent did not delay the scheduling of any assessments.

53. On Friday, March 2, 2018, Parent informed Oakland that she intended to observe the assessments and expected Oakland to give her a list of all testing instruments to be used, and to provide the raw data, notes, and testing protocols, along with age and grade equivalencies, following the assessments. That same morning, Oakland's counsel contacted Student's counsel to advise him that Parent was placing conditions on the assessments that Oakland could not accept. Within the hour, Student's counsel responded that he would contact Parent that day; that he was confident the matter would be resolved; and asked that the assessments not be cancelled. The next day, on Saturday evening, Student's counsel informed Oakland's counsel by email that all conditions were removed.

54. All assessments went forward as scheduled by Oakland. Student participated in multiple testing sessions on a near daily basis, specifically, March 5, 6, 7, 8, 12, 13, 14, and 22, 2018, as requested by Oakland assessors. The assessment sessions were all completed within the first two weeks of March 2018, with the exception of a follow-up speech session that the assessor delayed until March 22, 2018. As of the time of Student's psychological assessment, Parent had not completed a health inventory. There was no evidence that a nurse completed a health assessment or report.

⁹ Ms. Nachtman is a credentialed school psychologist. She has served in this capacity with Oakland since 2011, and has been assigned to the non-public school team for the past six years.

SPRING 2018 TRIENNIAL ASSESSMENTS

Academic Assessment

55. Mr. Pierce completed an academic evaluation of Student, beginning March 13, 2018. He administered the Woodcock Johnson Tests of Achievement, Fourth Edition, a standardized academic measure he had administered approximately 60 times. He was trained and qualified to administer and score this tool and followed the publisher's instruction manual. The measure was culturally, linguistically, and age-appropriate for Student. Student put forth her best effort, and Mr. Pierce had no reason to question the validity of the results. Although Mr. Pierce did not observe Student in a classroom setting, he observed her in the testing environment, which was appropriate for a student who was not in school. As Student's former case manager when she was attending Star, he was familiar with her past academic classroom functioning.

56. Mr. Pierce administered a total of eight subtests across the areas of reading, writing, and mathematics. He prepared a written report of his assessment and provided a copy to Parent prior to the May 7, 2018 IEP team meeting wherein he presented the results. The report described each subtest and Student's performance, and listed her standard scores. In his written report, Mr. Pierce explained that standard scores of 85-115 are within the broad average range, and those between 60-70 are in the low range. Student received standard scores of 81 in sentence reading fluency; 80 in letter word identification; 78 in spelling; 76 in passage comprehension; 72 in writing fluency, math calculation, and applied problems; and 59 in math fluency. He did not provide any further breakdowns of standard scores other than the average and low ranges. Despite the 22-point variance between Student's lowest and highest scores, Mr. Pierce described all of her scores as "below average." While technically correct as all of Student's standard scores were below 85, this broad generalization did not provide Student's IEP team, including Parent, with an understanding of her academic relative

strengths and weaknesses. He failed to report any of her broad cluster scores for each area, and his report did not make any comparison to Student's cognitive scores.

57. Mr. Pierce correctly explained in his report that a percentile rank indicates the percentage of test subjects who had scores the same as, or lower than, the examinee's score, with a percentile of 50 being considered average. The academic report purported to list Student's percentiles. For instance, the report noted that in math fluency, she received a standard score of 59 with the percentile listed as "53-65." By his own descriptor of percentiles, Student was performing above average in math fluency even though her standard score fell below the low range. On sentence reading fluency, Student's standard score was reported to be an 81, with a percentile of "76-86." The report of Student's percentiles was not accurate.¹⁰ These errors called into question the accuracy and reliability of the academic assessment and engendered confusion. For example, at the time of the May 7, 2018 IEP team meeting, Mr. Pierce informed the team that Student had improved greatly on her test scores from her previous triennial academic assessment in 2015. Only a comparison of Student's prior percentile rankings to the erroneously reported percentiles in Mr. Pierce's academic report would support this inaccurate conclusion. However, at hearing, he testified that Student scored in the below average range on each subtest, consistent with prior evaluations. Mr. Pierce's report of the testing data was not accurate, nor in a format to assist the reader in understanding the significance of Student's scores.

Psychological Assessment

58. Ms. Nachtman completed a psychological assessment of Student that included a review of eligibility for educationally related mental health services. She had

¹⁰ The report appears to have mistakenly identified the confidence intervals for Student's standard scores as her percentile ranks.

completed in excess of 350 special education psychological evaluations. The purpose of her assessment was to better understand Student's learning profile and mental health status, and determine whether she continued to meet the eligibility criteria for intellectual disability or any other category, and to qualify for educationally related mental health services. Ms. Nachtman conducted an extensive records review, interviewed Parent and Student, and administered several testing instruments. Her observations of Student during the assessment were proper and sufficient data points for an evaluation of a student who was not attending a school program.

59. Parent reported that Student was motivated to learn and able to persevere through challenging circumstances. Her seizures remained controlled by prescribed medication. Student's level of independence had improved since her psychotropic medication side effects ceased. However, her anxiety and depression had increased, which Parent attributed to being out of school, having limited peer socialization, and growing frustration with her stagnated academics. During the assessment, Student was visibly anxious and uncomfortable answering even impersonal questions and was emotionally unable to complete a self-report scale. The topic of school triggered tears and she shut down, stared off, and cried quietly. Ms. Nachtman reasonably concluded that Student required support to build coping skills and continued to qualify for educationally related mental health services.

60. Ms. Nachtman identified Student's suspected eligibility categories as intellectual disability and specific learning disability. She chose a variety of standardized assessment tools appropriate to Student's age of nearly 21 years, and her African-American ethnicity with regard to acceptable cognitive testing.¹¹ Ms. Nachtman was

¹¹ In *Larry P. v. Riles (I)* (9th Cir. 1974) 502 F.2d 963, and *Larry P. v. Riles (II)* (9th Cir. 1984) 793 F.2d 969, the Ninth Circuit Court of Appeals upheld district court injunctions preventing California schools from using standardized intelligence tests for

experienced in using, and trained and qualified to administer and score, each of the tests selected. She administered the tests under appropriate testing conditions, and in accord with the publishers' instruction manuals. All tests were validated for the purpose for which they were used, and were culturally and linguistically appropriate, and yielded accurate results. Student put forth good effort, and the testing produced reliable results representative of her abilities.

61. Ms. Nachtman administered tools to assess Student's cognitive functioning. On the Wechsler Nonverbal Scale of Ability, Student scored in the average range for two subtests, Matrices and Spatial Span. On this two-subtest battery, she received a standard score of 94, in the average range of functioning.¹² On the other two subtests, Coding and Picture Arrangement, both of which are timed and require use of executive functioning and working memory skills, Student received deficient scores. This brought her four-subtest battery standard score down to a 68, in the deficient range and at the second percentile.

62. Ms. Nachtman did not routinely use the Wechsler Nonverbal Scale, and had administered it approximately fifteen times. In her report, she concluded that the two-subtest battery was a better measure of Student's overall ability, as it provided the "most even picture of her profile." Ms. Nachtman did not explain in her report or during her testimony why she could rely on the higher subtest scores and discount the significance of the markedly lower scores, which were consistent with Student's historically low nonverbal processing scores. Ms. Nachtman's acknowledgement that

the purpose of identifying African-American students for special education and services. (See also *Crawford v. Riles* (9th Cir. 1994) 37 F.3d 485, 486.)

¹² Unless otherwise noted, the mean standard score is 100 with a standard deviation of 15. Standard scores between 85-115 fall in the average range.

Student's scores on visual puzzle tests like Matrices had also historically been in the deficient range, undercut her opinion that the two-subtest battery was the most accurate portrayal of Student's cognitive functioning. Even with increased expectations due to age, Student performed on the two-subtest battery in the average range, unexpectedly presenting with much stronger nonverbal reasoning skills than in the past. Ms. Nachtman found it difficult to account for this discrepancy. She opined in her report that Student's past performance may have been adversely impacted by her seizure activity, medication adjustments, or disengagement. Her opinion that Student's health condition, medical treatment, or behavior might have lowered her prior functioning levels underscored Oakland's duty to have looked further and assessed Student in the areas of health and behavior so the IEP team could appropriately identify and address Student's educationally related needs.

63. Consistent with prior assessments, additional cognitive and processing test measures indicated that Student had impairments in basic language skills, verbal reasoning and abstract thinking, and weaknesses in auditory processing, working memory, and visual motor integration, reflective of slow motor processing. Student's overall adaptive abilities were below average, with deficits in practical skills related to community use and home living. Student's cognitive profile revealed strengths and weaknesses ranging from high average abilities to deficient functioning. Ms. Nachtman determined this was not consistent with the globally low cognitive and processing scores typical of a student with an intellectual disability. She also determined that Student's generally below average adaptive functioning was higher than that which generally supports a finding of intellectual disability. Therefore, Ms. Nachtman concluded that Student no longer qualified for special education under the category of intellectual disability.

64. Ms. Nachtman prepared an assessment report detailing the purpose of each assessment, providing Student's scores, and explaining her results in comparison to prior evaluations. Parent received a copy of this assessment report prior to the May 7, 2018 IEP team meeting during which Ms. Nachtman presented her results and recommendations. In her summary, she outlined the special education eligibility criteria for the categories of intellectual disability and specific learning disability, and explained that Student no longer qualified pursuant to the category of intellectual disability. However, her report failed to include whether Student remained eligible for special education and under what category.

65. The psychological report identified two criteria for specific learning disability: a severe discrepancy between cognitive ability and academic achievement, and a processing deficit in an area related to the academic weakness. It did not specify the "rule-out" conditions, whereby a student's learning problems would not be included in the definition of a specific learning disability, such as when they are primarily the result of a motor disability, emotional disturbance, or intellectual disability. In her report, Ms. Nachtman did not specify any other means by which a specific learning disability may be determined, such as when a student does not achieve adequately in various academic areas and demonstrates a pattern of strengths and weaknesses in academic performance or cognitive ability. While she testified that Student's cognitive profile revealed a pattern of strengths and weaknesses, she failed to include alternate criteria for determining a specific learning disability or any such analysis in her report.

66. The psychological report did not define a severe discrepancy, namely a difference of one and one-half standard deviations between overall ability and academic performance, plus or minus a four-point margin of error. Further, Ms. Nachtman did not include the specific statistical calculations for the severe discrepancy analysis in the report, nor provide this by any other means to Student's IEP team. Ms. Nachtman

referred the reader to a separate academic evaluation report, but failed to do an analysis of her test data in comparison to Student's academic scores, and to render an opinion as to whether Student had a severe discrepancy between her academic ability and cognitive functioning, and if so, in which areas. Student's IEP team required this information to determine Student's unique needs.

67. Oakland's psychological report did not include all required components, namely whether Student may be eligible for special education and related services and the basis for that determination, including whether or not she had such a discrepancy between achievement and ability that was not explained by other factors and that could not be corrected without special education and related services. Ms. Nachtman's recommendation to the IEP team that Student's eligibility category change to specific learning disability, and her testimony at hearing that Student had a specific learning disability, which she characterized as "severe," did not cure the deficiencies in the written report. An analysis of the data with regard to a specific learning disability was particularly important given Ms. Nachtman's conclusion that Student no longer met the eligibility criteria for intellectual disability, and her opinion at hearing that Student did not fit clearly into one eligibility category. Ms. Nachtman explained at hearing that despite Student's average cognitive scores in some areas, her problem-solving deficits had a profound impact on her functioning, and she continued to underperform cognitively but not at her prior level of deficit.

Transition Assessment

68. Mr. Pierce also completed a transition assessment with Student. Star took the lead in developing individualized transition plans for its students. Because Mr. Pierce had supported Oakland students attending Star for the prior two academic years, he was familiar with Star's transition programming, and knowledgeable of Student's prior transition plans and her post-secondary needs and goals. Mr. Pierce was qualified to assess Student's transition needs.

69. There are no standardized assessments for post-secondary transition needs. A formal transition assessment is not required as relevant information may be obtained from a variety of sources. Mr. Pierce interviewed Student and administered age-appropriate, relevant surveys to assess her knowledge of post-secondary education and training, employment, daily living skills, self-determination, communication skills, relationships, leisure activities, and community involvement. These surveys assisted him in determining Student's interests, strengths, and weaknesses. He also solicited Parent input through a parent goal survey and a personality and performance survey. Student showed high interest in completing the surveys, and these assisted her in thinking about what she wanted to do for her future. Mr. Pierce obtained sufficient information to develop a transition plan covering the areas of post-secondary education, independent living, and employment.

70. Student informed Mr. Pierce that she wanted to attend college and have a career in athletic training for a major league baseball team. She did not inform him that she wanted to obtain a high school diploma. Student's reported interests and Parent input were consistent with her stated goals. The assessment report identified Student's goal of attending college and indicated that her career goal was to become a "personal trainer." Mr. Pierce used the term "personal trainer" in his written report and proposed individual transition plan as he viewed the field of athletic training to encompass personal training. This nomenclature did not call into question the accuracy of his data, his understanding of Student's goal, nor the appropriateness of the resulting transition plan.

71. Student's self-inventories provided information on work-related skills such as reading, writing, and perceptual abilities, and her level of knowledge as to how to transition to employment. Student identified that she needed help expressing herself;

did not know what college classes were required to become an athletic trainer; and would need a tutor to be successful in college.

72. Based on his assessment, Mr. Pierce developed two pages of proposed recommendations and suggested transition activities designed to increase Student's knowledge of and practical experience in her preferred career field of athletic training. He included these as part of the assessment report. He identified several employment and education objectives and numerous instructional activities, community experiences, and daily living undertakings to support Student's goals. Mr. Pierce incorporated his recommendations into an individual transition plan for Student that appropriately reflected her stated goals, interests, and needs.

73. Student's goal of becoming an athletic trainer for a major league baseball team consisted of many preliminary steps. These included obtaining practical community experience working with young athletes at the little league level, obtaining a personal training certificate to allow her to train in an athletic gym, getting work experience for her résumé, and obtaining a bachelor's level degree. Mr. Pierce developed an individual transition plan for Student built on her own surveys and those of Parent. The transition plan included activities to support her goal of attending college. It was individualized to assist her in developing the requisite skills and life experience, training, and education in athletic training to be able to pursue her identified career. Student's proposed transition plan was appropriately designed to put Student in a position to obtain exposure to and experience in her field of interest.

Occupational therapy assessment

74. Danielle Posey Otlin assessed Student's occupational therapy needs. She had been a school-based occupational therapist for eight years and generally completed 25 assessments each year. For her assessments, she typically observed the student in class and obtained input from the teacher. Ms. Otlin's testimony established

that based on professional assessment standards in her field, clinical observation during testing was sufficient for a student who was not attending school. Ms. Otlin reviewed educational records including Student's January 2015 triennial occupational therapy assessment, which had determined that Student no longer required occupational therapy services. She also interviewed Ms. Nachtman and Student, conducted clinical observations of Student's fine motor, visual motor, and sensory processing skills, and administered two standardized assessment measures.

75. Ms. Otlin was qualified, trained, and experienced in administering and scoring the tools she selected. She followed the publishers' instructions. The tools were valid for the purposes for which they were used and culturally, linguistically, and age-appropriate for Student. Student worked to the best of her ability, which allowed Ms. Otlin to obtain reliable data as to Student's levels of functioning and any needs. She observed Student to make consistent and appropriate eye contact and engage in appropriate conversation. Based on her clinical observations of Student walking, remaining seated for 60 minutes without a break, retrieving items, opening containers, and texting on her cell phone, Ms. Otlin reasonably concluded that Student had no deficits in her functional gross motor skills and activities of daily living that would impede her ability to participate in an educational setting.

76. With regard to fine motor skills, Student showed overall average skills, though her scores were below average on timed subtests for one test instrument. Student was able to manipulate the objects as required but exceeded the time limits. On a similar timed test on a separate measure, Student scored in the superior range. Testing showed that Student was able to write legibly with appropriate letter spacing and formation, and she demonstrated a functional level of typing skills. Ms. Otlin reasonably determined that Student had no fine motor needs.

77. Student earned average scores on tests measuring visual and perceptual

motor abilities. Throughout the two-hour assessment, Student was able to filter and process sensory stimuli across all senses, indicating no sensory processing deficits. These observations were confirmed by her record review, which showed no sensory concerns at school. As such, Ms. Otlin reasonably concluded she did not require additional data regarding Student's sensory processing. Ms. Otlin's assessment revealed no concerns requiring occupational therapy intervention. Parent had requested what she termed a "comprehensive occupational therapy assessment" to include testing on memory. Ms. Otlin established that memory issues are not within the scope of an occupational therapy assessment or services.

78. Ms. Otlin prepared a comprehensive written assessment report explaining her assessment, Student's scores, and her conclusion that Student did not require occupational therapy services. She provided this report to Parent prior to the May 7, 2018 IEP team meeting, during which she presented her results to the team.

Speech and Language Evaluation

79. Oakland contracted for Natalie Hibbs, a credential speech-language pathologist with Therapy Travelers, to complete Student's speech and language evaluation.¹³ She had completed in excess of 100 speech evaluations. Ms. Hibbs reviewed Student's educational file, conducted clinical observations, and administered standardized instruments, which she was qualified, trained, and experienced in administering and scoring. The tools she selected were culturally, linguistically, and age-appropriate for Student, and valid for the purposes for which they were used. With each instrument, she followed the publishers' instruction manuals. Student put forth good

¹³ Ms. Hibbs has provided school-based speech and language services and assessments to students since 2010, and obtained her Certificate of Clinical Competence from the American Speech and Hearing Association in July 2018.

effort, and Ms. Hibbs was confident that the results were reliable.

80. Student displayed appropriate attending skills and used complete sentences when providing verbal responses. However, Student did not advocate for herself such as when she appeared to not understand or might have needed a break. On one measure, Student's scores showed average expressive and receptive abilities, though she had difficulty repeating complex sentences verbatim, without visual cues or repetition. On a separate measure, Student's scores in the areas of grammar, nonliteral language, and the ability to infer meaning were significantly below average. These tests were difficult for Student as they lacked visual input, meaning she had to retain auditory information in order to respond to the test questions. Her score on the synonyms test, which provided visual cues, was slightly higher, in the below average range. Student's pragmatic language skills were average.

81. Ms. Hibbs determined that Student continued to present with a speech or language impairment, but did not require direct language services to access her education. She recommended consultative services to help build Student's self-advocacy skills and to ensure that she received visual supports to improve her comprehension. Ms. Hibbs prepared a written assessment report explaining the instruments used, comparing and explaining Student's performance on the two measures, and reporting her scores and percentiles. Her report specified that Student met eligibility criteria for speech or language impairment and included her recommendation for consultation services. Parent received a copy of the speech assessment report prior to the May 7, 2018 IEP team meeting during which Ms. Hibbs presented her results.

MAY 2018 IEP TEAM MEETINGS

Scheduling The Meetings

82. Mr. Pierce did not contact Parent to schedule an annual IEP team meeting

to review the assessments until April 9, 2018. He proposed a meeting for April 13, 2018, during a time slot when Parent was not available. Parent proposed an earlier meeting time, and also offered four additional dates and times the following week. By the time Mr. Pierce re-contacted Parent to inform her that the assessors could meet during her requested time slot on April 13, 2018, Parent was no longer available. Oakland was not available on the dates proposed by Parent for the week of April 16, 2018. Mr. Pierce then proposed April 20, 2018, but Parent was not available, so he proposed April 27, 2018. Parent suggested two earlier dates but Oakland was not available. On April 20, 2018, Mr. Pierce asked Parent to provide days and times for the week of April 30, 2018. At that point, Student's counsel involved Oakland's counsel. The parties agreed to meet on May 7, 2018, to review Student's triennial assessments.

83. Parent did not delay the scheduling of the assessments or the IEP team meeting. She made Student available for two weeks of testing in early March 2018, and promptly responded to all meeting scheduling requests. Oakland was aware that it took time to schedule an IEP meeting to review assessments given the number of team members. It was Oakland's decision to wait until April 9, 2018, to begin that process.

May 7, 2018 IEP Team Meeting

84. On April 26, 2018, Oakland sent Parent a notice of IEP team meeting for the purpose of a triennial review for a date of May 7, 2018. The notice specified that Mr. Pierce would attend as the administrator, the assessors Ms. Nachtman, Ms. Hibbs, and Ms. Otlin would attend, as well as Ms. Baskind, and Oakland's counsel Mr. Mishook. On May 4, 2018, Parent signed the notice informing Oakland that she would attend with her educational advocates Tina and Steven Maher.

85. The following individuals attended the May 7, 2018 IEP team meeting: Parent, Student's aunt, the Mahers, Ms. Baskind as the administrator, Mr. Pierce as the special education teacher, Ms. Nachtman, Ms. Otlin, Ms. Hibbs, and Student's

educationally related mental health services counselor. Parent again objected to Mr. Pierce attending as the special education teacher. Parent and Oakland agreed in writing to excuse the attendance of a general education teacher. Oakland provided Parent a notice of procedural safeguards.

86. Ms. Nachtman reviewed her psychological report and the IEP team discussed Student's change in eligibility from intellectual disability to specific learning disability. At this meeting, Parent received a draft copy of the IEP, which she referred to as "Version 1" during testimony. This first draft, prepared prior to the May 7, 2018 meeting, carried over Student's primary eligibility category of intellectual disability, pending the IEP team discussions and a final IEP offer. Oakland assessors presented their educational, speech and language, and occupational therapy evaluations and recommendations. Ms. Hibbs recommended 30 minutes per month of speech consultation services. The assessors afforded Parent and Student's advocates the opportunity to ask questions.

87. Parent questioned Mr. Pierce about his academic recommendations, which called for daily practice without any proposed services or strategies to target Student's academic skill deficits. Ms. Nachtman did not inform the IEP team of the nature or significance of Student's specific learning disability, nor did she or Mr. Pierce discuss Student's unique academic needs. This discussion of academic needs was foundational to building an appropriate IEP for Student. Even if Oakland determined that continued high school programming was no longer appropriate, Student's low academic scores reflected basic academic needs which necessarily impacted her ability to participate in transition activities. Further, Oakland's proposed goals, discussed below, called upon Student's academic abilities such as budgeting and reading academic assignments.

88. The team discussed Student's transcripts and whether her graduation plan was to obtain a diploma. Version 1 of the draft IEP listed Student's graduation plan as

participating in a curriculum leading to a diploma. Mr. Pierce previously checked this box in the SEIS system as part of Oakland's formal offer of Oakland Tech in October 2017. He failed to uncheck the diploma box when Parent declined the offer. Parent was not aware that the offer of a diploma was tied to the placement offer of Oakland Tech. Ms. Nachtman advised the IEP team that based on her testing data, it would be very difficult for Student to earn a diploma. Parent, Student's aunt, and Student's education advocates disagreed. The Mahers requested that Oakland conduct a transcript analysis to determine what credits Student had earned towards a diploma.

89. The first part of the May 2018 IEP team meeting lasted two hours. Oakland indicated it would find out the status of the assistive technology assessment that had not been completed. Mr. Pierce would present his transition assessment and individual transition plan at the next meeting, and the IEP team would discuss goals, services, and placement. Pending review of Student's assessments, Version 1 of the draft IEP included only partial present levels of academic performance and functioning; the proposed goals did not include baselines; the offer of services and placement had not been updated; and a transition plan was not attached. The May 2018 IEP remained a work in progress. Oakland continued the IEP team meeting for two and half weeks, scheduling part two for May 24, 2018.

May 24, 2018 IEP Team Meeting

90. All mandatory team members attended or were properly excused from the May 24, 2018 continued IEP team meeting. Parent, Student's aunt, the Mahers, Student's therapist, an assistive technology specialist, a general education teacher, special education teacher David Cammarata, Ms. Baskind as the administrator, and Mr. Pierce as an additional participant attended.¹⁴ Oakland provided Parent with a second draft of the

¹⁴ Mr. Cammarata is the coordinator of Oakland's young adult programs and

IEP, referred to as "Version 2" at hearing. This second draft incorporated Ms. Nachtman's assessment data supporting a change in eligibility, and identified Student's primary eligibility category as specific learning disability, with speech or language impairment remaining as a secondary eligibility category. No other changes were made. The graduation plan continued to specify a diploma track. Oakland did not update Student's present levels of performance, baselines for her proposed goals, or its offer of placement and services, and did not attach her individual transition plan.

91. Oakland did not complete Student's assistive technology assessment. The assistive technology specialist informed the team that it would be best to assess Student in the educational program that she would be attending. Parent agreed to delay the assistive technology assessment described in the December 2017 assessment plan. Oakland did not present the results of a health assessment, and there was no evidence that it had been completed.

92. Mr. Pierce reviewed his transition assessment and recommendations for Student's transition plan with the team, and was willing to answer any questions. Parent's chief complaint was that the transition assessment and plan did not include Student's goal of obtaining a high school diploma. Even so, many of the proposed activities included in the plan would support Student in obtaining a diploma, specifically, steps for developing and maintaining study skills, self-advocacy and social skills, and decision-making abilities. Mr. Pierce included all of his assessment recommendations in Student's individual transition plan. The transition plan form asks the drafter to "describe the results of the assessments." Mr. Pierce did not update this section from Student's

career transition services. He taught students at a college-based community immersion program for six years. He holds mild-to-moderate and moderate-to-severe teaching credentials and has been a special education teacher for 14 years.

April 2017 individual transition plan. Therefore, while this section appropriately noted Student's continuing desire to attend college, it inaccurately included her prior goal of working in the entertainment industry. This error was not material as the transition plan was based on Mr. Pierce's assessment and accurately captured her athletic training goal.

93. Based on her overriding career goal of being an athletic trainer, Mr. Pierce appropriately identified necessary steps along the way. The transition plan's proposed post-secondary training or education goal for Student was to take courses in support of a career as a personal trainer; her employment goal was to become a personal trainer; and her independent living goal was to acquire skills to allow for independent functioning. Each goal was supported by the related service of specialized academic instruction, and linked to Student's proposed annual IEP goals. Parent chose not to engage in any discussion regarding Student's goals, which she found to be inappropriate, as they did not focus on academic work in pursuit of a diploma.

94. Mr. Pierce prepared a comprehensive transition plan for Student. Student's proposed individual transition plan included numerous activities and community experiences designed to help Student along the path to her goals. In summary, the plan included: practice strategies to develop self-advocacy skills; compare colleges; learn course requirements and reading materials by visiting the college bookstore; complete applications; investigate a volunteer position such as an athletic coach for little league; obtain a gym membership; contact personal trainers; create a resume; and practice job interview skills.

95. Because Oakland had not provided Student any specialized academic instruction or an educational placement for the entire 2017-2018 school year, and in light of her desire to earn a high school diploma, Parent and Student's education advocates believed Student's primary needs were in the areas of academics and socialization. Student's IEP team considered Parent's request for Student to continue in

a high school diploma program. Oakland's general education teacher presented an analysis of Student's transcript, which showed that Student had not yet attempted numerous courses required to earn a diploma.

96. Ms. Nachtman testified that in light of the assessment data, and given Student's academic performance, her long-standing deficits and their impact on her education, and her anxiety and limited coping strategies, it was her professional opinion that Student would not be able to complete the required coursework to earn a high school diploma. Although Parent disagreed with Ms. Nachtman's opinion, it was unrefuted. Prior to her medication-induced psychosis, Student had received close to three years of specialized language and reading intervention services at Star based on Lindamood Bell programming, but had not been in a position to attempt algebra, a course required to earn a diploma.

DISCUSSION OF GOALS AND OFFER OF FAPE

97. Oakland members of the IEP team determined that Student's areas of need were functional academics, specifically budgeting and literacy; self-advocacy; organizational systems; behavior-coping strategies; travel training; and vocational skills. Mr. Cammarata presented proposed draft goals for Student in each of these areas. At the time of the IEP team meeting, Student's baselines, as determined by assessment results, were not filled in. The team was not able to further develop the proposed goals with Parent input, as Parent deemed them inappropriate for Student, whose goal was to obtain a high school diploma. Parent wanted to continue Student's 2017 annual goals, which included academic and organization goals; social pragmatic, critical thinking, self-advocacy, and coping skills goals; and transition goals. Oakland disagreed with continuing what it determined to be outdated goals, essentially carried over since the 2015 annual IEP.

98. The IEP team discussed related services to support Student's goals. Parent

requested that Student continue to receive direct speech and language services for 120 minutes per week. Oakland agreed. Oakland continued to offer 100 minutes per week of educationally related mental health services to assist Student with her anxiety and to develop coping strategies.

OAKLAND'S YOUNG ADULT COMMUNITY IMMERSION PROGRAM

99. Mr. Cammarata explained the college-based, young adult community immersion programs that were available to Student and answered questions from the IEP team. The young adult program serves a broad spectrum of young adults ages 18-22 with moderate to severe disabilities who have not obtained their diploma. There are approximately 150 students in the program. The instructor-to-young adult ratio depends on student needs, but Mr. Cammarata was working with 11 young adults with the help of three instructional aides at the time of the May 2018 IEP team meeting. Some students are severely impacted by their disabilities while others are very independent in the community. Few, if any, of the enrolled students have a specific learning disability; most have an intellectual disability. There is a growing population of students with the goal of obtaining their diploma or passing the General Education Development test. The young adult programs are determining how to best assist these students by formalizing relationships with the local high school network, and helping students study for the GED or enroll in adult education classes to pursue a diploma.

100. The community immersion programs are located on community college campuses. For these programs, the community is the classroom where students are supported in their post-secondary educational, vocational, and independent living goals and able to interact with age-appropriate peers with similar interests and abilities. The students are immersed in the community just like their age-appropriate peers who do not have a disability. Each student's program is driven by his or her individual transition plan. For instance, the program teachers assist students with the goal of attending

community college to identify and enroll in classes of interest, apply for financial aid, work with the disability services office on campus, and develop relationships with college instructors. The young adult programs provide access to employment opportunities; offer training on public transportation; and teach weekly workshops including driver education, job skills, advanced literacy skills, and a self-advocacy workshop.

101. During the IEP team meeting and at hearing, Mr. Cammarata had no concerns about being able to implement Student's proposed individual transition plan. He was familiar with her goal of becoming an athletic trainer and persuasively explained how any of the college-based programs could assist her with this goal. Following a discussion of the transition program, Oakland offered placement in the young adult community immersion program. Parent declined.

102. After the May 24, 2018 IEP team meeting, Oakland created a final "Version 3" of the May 2018 IEP to reflect the team discussions and Oakland's formal offer. This final IEP included updated present levels of performance from Student's assessment data in the areas of academics, communication development, motor development, social-emotional and behavioral functioning, vocation, adaptive behavior, and daily living skills. The offered goals included baselines derived from Student's assessments. The offer of placement reflected Oakland's offer of a community immersion program at the Laney College site with 360 minutes per day of group specialized academic instruction. The final May 2018 IEP noted Student's graduation plan to be a certificate of completion, despite having received this on June 30, 2017.

103. Oakland offered 120 weekly minutes of group speech therapy sessions, 100 minutes per week of individual educationally related mental health outpatient services; 120 weekly minutes of group college awareness services; 180 weekly minutes of group career awareness; and 180 weekly minutes of group "other transition service."

The offers of services had start and end dates, and specified the location, duration, frequency, and type of service. The counseling location erroneously listed the location as a non-public school. Oakland offered accommodations of a word processor and speech-to-text program Student had previously been accessing, as well as visual cues, and the program supports of daily travel training with monthly public transportation passes. The May 2018 IEP additionally offered transportation and extended school year, noted by a check box. For each of her years at Star, Student had received extended school year services that mirrored her regular school year services. The extended school year offer did not include any details as to the offered program or services. The final May 2018 IEP included Student's proposed individual transition plan derived from Mr. Pierce's transition assessment report.

104. On June 12, 2018, Oakland sent Parent a prior written notice explaining Oakland's proposal to change Student's educational placement to a young adult program, along with the final IEP document described above, and a copy of her procedural safeguards.

Parent's Tours of Community Immersion Programs

105. During the extended school year 2018, Parent visited three college-based young adult programs. Mr. Cammarata had informed her that she would be able to get an overview of the program, but during the summer, the program had fewer students and shorter days. Further, given the community immersion aspect of the program, she would not be able to see the participation of the more independent students. In general, during her three observations, the students gathered at a central location, either the student union or a bus stop, for a morning check-in with the teacher, and then dispersed to their next assignments. At all three programs, Parent observed students who did not appear to have the ability to communicate or function at Student's level. It was Parent's opinion that these young adults would not provide Student with the

opportunity to further develop her social communication skills or meet her needs for socialization. Parent did not have the opportunity to observe more independent students who were immersed in the community with their age-appropriate peers, at college or work.

PARENT'S REQUEST FOR INDEPENDENT EVALUATIONS

106. On August 30, 2018, Parent informed Oakland in writing that she disagreed with its assessments as they were not comprehensive; lacked classroom observations and teacher interviews; did not assess in all suspected areas of disability; and the reports did not include appropriate recommendations. She requested independent evaluations in the areas of academics; speech and language including phonemic awareness and problem solving; occupational therapy including working memory; social skills; transition; and neuro-psychological functioning. Student did not introduce any evidence regarding the required components of a neuro-psychological evaluation or her need for such. Ms. Nachtman testified that as a school psychologist she is not qualified to conduct a neuro-psychological evaluation which includes more detail and testing than that obtained in a school psychological or psycho-educational evaluation.

107. Upon receipt of Parent's request for independent evaluations, Ms. Baskind asked Oakland's counsel to file a request for due process to defend Oakland's assessments because she believed they were legally compliant. On August 31, 2018, Ms. Baskind sent Parent a prior written notice declining her request for independent evaluations. On September 4, 2018, Oakland filed a motion to amend its original due process complaint to include the defense of its assessments. OAH granted Oakland's motion to amend and this hearing ensued.

PARENT'S PROPOSED PLACEMENT AND PROGRAMMING

108. Parent testified that her requested remedy was for Oakland to fund two years of placement at Tilden Preparatory Academy, a private school for students with learning differences. Gail Alter, associate director for Tilden, testified at hearing as to a proposed two-year, individual instructional program for Student leading to a diploma, at a total cost of approximately \$57,600.¹⁵ Tilden instruction cost \$90 per hour. Tilden had not accepted Student as of the time of hearing. Its oldest student was 19 years old, and it had never served a student 21 years of age or older. Tilden is not a certified non-public school, and there was no evidence it provides therapeutic supports.

109. Parent additionally requested that Student receive two hours per day of Lindamood Bell programming for intensive remediation during the regular school year, and four hours per day for eight weeks during extended school year. Ashley Thompson, an executive center director for Lindamood Bell, testified at hearing. Lindamood Bell offers multi-sensory reading and math programs to build concept imagery and phonemic awareness. In January 2018, Parent paid Lindamood Bell \$295 to assess Student. Lindamood Bell recommended that Student receive intensive, daily, one-to-one instruction for 400-600 hours, at a rate of \$129 per hour. They would assess Student every 200 hours to make further recommendations. Lindamood Bell is not a certified non-public school or agency; its assessors and instructors are not licensed or credentialed, and no pre-employment experience is required; its programs are not taught by credentialed special education teachers; and it does not teach an academic

¹⁵ In her closing brief, Student calculated the total two-year program to be \$110,900. This did not take into account Ms. Atler's testimony regarding the lower cost of a modified program in pursuit of a basic diploma without courses required for California university admission, commonly referred to as "(a) though (g) courses."

curriculum. Lindamood Bell does not provide therapeutic supports.

Alternate Young Adult Transition Program

110. Ms. Reilly did not share the same opinion as Oakland's witnesses that once a student obtains a certificate of completion, she necessarily transitions to a young adult transition program. Rather, she persuasively testified that it depends on individual needs and the student's own trajectory. Further, there are public and non-public young adult program options. At hearing, Ms. Reilly described Star's new young adult program. Star offers an adult transition program for students ages 18-22. The program opened last school year and served four students for the 2017-2018 school year. Two students were enrolled for the 2018-2019 school year at the time of hearing. Students attend educational classes at Star and at a junior college; participate in vocational readiness programs; and receive independent living skills training including community access, budgeting, and cooking. Star had not accepted Student as of the time of hearing.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT¹⁶

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006));¹⁷ Ed. Code, §

¹⁶ Unless otherwise stated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

¹⁷ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

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

2. A FAPE means special education and related services that are available to an eligible student at no charge to the parent, meet state educational standards, and conform to the student'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 student with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031, subd. (a).) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. §300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each student with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the student's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the student to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(a); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to

specialized instruction and related services which are individually designed to provide educational benefit to” a student 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 student “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a student receives access to an education that is reasonably calculated to “confer some educational benefit” upon the student. (*Id.* at pp. 200, 203-204.)

4. Recently, in *Endrew F. v. Douglas County School Dist. RE-1* (March 22, 2017) 580 U.S. -- [137 S.Ct. 988] (*Endrew F.*), the Supreme Court considered the meaning of the phrase “some educational benefit” for a student not being educated in the general education classroom. When a student is not able to achieve at grade level and progress through the regular curriculum, the student’s educational program must be “appropriately ambitious in light of his circumstances ... as every child should have the chance to meet challenging objectives.” (*Id.* at p. 1000.) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at p. 1001.)

5. If the parent of a student who is an individual with exceptional needs refuses some or all services in the IEP, and if the public agency determines that the special education program or program component to which the parent does not consent is necessary to provide a FAPE to the student, the local educational agency shall file a request for a due process hearing. (*I.R. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164, 1169 (*I.R.*); Ed. Code, § 56346, subd. (f).)

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a

FAPE. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. fCode, §§ 56501, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].) In this matter, the parties bear the burden of proof as to their respective issues for hearing.

ISSUE 3(A), (B) & (C): OAKLAND FAILED TO ASSESS STUDENT IN ALL SUSPECTED AREAS OF DISABILITY

7. Student contends that because adverse side effects from her psychotropic medication regimen prevented her from accessing her education, Oakland had a duty to assess her in the areas of health and behavior, and to conduct a neuro-psychological evaluation. Student argues Oakland's failure to assess in these areas denied her a FAPE from January 1, 2017, through December 7, 2017, when Oakland prepared a triennial assessment plan. Oakland asserts that it was not required to assess Student prior to her required triennial evaluation in spring 2018, and that it was not Oakland's responsibility to assess Student's temporary medical condition.

Unique Needs

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

BEHAVIORAL NEEDS

9. When a student's behavior impedes her learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).) It is the intent of the Legislature that students with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a student's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

Duty to Assess

10. In order to meet the continuing duty to develop and maintain an appropriate educational program, the school district must assess and reassess the educational needs of a student with a disability. (20 U.S.C. § 1414(a) & (b); 34 C.F.R. § 300.305; Ed. Code, §§ 56320, 56321.) The district must ensure that the student is assessed in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.) These terms are used interchangeably in this Decision.

11. A disability is "suspected," and a student must be assessed, when the district is on notice that the student has displayed symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119, cert. den. (Apr. 17, 2017, No. 16-672) 137 S.Ct. 1578 [2017 WL 1366731] (*Timothy O.*)). Such evaluations are necessary for the school district to "begin the process of determining what special education and related services will address the child's individual needs." (*Id.* at p. 1110.) Notice may come in the form of concerns

expressed by parents about the student's symptoms, opinions expressed by informed outside experts, or other less formal indicators, such as the student's behavior. (*Id.* at pp. 1120-1121 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202 (*N.B.*).])

Heath Assessments

12. When a student has been diagnosed as having a chronic illness, as Student was, the student may be referred to the district for a health assessment to determine the need for special education. (Cal. Code. Regs., tit. 5, § 3021.1(a).) "A health assessment focuses on diagnoses, health history, and those specific health needs while in school which are necessary to assist a student with a disability." (*L.J. v. Pittsburg Unified School Dist.* (9th Cir. 2017) 850 F.3d 996, 1008 (*L.J.*).) State regulations require that the IEP team review the possible medical side effects and complications of treatment that could affect school functioning, and educational and social implications of the condition and treatment, such as the likelihood of fatigue, absences, or problems with fine and gross motor control. (*Ibid.*; Cal. Code. Regs., tit. 5, § 3021.1.)

13. A health assessment must be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the student being assessed. (Ed. Code, § 56324, subd. (b).) Medical services for diagnostic and evaluation purposes are included within the definition of related services. (20 U.S.C. § 1401(26); 34 C.F.R. §300.34; Ed. Code, § 56363, subd. (a).) Medical services mean services provided by a licensed physician to determine a student's medically related disability that results in her need for special education and related services. (34 C.F.R. § 300.34 (c)(5).)

14. In March 2015, Student's health needs changed. She suffered a grand mal seizure and was diagnosed with Juvenile Absence Epilepsy. This new diagnosis caused Student to become anxious and depressed, and she missed class time. In April 2015,

Oakland responded with a behavior intervention plan to address her weekly behavior of being out of class. Even so, Student struggled to complete assignments and required more breaks. Health issues caused her to continue to miss instructional time, and after the fall 2015 semester, Star transferred her from pre-algebra to a lower level consumer math class because she fell behind due to health-related absences.

15. During the spring 2016 semester, Student's needs and presentation changed dramatically. She had frequent seizures at school, which caused her to become tired and significantly impaired her academic progress. Her seizure disorder negatively impacted her already-weak memory skills and her academic confidence, causing her to withdraw from the learning process. She was diagnosed with major depression and anxiety and began various psychotropic medication trials, which caused severe, adverse reactions such as paranoia, panic, and insomnia, and resulted in frequent absences.

16. Due to the cognitive and emotional challenges associated with her seizure disorder and depression, along with the many unsuccessful attempts to find the right medication to control both conditions, Student shut down and was unable to attend to learning or make progress on her goals. Student's June 2016 behavior intervention plan identified depression, anxiety, seizures, fatigue, and hunger as triggers for her withdrawal from learning. Formerly an A and B student, she received incompletes in all of her classes the final semester of her senior year due to her health challenges. Oakland was aware of her health issues and medical complications and that these negatively affected her class attendance. In response, Oakland offered a fifth year of high school at Star. Given these facts, Oakland was on notice by June 2016 that Student had suspected needs in the areas of health and behavior, namely withdrawal from school participation and attendance, for which it had an independent duty to assess.

17. Oakland's duty to assess took on a new level of urgency during fall 2016, as Student suffered increasingly severe seizures at school resulting in periods of

unconsciousness and fatigue, and which necessitated a 911 call and emergency room visit. Student's seizures interrupted her schooling. Once again, Student received incompletes for all of her courses and did not make expected progress on her goals during fall 2016 because of her excessive health-related absences and emotional and physical dysregulation. Oakland continued to be on notice as of January 2017, that Student had suspected health disabilities and behavior needs related to class participation and attendance, such that it had a duty to assess her in these areas. As the school year progressed, she began to experience a medication-induced psychosis with periods of confusion and dissociation. Oakland's characterization of Student's presentation as simply an unfortunate, temporary, medical side effect, does not insulate it from its duty to determine the impact of Student's health conditions and medical treatment on her education.

18. Oakland's duty to assess continued through the 2016-2017 school year, including extended school year. Student's psychosis intensified and her world became a scary place. She no longer recognized her teachers or family and tried to run and hide. Star questioned its ability to continue to serve Student and recognized she might need a one-to-one aide to keep her safe. She suffered psychogenic seizures triggered by her anti-depressant medications. These seizures resulted in convulsions and precipitated another 911 call from school. Student's declining health challenged her every day, in every area of her education. She missed a total of 72 school days during the 2016-2017 school year, and she earned no credits her fifth year of high school.

19. Health was not simply a suspected area of disability, it was a core area of need for Student, an unaddressed need that prevented her from regularly attending school. State regulations highlight the importance of the IEP team addressing a special education student's medical absences. (Cal. Code Regs., tit. 5, § 3051.4, subd. (c); see Cal Code Regs., tit. 5, § 3051.17, subd. (c) [district must assure that an IEP team meeting is

convened when an eligible student experiences an acute health problem resulting in an absence of more than five consecutive days]¹⁸.)

20. Oakland's failure to have a qualified nurse or physician determine the impact of Student's health on her education, and to assess Student's related behaviors of withdrawal from the learning environment and poor attendance constitute procedural violations, beginning January 1, 2017, the start of Student's assessment claim. Student did not meet her burden of proving that Oakland was required to conduct a neuro-psychological evaluation. While a neuro-psychological evaluation generally includes more testing than a school psychologist evaluation, Student did not establish that this additional level of testing was required.

ANALYZING A PROCEDURAL VIOLATION

21. A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033 (*Park*); *Timothy O.*, *supra*, 822 F.3d 1105, 1118.) The failure to obtain critical assessment information about a student "render[s] the accomplishment of the IDEA's goals – and the achievement of a FAPE – impossible." (*N.B.*, *supra*, 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 894 (*Amanda J.*).

22. 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. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute

¹⁸ This regulation references students with other health impairment under former eligibility regulation at Cal. Code Regs., tit. 5, § 3030, subd. (f), amended July 1, 2014.

(*Target Range*.) A procedural error results in a denial of a FAPE only if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j); *Target Range, supra*, at p. 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

23. The Ninth Circuit has held that a procedural error resulting in a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (*Doug C.*)) "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Id.* at p. 1047, quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.) "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." (*Amanda J., supra*, 267 F.3d 877, 892.)

24. The Ninth Circuit's holding in *L.J.* is particularly instructive in this matter. In *L.J.*, the Ninth Circuit held that the district court erred in determining there was no denial of FAPE when the school district failed to conduct a health assessment of a student with attention deficit disorder and an emotional disturbance, and who was prescribed psychotropic medication. The Ninth Circuit concluded that the failure to conduct a health assessment rendered the district and IEP team unable to evaluate and address L.J.'s medication and treatment-related needs, thereby depriving him of an educational benefit under the rationale of *Doug C., supra*, 720 F.3d 1038, 1043 [a FAPE is denied where procedural inadequacies result in loss of educational benefits]. (*L.J., supra*, 850 F.3d 996, 1008.)

25. Similarly, Oakland's failure to assess Student's health and behavior

rendered Student's IEP team unable to determine and address her health and related school attendance challenges. This deprived Student of educational benefit, resulted in a loss of educational opportunity, and significantly impeded Parent's meaningful participation in the decision making process. Without critical assessment information as to the impact of Student's health on her learning, Student's IEP team could not determine her educational needs or consider appropriate services or alternative programming to meet her needs.

26. Student's seizures and her medication reactions compromised her school functioning and resulted in fatigue and absences, and furthered her depression. Had Oakland timely assessed Student's health and need for behavior support, the IEP team would have had relevant assessment data to inform its April 2017 IEP offer, and the team likely would have better considered other programming options in light of Student's inability to participate in her education. As such, Oakland's failure to assess resulted in a substantive denial of FAPE beginning January 1, 2017.

27. Ms. Ordonez gradually reduced Student's psychotropic medication, and eliminated them by June 2017. By the end of June 2017, Student was no longer experiencing any side effects. Her health and behavior challenges were long-standing, but drew to a close, as they were the result of her psychotropic medication trials. By the start of the 2017-2018 school year, Student was ready and able to participate in her educational program. Therefore, Oakland's denial of FAPE continued through the beginning of the 2017-2018 school year. Student's remedy will be addressed below.

ISSUE 3(E): OAKLAND'S FAILURE TO ASSESS PURSUANT TO PARENT'S JUNE 2017 REQUEST DID NOT DENY STUDENT A FAPE

28. Student alleges that Oakland was required to assess her memory deficits by means of an occupational therapy assessment, and to conduct a functional behavior assessment and an assistive technology assessment pursuant to Parent's June 2017

requests. Student maintains that Oakland's failure to assess pursuant to Parent's requests denied her a FAPE. Oakland contends it was not required to assess Student prior to her January 2018 triennial assessment due date.

Referrals for Reassessment

29. After a student has been determined to be eligible for special education, a reassessment shall be conducted if the district determines that the educational or related service needs, including functional performance of the student, warrant a reassessment, or if the parent or teacher requests reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the district agree otherwise, and shall occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

Assessment Timelines

30. All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal. Code Regs., tit. 5, § 3021, subd. (a).) A referral for assessment means "any written request for assessment to identify an individual with exceptional needs" made by a parent or teacher. (*J.G. v. Oakland Unified School District* (N.D. Cal., Sept. 19, 2014, No. C -14-00366 EDL) 2014 WL 12576617, at p. 9.) The school district must provide the student's parent with a proposed assessment plan along with notice of the parent's rights within 15 days of the referral for assessment, not counting days between the student's regular school sessions. (Ed. Code, § 56321, subd. (a).) For each student for whom a referral has been made 10 days or less prior to the end of the regular school year, the district shall develop the assessment plan within 10 days after the commencement of the subsequent regular school year. (*Ibid.*)

The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); Ed. Code, §§ 56043, subd. (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

31. During the June 23, 2017 IEP team meeting, Parent verbally requested an occupational therapy assessment for Student's short-term memory loss and a functional behavior assessment because of her school elopement attempts during periods of dissociation. On June 27, 2017, following the close of the 2017-2018 school year, Parent made a written request for Oakland to conduct an occupational therapy assessment, an assistive technology assessment, and a functional behavior assessment of Student. Student was entitled to the protections of the reassessment provisions. Oakland was required to provide Parent an assessment plan in response to her June 2017 assessment requests within 10 days of the start of the 2017-2018 school year, by August 23, 2018, and to complete these assessments within 60 days of obtaining consent. Oakland's failure to do so constitutes a procedural violation.

32. However, not all procedural violations result in a FAPE denial. Student did not establish that as of Parent's June 2017 request through December 7, 2017, the time period alleged in Student's claim, she had occupational therapy needs warranting assessment. Student's memory deficits were not an area of need that could be assessed through an occupational therapy assessment. Similarly, Student did not introduce any evidence of her assistive technology needs, or that she had behavior needs warranting assessment as of the start of the 2017-2018 school year. Therefore, Student did not prove that Oakland's failure to assess pursuant to Parent's June 2017 request denied her a FAPE.

ISSUE 5: OAKLAND FAILED TO IMPLEMENT THE APRIL 2017 IEP

33. Student contends that Oakland failed to implement her April 2017 IEP in

terms of providing a non-public school placement, speech and language services, counseling services, and social skills training, thereby denying her a FAPE from June 1, 2017, through the time of hearing. Oakland maintains that Student naturally matriculated to an Oakland-operated young adult program once she received her certificate of completion on June 30, 2017, and that it was no longer required to implement a non-public school placement. In the alternative, Oakland argues that it could not locate a non-public school willing to serve Student given her age and desire to pursue a diploma, and that it's October 2017 IEP offered a comparable program.

Material Failure to Implement

34. The IDEA's definition of a "free appropriate public education" includes "special education and related services that . . . are provided in conformity with the individualized education program required under section 1414(d) of this title." (20 U.S.C. § 1401(9).) As soon as an IEP is agreed upon by parents and a district, special education and related services must be made available to the student in accordance with her IEP. (34 C.F.R. § 300.323(c)(2).) A district must continually ensure that a placement is based on the student's IEP. (34 C.F.R. § 300.116(b)(2).) The Supreme Court has confirmed that the provision of special education in conformity with the IEP is an essential element of a FAPE: "[T]he definition [of FAPE] also requires that such instruction and services . . . comport with the child's IEP." (*Rowley, supra*, 458 U.S. 176, 189.)

35. A district commits a substantive violation of the IDEA when it departs from a provision of an agreed-upon IEP, except when the deviation can be characterized as only a minor variation from the IEP. (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).) There is no requirement that the student suffer demonstrable educational harm in order to prevail. (*Ibid.*) In *Van Duyn*, the Ninth Circuit held that failure to deliver related services promised in an IEP is a denial of FAPE when "there is more than a minor discrepancy between the services provided to a disabled

child and those required by the child's IEP." (*Ibid.*) In the course of its opinion the *Van Duyn* majority cautioned:

[N]othing in this opinion weakens schools' obligation to provide services "in conformity with" children's IEPs. § 1401(9). IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute — not to decide on its own no longer to implement part or all of the IEP. See §§ 1414(d)(3)(F), 1415(b)(3).

(*Ibid.*) The dissenting judge would have held that any deviation from an IEP provision automatically denied the student a FAPE. (*Id.* at pp. 826-827 [Ferguson, J., dissenting].)

OAKLAND WAS REQUIRED TO IMPLEMENT STUDENT'S APRIL 2017 IEP

36. Oakland was required to implement the April 2017 IEP once Parent signed consent on September 17, 2017. Parent consented to this IEP with exception to the offer of services, whether that be the "interim offer" which purportedly provided a temporary period of programming, or the outdated offer that simply indicated that all services had ended as of June 2017. As such, the September 2016 amendment offer of services remained in effect. Oakland remained obligated to provide Student with a non-public school placement, and her related services of school-based counseling, speech, and educationally related mental health sessions. Student's educationally related mental health services continued without interruption through the time of hearing. Student did not prove that social skills training, separate from speech services, was one of her IEP services.

37. Oakland failed to implement Student's April 2017 IEP from September 17,

2017, through the time of hearing by failing to offer and provide 120 minutes per week of speech and language services, 90 minutes per week of school-based counseling services, and placement at a non-public school. These were not minor deviations, but rather a wholesale disregard of Student's entitlement to receive her IEP placement and services, and a blatant denial of FAPE. Oakland materially failed to implement Student's IEP for which Student is entitled to a remedy, as detailed below.

Oakland's Affirmative Defense of Matriculation to Adult Programming

38. Oakland asserts that Student naturally matriculated to a young adult transition program upon receipt of her certificate of completion, such that it was no longer required to implement her operative IEP.

39. A statement of any new matter constituting a defense qualifies as an affirmative defense. (*Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 627.) "Generally, a party must raise an issue as an affirmative defense where the matter is not responsive to essential allegations of the complaint." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 698; *State Farm Mutual Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725; Code Civ. Proc., § 431.30, subd. (b)(2); 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 1004, pp. 425–426.) Because an affirmative defense requires an assertion of facts beyond those claimed by the petitioner, generally the party who offers an affirmative defense to the identified claims bears the burden of proof on the defense. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 969; *Hinerfeld-Ward, Inc. v. Lipian* (2010) 188 Cal.App.4th 86, 93; 1 Cal. Affirmative Defense, Burden of Proof (2d Ed. 2017) § 1:6.) In this case, Oakland bears the burden of proving its affirmative defense that Student matriculated and that such a matriculation relieved it of its duty to implement her respective operative IEP's, both prior to and after Parent signed partial consent to the April 2017 IEP.

STUDENT WAS ON A DIPLOMA TRACK WHEN SHE RECEIVED HER CERTIFICATE

40. Student's operative IEP as of June 30, 2017, when Star presented her with a certificate of completion, was the April 2015 IEP, with the services as agreed to in September 2016. The April 2015 IEP called for a non-public school placement and clearly stated that Student's graduation plan was to participate in a curriculum leading to a high school diploma. Although the individual transition plan attached to the April 2015 IEP noted that Student was participating in a course of study leading to a certificate of completion, Parent consented to the April 2015 IEP with the exception of the transition plan. If Oakland did not intend to offer Student a diploma track, it had the burden of correcting its error prior to Parent providing consent on May 11, 2015. Once Parent consented, Oakland was bound by the terms of the IEP as written. As determined by the Ninth Circuit,

An IEP, like a contract, may not be changed unilaterally. It embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP. If the District discovered that the IEP did not reflect its understanding of the parties' agreement, it was required to notify [Parent] and seek her consent for any amendment.

(*M.C.*, *supra*, 858 F.3d 1189, 1197.)

41. Oakland's next annual IEP from June 20, 2016, specified that Student's graduation plan was a certificate of completion, but Parent never consented to this IEP. Rather, at the September 15, 2016 amendment IEP team meeting, Parent initialed the box indicating that she agreed to the contents of the amendment to the underlying IEP dated June 20, 2016, but she never consented to the underlying IEP itself. Student's April

18, 2017 annual IEP also offered a certificate of completion track. However, Parent did not consent to this IEP until five months later. Therefore, when Star awarded a certificate of completion to Student, she was on a diploma track pursuant to the last implemented and consented to IEP from April 2015. As such, Student's June 2017 certificate of completion was in contravention to her operative IEP's prescribed diploma course of study. As of June 30, 2017, Student had not completed her prescribed course of study, which called for a high school diploma, though she persevered through very challenging circumstances, and made it to the end of the school year and her programming at Star.

PARENT CONSENT AUTHORIZED STUDENT'S CERTIFICATE AS OF SEPTEMBER 2017

42. On September 17, 2017, Parent consented to the April 2017 IEP, which placed Student on a certificate of completion track. Parent's consent retroactively authorized Student's receipt of her certificate of completion. Even so, Oakland did not meet its burden of proving that Student's receipt of her certificate of completion, effective September 17, 2017, by Parent consent, resulted in her natural matriculation to a young adult transition program.

Stay Put Provisions

43. Until due process hearing procedures are complete, a special education student is entitled to remain in her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006)1; Ed. Code, § 56505, subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's individualized education program, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) In California, "specific educational placement" is broadly defined as "that unique combination of facilities, personnel, location or equipment necessary to provide

instructional services to an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

44. Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy v. San Luis Coastal Unified School Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086 ["stay put" placement was advancement to next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F.Supp.2d 532, 534; *Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities* (Mar. 12, 1999) 64 Fed. Reg. 12616, [discussing grade advancement for a student with a disability].)

STUDENT DID NOT MATRICULATE TO ADULT PROGRAMMING

45. Oakland did not establish that Student's receipt of a certificate of completion resulted in her matriculation to adult programming or that the certificate extinguished its obligation to implement her operative IEP. None of Student's IEP's from 2013 forward identified the prerequisites for earning a certificate of completion, or that receipt of a certificate resulted in an automatic transfer to a young adult program, public or non-public. None of the IEP team meeting notes reflected any such discussions. As such, neither Student nor Parent, nor any of the IEP team members would have known when Student met the requirements, whether based on the number of years in attendance; the number of credits earned; the type or number of courses completed; seat time; Student's age; her exit date from special education programming; or any other criteria. Lacking this specificity as to the prescribed course of study, there was no agreement as to the requirements or effect of a certificate of completion. In addition, Student's IEP's did not include a projected date for attaining a certificate of completion,

but simply identified June 28, 2019, as an “anticipated completion date” without explaining what would be completed at that time.

46. Student did not earn any high school credit for the spring 2016 semester or for the entirety of the 2016-2017 school year. Ms. Reilly, head of school at Star Academy, admitted at hearing that despite her attempts to research the requirements for earning a certificate of completion from Star, there were no set requirements. While Oakland witnesses held the belief that Student naturally matriculated to a young adult program, Ms. Reilly persuasively established that the educational path for a student who received a certificate of completion depends on the student’s needs and trajectory, and that there are public and non-public programming options. It is the province of Student’s IEP team to determine her unique needs and appropriate program. Receiving a certificate of completion, on the facts presented here, did not divest Student’s IEP team of this role and obligation.

47. Oakland did not meet its burden of proof that Student naturally matriculated to post-secondary, young adult programming. Further, Oakland’s own actions of searching for a non-public school placement for Student following her receipt of a certificate of completion, including referring her to Bayhill, offering placement at Oakland Tech where she could pursue her diploma, and informally offering an independent study program, belie its stated position that Student had matriculated to young adult programming. Indeed, Oakland did not even propose a young adult program until May 2018, nearly a full school year after Student received her certificate of completion from Star.

48. A district is required to provide written notice to the parent whenever it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the student, or the provision of a FAPE. (20 U.S.C. §1415(b)(3); 34 C.F.R. § 300.503(a).) This includes a student’s graduation with a

regular diploma and exit from high school, as the graduation constitutes a change in placement due to the termination of services upon graduation. (34 C.F.R.

300.102(a)(3)(iii).) Similarly, a change from Star to an Oakland young adult program also constitutes a change in placement such that Student and Parent were entitled to procedural safeguards. Oakland recognized this requirement and provided Parent prior written notice dated June 12, 2018, in conjunction with its May 2018 IEP proposal to change Student's educational placement to its young adult program at Laney College.

49. Oakland committed to providing Student a non-public school placement through its April 2017 IEP offer shortly before her completion of Star programming. Its own IEP document specified that Student required a non-public school placement. It held this offer open even after determining that it could not find a suitable non-public school placement for Student. If Oakland believed that a non-public school was no longer appropriate for Student, it had the responsibility to make a new offer of program and placement through the IEP team process, and, if Parent refused to consent, to file to defend its offer. (*I.R., supra*, 805 F.3d 1164, 1169.) Oakland was required to implement Student's operative IEP until Parent consented to a new IEP or OAH found a new offer to be legally compliant.

50. Oakland did not meet its burden of proof that Student's receipt of a certificate of completion equated to a natural matriculation to a young adult program. Further, Oakland did not provide any persuasive legal authority for its contention that Student's receipt of a certificate of completion extinguished its duty to implement her IEP services and placement. Oakland's alternative argument, that it was excused from implementing Student's April 2017 IEP because there were no available non-public schools and that its offer of Oakland Tech satisfied its remaining obligation to offer a comparable program, is addressed below.

ISSUE 8: THE OCTOBER 2017 IEP TEAM WAS PROPERLY CONSTITUTED

51. Student argues that Oakland denied her a FAPE by failing to convene an appropriate and complete IEP team at the October 12, 2017 IEP team meeting when it included Ms. Baskind and allowed Mr. Pierce to serve the role of Student's special education teacher. Oakland asserts that Ms. Baskind and Mr. Pierce were appropriate members of Student's IEP team, and that Mr. Pierce was qualified to serve as the special education teacher.

Required IEP Team Members

52. An IEP is developed by an IEP team. The IEP team must include: (1) one or both of a student's parents; (2) no less than one general education teacher; (3) no less than one special education teacher or, if appropriate, a special education provider of the student; (4) a representative of the district who is qualified to provide or supervise specially designed instruction, and is knowledgeable about the general education curriculum and the availability of district resources; (5) an individual who can interpret the instructional implication of assessment results; (6) at the discretion of the parent(s) or district, any other individual who has knowledge or special expertise regarding the student, including related services personnel, as appropriate; and (7) whenever appropriate, the student with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, § 56341, subd. (b).)

53. To satisfy the requirement of ensuring that a special education teacher or provider is a member of the student's IEP team, that member need not be the current teacher or provider, but he or she must have been the teacher or provider *for the student* at issue. (*R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 940 (italics added).)

54. The school district may designate one of the district team members, such

as a special education teacher, to also serve as the agency representative, so long as that member meets the legal criteria for serving as the agency representative (qualified to provide or supervise specially designed instruction; and knowledgeable about general education curriculum and district resources). (34 C.F.R. § 300.321(d), Ed. Code, § 56341, subd. (e).) The determination of whether an individual has knowledge or special expertise regarding the student is made by the party who invited the individual to be a member. (34 C.F.R. § 300.321(c); Ed. Code, § 56341, subd. (b)(6).)

55. The school district is required to give notice of the IEP team meeting that indicates who will be in attendance. (34 C.F.R. § 300.322(b)(1)(i); Ed. Code, § 56341.4, subd. (c).) The Office of Special Education Programs (OSEP) is a division of the United States Department of Education charged with administering the IDEA and developing and interpreting special education regulations. It has determined that providing notice of the titles of the individuals who will be attending, meaning their positions as employees of the district, as opposed to their individual names or even the role they will serve at the IEP team meeting, meets the notice requirement. (*Letter to Livingston* (OSEP 1994) 21 IDELR 1060; *Letter to Livingston* (OSEP 1995) 23 IDELR 564; *Letter to Anonymous* (OSEP 2008) 50 IDELR 259.)

56. The September 22, 2017 Notice of Meeting for the October 12, 2017 IEP team meeting, identified by name that Mr. Pierce would serve as the administrator and that Oakland's Director of Legal Services Ms. Baskind would also be in attendance. Ms. Baskind was listed as "other," meaning, that Oakland had invited her as an "other individual who has knowledge or special expertise regarding the student." (Ed. Code, § 56341, subd. (b)(6).) Ms. Baskind had knowledge regarding Student and was an appropriate team member. The fact that she holds a juris doctorate degree does not change the analysis. She is not and was not an attorney, nor purporting to appear as an attorney for Oakland. Parent was on notice of Ms. Baskind's title and that she would be in attendance.

57. At the October 2017 IEP team meeting, Ms. Baskind participated as Oakland's representative rather than Mr. Pierce. Ms. Baskind met the requirements for serving as the representative. The law does not require Oakland to provide notice to Parent as to the identity of the participants by name, or by the role they will serve at the IEP team meeting, but only by the position they hold within the district. Although Oakland's decision to have Ms. Baskind switch roles may have contributed to an atmosphere of mistrust, it was not legally prohibited. As such, Student did not establish that Oakland committed a procedural violation when it had Ms. Baskind serve the role of agency representative instead of Mr. Pierce.

58. Mr. Pierce attended the October 2017 IEP team meeting as a special education teacher. He is a credentialed special education teacher and Student's case manager. Although Mr. Pierce had never instructed Student, Oakland was not required to ensure the attendance of one of Student's special education teachers, because a special education provider of Student was in attendance, namely, her educationally related mental health services counselor. Student did not prove that Oakland failed to convene a legally appropriate IEP team for the October 2017 IEP amendment meeting.

ISSUE 3(D): OAKLAND WAS NOT REQUIRED TO ASSESS STUDENT PRIOR TO OFFERING A PUBLIC PLACEMENT

59. Student alleges Oakland was required to assess her educational needs prior to offering her a change in placement from a non-public school setting to a public high school setting in October 2017. Oakland contends that it had no duty to assess; that it did not offer a change in placement but rather a change in location; and that its October 2017 offer of Oakland Tech's special day class was comparable to her non-public school placement.

60. Student did not provide any legal authority for her contention that

Oakland was required to conduct an assessment prior to offering a change in programming or placement. No violation was established in this regard.

ISSUE 6: OAKLAND FAILED TO OFFER AND PROVIDE AN APPROPRIATE PROGRAM AND PLACEMENT DURING THE 2017-2018 SCHOOL YEAR THROUGH THE TIME OF HEARING

61. Student asserts that beginning June 1, 2017, Oakland denied her a FAPE by failing to offer and provide appropriate programming, specifically reading and comprehension services, vision therapy, and life skills training, as well as an appropriate placement. Oakland counters that upon Student's receipt of a certificate of completion, it was no longer required to offer and provide a non-public school. Further, Oakland asserts that it offered an appropriate, comparable program at Oakland Tech's upper campus, and that Student did not require reading comprehension or vision therapy services.

62. Oakland offered and provided Student with her IEP services and placement at Star through June 30, 2017, to the extent she was able to avail herself of her educational program. This included Star's reading and language intervention programs, a transitions class, and a life skills class. Star's teachers and speech-language pathologist were implementing Student's individual transition plan and annual goals that furthered her life skills such as social communication, problem solving, self-advocacy, career awareness, job readiness, coping strategies, and organization. To the extent Student contends that her programming was deficient for failing to provide appropriate reading and comprehension services and life skills training, Student did not meet her burden of proof. Further, Student did not prove that she required vision therapy to benefit from her education. Student did not prove a denial of FAPE with regard to her program and placement from June 1, 2017, through June 30, 2017.

63. The next period of time to analyze in relation to this claim runs from the

start of the 2017-2018 school year through the October 12, 2017 amendment IEP team meeting. The school year started, and Student did not have a program or placement to attend. During this period of time, Oakland failed to offer or provide any programming or placement, and thereby denied Student a FAPE.

Oakland Did Not Establish It Offered a Comparable Program

64. Oakland argues that it was not required to provide Student a non-public school placement but rather to offer and provide a comparable placement because there were no suitable non-public schools willing to serve Student. Oakland believes that its offer of Oakland Tech at the October 2017 IEP team meeting satisfied its obligation.

65. Oakland's October 12, 2017 IEP amendment made changes to the April 2017 annual IEP, specifically the placement offer. However, the April 2017 IEP did not include a full program offer in terms of services. Rather, Oakland was waiting for a further IEP team discussion and determination as to what Student's new placement and program would be, before updating its offer of services. At the October 2017 amendment IEP team meeting, Oakland offered Student an educational placement at the counseling-enriched special day class on the upper campus of Oakland Tech. Oakland did not offer any programming or update its underlying April 2017 offer of services to reflect the type, duration, and frequency of any specialized academic instruction or related services that it was committing to provide to Student.

66. Having failed to offer any programming, it is not possible to determine whether the offer of placement was appropriate, or to analyze whether it was comparable to Star. A student's "current placement," for the purposes of stay put, includes the IEP with its program offer, as well as the setting in which the IEP is implemented. (*Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, (Mar. 12, 1999) 64 Fed. Reg. 12616.) As

such, Oakland's offer of Oakland Tech did not cut off its liability for failing to offer and provide appropriate programming and placement. Further, Oakland did not establish that its October 2017 IEP offer of placement only was comparable to Student's non-public program at Star.

67. As such, Student met her burden of proof that Oakland denied her a FAPE by failing to offer and provide an appropriate program and placement from the start of the 2017-2018 school year. This denial of FAPE continued through the time of hearing given the determination below that Oakland's May 2018 IEP offer was procedurally defective to such an extent that it substantively denied Student a FAPE. Her remedy is discussed below.

ISSUE 3(D): OAKLAND'S FAILURE TO ASSESS PURSUANT TO PARENT'S NOVEMBER 2017 REQUEST DID NOT DENY STUDENT A FAPE

68. Student argues that Parent's November 2017 repeated request for occupational therapy and assistive technology assessments, and new request for a formal transition assessment and an independent neuro-psychological evaluation, again triggered Oakland's duty to perform these assessments. Oakland contends that pursuant to Parent's November 2017 assessment request, it timely offered a comprehensive assessment plan and completed all necessary assessments. Oakland asserts it was not required to offer an independent neuro-psychological evaluation as it had not conducted any psychological evaluation with which Parent could have disagreed, since the time it granted her prior independent evaluation in 2016.

69. Oakland responded to Parent's November 27, 2017 written request for a comprehensive occupational therapy, a formal transition, and assistive technology assessments by timely providing a written assessment plan covering these areas on December 7, 2017. Student did not establish a procedural violation in this regard. Similarly, there is no legal requirement that Oakland assess Student upon Parent's

request for an independent neuro-psychological evaluation. Oakland completed an occupational therapy and transition assessment pursuant to the December 2017 assessment plan. However, Oakland's failure to timely complete these assessments, and its failure to conduct assistive technology and health assessments are analyzed below.

ISSUES 2, 4, 9: OAKLAND'S ASSESSMENTS WERE NOT LEGALLY COMPLIANT AND ITS FAILURES TO TIMELY ASSESS AND TIMELY CONVENE AN IEP TEAM MEETING DENIED STUDENT A FAPE

70. Oakland alleges that its psycho-educational, academic, speech and language, occupational therapy, and transition assessments met all legal requirements such that Student is not entitled to independent evaluations in these areas at public expense. Oakland argues that to the extent its assessments were late, this was Parent's fault because she did not timely consent to the assessment plan and delayed the assessments and the convening of the IEP team meeting. Oakland contends that the short delay did not result in a substantive denial of FAPE.

71. Student maintains that Parent did not delay the assessment process nor the convening of the IEP team meeting, and that the delay of more than two months denied Parent meaningful participation and impeded Student's right to a FAPE. Further, Student asserts that the failure of Oakland's assessors to conduct class observations, obtain teacher input, complete comprehensive assessments, and provide sufficient recommendations to address her needs and her goal of obtaining a diploma, rendered Oakland's assessments deficient. Student also alleges that Oakland's failure to conduct health and assistive technology assessments pursuant to the assessment plan denied her a FAPE.

Oakland Timely Responded to Request for Independent Evaluations

72. The importance of timely, comprehensive evaluations is underscored by

the IDEA's provisions that allow parents, who disagree with district evaluations, to seek an independent evaluation at public expense. The procedural safeguards of the IDEA provide that under certain conditions, a parent is entitled to obtain an independent evaluation of her child at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a) & (b).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent has the right to request an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests a publically-funded, independent evaluation, the school district must, "without unnecessary delay," either initiate a due process hearing to show that its evaluation is appropriate, or provide the independent evaluation at public expense. (34 C.F.R. § 300.502(b)(2); see Ed. Code, § 56329, subd. (c).)

73. On August 30, 2018, Parent requested independent educational evaluations in the areas of academics, speech and language, occupational therapy, social skills, transition, and neuro-psychology. Oakland denied her requests through a prior written notice dated August 31, 2018. Without unreasonable delay, Oakland filed a request to amend its complaint to defend its assessments on September 4, 2018, and this hearing ensued.

Oakland Gave Proper Notice But Failed to Meet Required Timelines

74. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(i); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the school district must provide proper notice to the student and parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of a proposed written assessment plan describing any evaluation procedures the district proposes to use and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C. § 1414(b)(1); 34 C.F.R. § 300.304(a); Ed. Code, § 56321,

subd. (a).) The proposed assessment plan must be written in a manner that is easily understood and in the parent's primary language. (Ed. Code, § 56321, subd. (b)(1) & (2).) It shall explain the types of assessments to be conducted and state that the assessment will not result in an IEP without parental consent. (Ed. Code, § 56321, subd. (b) (3) & (4).)

75. The parent shall have at least 15 days to consider the assessment plan. (Ed. Code, § 56321, subd. (c)(4).) The assessment may begin immediately upon receipt of the parent's consent. (*Ibid.*) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); Ed. Code, §§ 56043, subd. (f)(1), 56302.1, subd. (a), and 56344, subd. (a).) These timelines are not idle requirements but rather highlight the importance of prompt consideration of a student's educational needs.

76. Oakland provided Parent a legally compliant assessment plan and a copy of her procedural rights on December 7, 2017. Parent signed the assessment plan, and Oakland received her consent to assess on January 17, 2018. The law does not require a parent to consent to an assessment plan within a prescribed period of time. That Parent did not readily consent to the plan did not relieve Oakland of its responsibility to timely assess Student. As such, Oakland was legally required to complete its assessments, and prepare and review written assessment reports at an IEP team meeting within 60 days of receiving Parent's consent, on or before March 19, 2018.

77. Oakland assessors did not contact Parent to begin the process of scheduling assessments until February 23, 2018. Oakland assumed the risk of waiting 37 days before it scheduled testing sessions. Oakland then scheduled Student's first assessment session for March 5, 2018. Parent did not delay the assessment process. Student participated in near daily assessments for the first two weeks of March with the final session occurring on March 22, 2018, at the request of the assessor. Parent initially

placed conditions on the assessments, but she promptly withdrew the conditions and no delay ensued. The fault for the late assessments rests solely on Oakland.

78. All of the testing sessions, with the exception of one follow-up session, were completed by March 14, 2018. However, Mr. Pierce waited to contact Parent to schedule Student's IEP team meeting until April 9, 2018, following spring recess. The first date Oakland proposed was April 13, 2018. It should not have been a surprise to Oakland that it would take some time to schedule an IEP assessment review team meeting, given the number of team members. Parent was not required to accept the first date Oakland proposed. Rather, the IEP team meeting shall be scheduled at a mutually agreed-upon time and place. (Ed. Code, § 56341.5, subd. (c).)

79. While there were several emails back and forth between Parent and Oakland proposing various days and times, the evidence did not corroborate Oakland's assertion that Parent delayed the scheduling of the IEP team meeting. It was Oakland's responsibility to timely begin the scheduling process. Eventually the parties agreed to meet on May 7, 2018. Given the number of assessments to be discussed, an additional meeting was required to complete the assessment review. Oakland should have anticipated this need for a two-part meeting. Oakland proposed that Student's IEP team reconvene more than two weeks later on May 24, 2018. Oakland's failure to timely assess Student and timely convene an IEP team meeting within 60 days of January 17, 2018, constitute procedural violations.

LATE ASSESSMENTS DENIED STUDENT A FAPE

80. The next question to determine is whether Oakland's delay in completing Student's assessments and convening the IEP team meeting resulted in a substantive denial of FAPE. Had Oakland timely assessed Student and reviewed the assessment results in an IEP team meeting by March 19, 2018, it is likely Student's educational program and placement would have been determined prior to the start of the 2018-

2019 school year. Parent could have requested independent evaluations sooner, and Oakland could have filed to defend its assessments and IEP offer sooner, resulting in an earlier resolution.

81. Oakland claims that Student's 2018 annual IEP was not due until April 18, 2018. The law requires Student's IEP team to meet at least annually to review her progress and revise her program. (Ed. Code, § 56343, subd. (d).) The delay in this case in convening Student's IEP team to review the assessment results was substantial, in light of the fact that Oakland had never completed Student's 2017 annual IEP offer. The April 2017 IEP did not include an offer of services, nor did any of the amendment IEP's. Student was entitled to a timely review of her 2018 assessments and for her IEP team to timely determine the content of her IEP.

82. The law requires a district to ensure that every eligible student has an IEP in place for the start of the school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323 (a); Ed. Code, § 56344, subd. (c).) This was especially crucial for Student. Student made no progress on her IEP goals for the 2016-2017 school year, and had not earned any academic credits since fall 2016. Student did not attend any educational program for the 2017-2018 school year. The 2018-2019 school year is her final year of special education programming as she will be 22 years old in May 2019. On the facts of this case, Oakland's approximate two-month delay deprived Student of educational benefit, and significantly impeded Parent's ability to participate in the IEP process. Oakland's failure to timely assess Student's academic, psycho-educational, occupational therapy, transition, and speech and language needs and review the assessment results at an IEP team meeting by March 19, 2018, denied Student a FAPE. Student's remedy is discussed below.

NO FAPE DENIAL FOR FAILING TO ASSESS HEALTH AND TECHNOLOGY NEEDS

83. Oakland failed to complete both a health assessment and an assistive

technology assessment of Student pursuant to its December 2017 assessment plan. These two failures constitute separate procedural violations. As of March 2018, Student's epileptic seizures remained medically controlled. Student had not been prescribed any psychotropic medications since prior to June 2017, and, therefore, had not experienced any adverse side effects since that time. On these facts, Student did not meet her burden of proof that Oakland's failure to assess her health needs in spring 2018, resulted in a substantive denial of FAPE.

84. Similarly, Student did not prove that she had needs in the area of assistive technology warranting assessment from the date Oakland offered its assessment plan through the time of the May 24, 2018 IEP team meeting. At that meeting, Parent agreed to postpone an assistive technology assessment until Student was back in an educational setting. As such, Student did not meet her burden of proving that Oakland's failure to conduct an assistive technology assessment substantively denied her a FAPE.

Qualified Assessors administered Proper Tools Appropriately

85. Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the local educational agency." (Ed. Code, §§ 56320, subd. (g), 56322.) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, §§ 56324, subd. (a), 56320, subd. (b)(3) [tests of intelligence and emotional functioning shall be administered by a credential school psychologist].) Assessments and other evaluation materials must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iv) and (v); 34 C.F.R. § 300.304(c)(iv) and (v); Ed. Code, § 56320, subd. (b)(3).)

86. No single measure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program

for the student. (20 U.S.C. § 1414 (b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Rather, the assessor must use a variety of technically sound instruments. (20 U.S.C. § 1414 (b)(2)(A); 34 C.F.R. § 300.304(b)(1) & (2).) The selected instruments are to also assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 330.304(b)(3).) An assessment tool must “provide relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) A school district is required to use those assessment tools necessary to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, to assist in determining the content of the student’s IEP. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1)(ii); see also Ed. Code, § 56320, subd. (b)(1).)

87. Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory; must be provided and administered in the student’s primary language or other mode of communication, unless this is clearly not feasible, and in the form most likely to yield accurate information on the student’s functioning; and must be used for the purposes for which the assessment or measures are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(i), (ii) & (iii); 34 C.F.R. § 300.304 (c)(1); Ed. Code, § 56320, subds. (a), (b)(1) & (2).)

88. Oakland’s assessors were qualified and competent to assess Student in their respective professional areas of expertise. They were knowledgeable of Student’s suspected areas of disability, and selected and administered a variety of appropriate tools which they were experienced in using. Oakland’s assessors administered and scored the testing instruments in accord with the publishers’ instructions. They obtained valid data on Student’s functioning, strengths, and weakness that could assist the IEP team in determining her programming.

Assessments must be Sufficiently Comprehensive

89. Given the importance of assessments, the IDEA and accompanying regulations set forth an extensive set of procedural safeguards to ensure that evaluations 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.*, *supra*, 822 F.3d 1105, 1110.) A district must, therefore, ensure that the evaluation is sufficiently comprehensive to identify all of the student’s needs for special education and related services, whether or not commonly linked to the identified disability category. (34 C.F.R. § 300.304(c)(6); *Letter to Baus* (2015 OSEP) 65 IDELR 81 [right to request an independent evaluation in an area district failed to assess].)

Assessment Report Requirements

90. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. § 300.306(a)(1); Ed. Code, § 56329, subd. (a)(1).) However, in order to aid the IEP team in determining eligibility, an assessor must produce a written report that includes information about whether the student may need special education and related services, along with the basis for that determination. (Ed. Code, § 56327, subds. (a) and (b).)

91. Upon completion of an assessment, the district shall provide parents with a copy of the evaluation report and the documentation of determination of eligibility. (20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306(a)(2); Ed. Code, § 56329, subd. (a)(3).) The personnel who assess a student 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) for students with learning disabilities, whether there is such a

discrepancy between achievement and ability that it cannot be corrected without special education and related services; and (7) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage. (Ed. Code, § 56327.)

92. At hearing and in her closing brief, Student pointed to the legal requirement that an IEP team and other qualified professionals must, as appropriate, review existing evaluation data including current classroom observations and teacher observations in order to determine, as part of the reevaluation process, if any additional data is required to determine the student's needs. (34 C.F.R. § 300.305(a).) However, Student did not present any legal authority for her contention that an assessor is required to conduct classroom observations and obtain teacher input. At the time of the assessments, Student was not attending school and did not have a teacher.

93. When determining whether a student has a specific learning disability, the law requires that an IEP team member observe the student in her learning environment to document academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a); Ed. Code § 56341, subd. (c).) However, there is an exception for students who are not attending school. For a student who is not attending school, and is suspected of having a specific learning disability, the student must be observed in an environment appropriate to her age. (34 C.F.R. § 300.310(c); Ed. Code § 56341, subd. (c).) The testing environment was an appropriate environment for the assessors to obtain observation data relevant to Student's functioning.

94. Oakland's assessors prepared written assessment reports, and Parent received a copy of each report prior to the IEP team meeting wherein it was discussed. Oakland's speech and language, occupational therapy, and transition assessments and reports were sufficiently comprehensive to identify Student's strengths and weaknesses and whether she had any educationally related needs in these areas. Oakland's psychological assessment was not sufficiently comprehensive, and the psychological and

academic assessment reports were deficient as discussed below.

Determining a Specific Learning Disability

95. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities. (34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030(b)(10).) The basic psychological processes include attention, visual processing, auditory processing, phonological processing, sensory-motor skills, and cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030(b)(10).)

96. In California, a student is eligible for special education in the category of specific learning disability if, among other things, she exhibits a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).) A severe discrepancy exists if, on standardized tests, a student's scores show a standard deviation of 1.5 or more between ability and achievement according to a complex mathematical formula set forth by regulation. (*Ibid.*) This difference must be adjusted for a standard error of measurement not to exceed four standard score points. (*Ibid.*) If such a discrepancy exists, it must be corroborated by other assessment data including tests and observations. (*Ibid.*)

97. If standardized tests do not reveal a severe discrepancy, the IEP team may still find that a severe discrepancy exists, provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. (Cal. Code Regs., tit. 5, §

3030, subd. (b)(10)(B)(3).) The written report must include a statement of the area, the degree, and the basis and method used in determining the discrepancy, and shall contain the information considered by the team. (*Ibid.*)

98. In determining whether a student has a specific learning disability, a school district is not required to take into consideration whether a student has a severe discrepancy between achievement and ability. (20 U.S.C.A. § 1414 (b)(6)(A); Ed. Code, § 56337, subd. (b).) A student may be determined to have a specific learning disability if the student does not achieve adequately for her age or to meet grade-level standards in oral expression; listening comprehension; written expression; basic reading skill, or reading fluency or comprehension; or mathematics calculation problem solving; and the student either does not make sufficient progress in response to research-based interventions, or exhibits a pattern of strengths and weaknesses in performance and/or achievement, relevant to the identification of a specific learning disability. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(1) & (2).)

ACADEMIC AND PSYCHOLOGICAL REPORTS WERE SUBSTANTIVELY DEFICIENT

99. The education assessment report prepared by Mr. Pierce listed Student's scores from the academic achievement subtests, but failed to explain the significance of the data such that the IEP team could rely on it to develop an appropriate IEP. The education report characterized all of Student's standard scores as "below average" even though her math fluency standard score of 59 fell below the low range of functioning (standard scores 60-70). The report was notable for its missing link between Student's below average academic scores and deficient math fluency score, and how these deficits impacted her learning and programming needs.

100. Even more concerning, the academic report included contradictory information regarding Student's reported standard scores and percentiles. It erroneously listed Student's percentiles as ranges that far exceed the level of functioning reflected

by her reported standard scores. This error rendered the written report confusing, called into question the accuracy of the reported scores, and undermined its reliability. Indeed, in presenting his reported data at the May 2018 IEP team meeting, Mr. Pierce misinformed the IEP team that Student's scores had greatly improved since her last triennial academic evaluation in 2015. The only data point supporting this was the erroneously reported percentile ranges. Rather, Student's below average scores were consistent with prior testing.

101. In the psychological report, Ms. Nachtman included a partial description of the elements of a specific learning disability based on the severe discrepancy method. However, the report failed to define what constitutes a severe discrepancy between cognitive ability and academic achievement, or to provide the mathematical formula of how to calculate such a discrepancy. This calculation was important given Student's discrepant cognitive results on the Wechsler Nonverbal Scale of Ability. While Ms. Nachtman reasonably concluded that Student had processing deficits, she failed to analyze the testing data and compare Student's academic scores with her cognitive ability. Ms. Nachtman did not identify whether or not Student had a severe discrepancy between ability and achievement in any academic area, or how Student's processing disorder and academic deficits impacted her ability to access her education. In her report, she concluded that Student no longer qualified for special education as a student with an intellectual disability, but she failed to determine whether Student may meet the criteria for having a specific learning disability, pursuant to any of the established methods for making this determination whether by a severe discrepancy, response to intervention, or pattern of strengths and weaknesses analysis.

102. While it is the IEP team that determines eligibility, the team is aided by the assessor's report and opinion in making that determination. The important role of the IEP team in determining eligibility does not relieve the assessor of the duty to include

within the written report an analysis of the data with regards to possible eligibility categories. While there was no dispute that Student remained eligible for special education and related services, there was a question of which eligibility category most accurately described her academic and functional profile. In failing to address this, Oakland's psychological assessment report did not shed light on the types of specialized academic instruction and related services Student required. Oakland failed to complete a legally compliant assessment report as it failed to include the required components of analyzing whether Student had a severe discrepancy between achievement and ability, and whether such a discrepancy could not be corrected without special education services; and determining whether Student might need special education and related services, and providing the basis for that determination.

103. The failure of the psychological assessment to address whether or not Student had a severe discrepancy between her cognitive functioning and academic ability; the fact that the psychological report did not include all required components; and the inaccurate reporting of Student's academic percentiles constitute procedural violations. These assessment deficits deprived the IEP team of relevant information as to Student's academic needs, which were supposed to be uncovered by the assessment results, and what she might require to make appropriate progress in light of her unique circumstances. Understanding Student's academic needs was critical to developing an IEP that allowed for appropriate progress. This was true even though Student had received a certificate of completion and even though she was 21 years old. The psychological and academic reports were insufficient in that they failed to provide Student's IEP team with understandable, comprehensive assessment information upon which to develop an appropriately ambitious educational program for her.

104. Oakland's determination at the May 7, 2018 IEP team meeting that Student no longer met the eligibility criteria for intellectual disability, and instead

qualified as a student with a specific learning disability, did not cure its failure to identify her needs relative to her specific learning disability and any areas of severe discrepancy. Student's eligibility category did not determine her needs. As explained by the Seventh Circuit Court of Appeal,

The IDEA concerns itself not with labels, but with whether a student is receiving a [FAPE]. A disabled child's [IEP] must be tailored to the unique needs of that particular child The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [a student's] multiple disabilities.

(*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055.)

105. The deficient psychological and academic assessment reports impeded the ability of the IEP team to determine Student's academic needs and how these impacted her ability to access her education and work on her transition goals. These two concepts, a student's needs and their impact, is the foundation for developing an appropriate program and determining services and placement. Student was not simply entering her final year of special education eligibility, she was and is facing her future life beyond the borders of special education. The law requires that Student's IEP team assist her in this regard. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8) [an IEP for a student 16 years of age and older must include post-secondary training, education, employment, and, as appropriate, independent living skills goals, along with transition services to support achievement of these goals].)

106. These procedural deficiencies significantly impeded Parent's ability to participate in the IEP decision making process, and deprived Student of educational benefit. If Student's IEP team, including Parent, had been provided with clear data as to

the academic areas in which Student had a severe discrepancy between her ability and achievement, or an understanding of the nature of her specific learning disability, alternate goals, services, or programming would likely have been bettered considered. Oakland's psychological and academic assessment reports essentially reported that Student was no longer intellectually delayed, and that she was performing academically from the 53rd to 86th percentiles. Without complete, reliable, and comprehensible results, Parent could not understand Student's learning needs and was unable to advocate for an appropriate program. The assessment and reporting deficiencies were material and resulted in substantive harm, rendering the assessments fundamentally flawed. Student's remedy of independent evaluations is detailed below.

ISSUE 1: PROCEDURAL VIOLATIONS RENDERED THE MAY 2018 IEP OFFER SUBSTANTIVELY DEFECTIVE

107. Oakland contends that its May 2018 IEP offer met all legal requirements and offered Student a FAPE in the least restrictive environment given her age, disabling conditions, and post-secondary transition needs. Student asserts that the May 2018 IEP failed to address her unique needs or provide her with an appropriately ambitious program that would allow her to obtain a diploma.

Analysis of a FAPE Offer

108. When a school district seeks to demonstrate that it offered a FAPE, the legal analysis consists of two parts. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the student's unique needs, and reasonably calculated to enable the student to receive educational benefits, and appropriate in light of the student's circumstances. (*Ibid.*; *Endrew F., supra*, 137 S.Ct. 988, 1001.)

109. In *Rowley*, the Supreme Court emphasized the importance of adherence to the procedural aspects of the IDEA. In pertinent part the Court found,

...we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.

(*Rowley, supra*, 458 U.S. at pp. 206-207.)

110. Mere technical violations will not invalidate an IEP. However, as determined by the Ninth Circuit, "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed."

(*Amanda J., supra*, 267 F.3d 877, 892.)

Oakland's May 2018 IEP Offer is Structurally Defective

111. As determined above, Oakland's failure to timely convene an IEP team meeting on or before March 19, 2018, resulted in a substantive denial of FAPE as it delayed a determination of Student's unique educational needs and resolution of her 2018-2019 school year program and placement. A timely triennial assessment and IEP team meeting were especially critical given Student's unique circumstances of having earned no high school credit for her last year and a half in a non-public school program; having been without a school program and placement for an additional year; and facing

her final year of special education programming.

112. Additionally, Oakland's May 2018 IEP was structurally defective as it was based on substantively deficient psychological and academic assessment data detailed above. As such, Student's IEP team could not appropriately and sufficiently identify her unique educational needs and develop "a plan for pursuing academic and functional advancement." (*Endrew F.*, *supra*, 137 S.Ct. 988, 999.) The IEP team could not appropriately develop a program for Student without prompt, reliable, complete assessments. The May 24, 2018 offer came on the eve of the 2018 extended school year. Oakland did not provide Parent the final written IEP until June 12, 2018, after the end of the regular school year. The offer of extended school year, as a means to stem further regression following a year of no educational program, and to provide a transitional period back to public school programming, was vital to Student's final year of special education services.

No Clear Written Offer of Extended School Year Services

113. "[T]he purpose of an IEP is to embody the services and educational placement or placements that are planned for the child." (*N.E. v. Seattle Sch. Dist.* (9th Cir. 2016) 842 F.3d 1093, 1096-97.) The IEP "embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP." (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1197 (*M.C.*) cert. denied sub nom. *Antelope Valley Union High School Dist. v. M.C.* (2017) 138 S.Ct. 556 [199 L.Ed.2d 437].) A failure to include the required specificity as to the programming offer would "render the IEP useless as a blueprint for enforcement" and infringe on parental participatory rights which include the development and the enforcement of an IEP. (*M.C.*, *supra*, 858 F.3d 1189, 1197-99.)

Extended School Year Services

114. California Code of Regulations, title 5, section 3043, provides that extended services shall be provided for each individual with exceptional needs who requires special education and related services in excess of the regular academic year. Students to whom extended programming must be offered under section 3043:

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

115. The purpose of special education during the extended school year is to "prevent serious regression over the summer months." (*Hoeft v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; *Letter to Myers* (OSEP 1989) 16 IDELR 290.)

116. One of the procedural prerequisites is that a school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*)). An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it, including whether to accept or reject it. (*Ibid.*) In *Union*, the Ninth Circuit held, "We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously." (*Ibid.*)

117. During the May 2018 IEP team meetings, there was no discussion of extended school year services. Student had received extended school year services each of her years at Star. Her prior non-public school program during the extended school

year mirrored her regular school year program. The May 2018 IEP was her first IEP offer for services and placement at an Oakland program since the 2012-2013 school year, as the October 2017 amendment IEP did not include an offer of services. On the May 2018 IEP, Oakland offered extended school year services as evidence by the checked box indicating "yes" next to this listed service on the IEP document. However, Oakland failed to identify what placement and services would be included for the 2018 extended school year.

118. A clear offer was particularly important as the extended school year program for the young adult programs differed from the regular school year. Further, Student had been out of school for the 2017-2018 school year, and this offer immediately preceded the 2018 extended school year. Therefore, the specifics of this offer and what Student's program would look like in terms of services and hours, and any transition period to ease her back into public programming was critical. Oakland's failure to commit to and provide a specific offer of extended school year significantly impeded Parent's ability to participate in the decision making process and denied Student a FAPE.

119. Oakland filed for due process to prove that the entirety of its May 2018 IEP offer was legally compliant, both procedurally and substantively. The offer of extended school year failed to provide a clear written offer of FAPE, in violation of *Union*. That Parent was not likely to consent to any offer of the young adult program does not vitiate Oakland's duty to provide a clear written offer. As the Ninth Circuit determined, "We find that a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union, supra*, 15 F.3d 1519, 1526.)

120. The cumulative impact of Oakland's failure to timely assess Student, and to

timely review her assessments at an IEP team meeting; coupled with its deficient psychological and academic assessment reports that failed to provide required information to the IEP team members; and its failure to make a clear offer of extended school year services following an entire school year of failing to offer and provide an appropriate program, undermined the substance of its May 2018 IEP offer.

121. To be found appropriate under the IDEA, an IEP must be procedurally and substantively compliant. In the aggregate, Oakland failed to establish it procedurally complied with the IDEA in developing its May 2018 IEP offer. These were not minor procedural violations, but significant violations such that the substantive appropriateness of the May 2018 IEP offer is not reached. Oakland did not meet its burden of proving that it offered Student a FAPE in the least restrictive environment in the May 2018 IEP.

ISSUE 7: OAKLAND PREPARED AN APPROPRIATE INDIVIDUAL TRANSITION PLAN

122. Student argues that Oakland denied her a FAPE because its May 2018 individual transition plan did not include her goal of obtaining a high school diploma, incorrectly identified her career goal, and its proposed transition services would not assist her in obtaining her goals. Student alleges that Oakland unilaterally implementing modifications to her transition plan without Parent's consent. Oakland contends that it developed an appropriate transition plan based on Student's interests, preferences, and goals as determined through Student's transition assessment.

Transition Services and Assessment

123. Beginning not later than the first IEP to be in effect when a student with a disability turns 16, and updated annually thereafter, the IEP must include appropriate, measurable, post-secondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living

skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8).) Every such IEP must also include transition services to assist the student in reaching those post-secondary goals. (*Ibid.*) Post-secondary goals are those goals that a student hopes to achieve after leaving secondary school (i.e., high school). (*Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities* (Aug. 14, 2006) 71 Fed. Reg. 46668.)

124. Transition services are defined as a coordinated set of activities for a special needs student that: (A) is designed within a results-oriented process focused on improving the student's academic and functional achievement to facilitate movement from school to post-school activities, including post-secondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation; (B) is based upon the individual needs of the student, taking into account his strengths, preferences, and interests; and (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(a); Ed. Code, § 56345.1, subd. (a).)

125. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief only upon a showing of a loss of educational opportunity or a denial of a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [notation in IEP that the required transition plan would be "deferred" was procedural violation where student was not in a position to benefit from it]; *A.S. v. Madison Metro School Dist.* (W.D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as procedural violation]; *Virginia S. v. Department of Education, State of Hawaii* (D. Hawaii, January 8, 2007, Civ. No. 06-00128 JMS/LEK) 2007

WL 80814, p. 10 [transition plan violated procedural requirements of IDEA when it was not based on an interview with the student or parents, did not reference student's interests, and generically described post-secondary goals as graduation from high school and employment, but was ultimately found to be harmless error; transition plan assumes greater importance as student approaches graduation]; *C.B. v. Garden Grove Unified School District* (9th Cir. May 28, 2014, No. 12-56911) 2014 WL 2199324, 575 Fed. Appx. 796, 799 [nonpub. opn.] [inadequate transition service did not result in a FAPE denial as student had several years to receive services and work on transition goals].)

126. Although Student's transition plan claim dates back to June 2017, she did not introduce any evidence as to her operative individual transition plan at that time. As such, she did not meet her burden of proving that Oakland implemented unilateral changes to her operative transition plan. As to her claim that Oakland did not prepare an appropriate transition plan, the only plan at issue is the May 2018 transition plan, as the prior one was developed in April 2017, which predates her claim.

127. Mr. Pierce developed Student's May 2018 individual transition plan based on his assessment, which included an interview with Student, and Student and Parent surveys. The plan mistakenly listed one of Student's prior goals of working in the entertainment industry as determined by her April 2017 transition assessment. This oversight did not impact the appropriateness of the transition plan, as the plan was based on and included Mr. Pierce's transition assessment data, not outdated information from past surveys.

128. Mr. Pierce identified Student's post-secondary training or education goal as taking courses in support of a career as a personal trainer with her employment goal to become a personal trainer. He was aware that Student's overarching goal was to become an athletic trainer for a major league baseball team. However, Mr. Pierce appropriately considered the preliminary steps that Student would need to take to

embark on her long-term career path, and personal training is reasonably encompassed within the field of being an athletic trainer. Finally, he identified Student's independent living goal as acquiring daily living skills to allow for independent functioning at home, in the community, and in her vocation. These goals were appropriate, as they were based on Student's expressed interests and identified strengths and weaknesses, and linked to Student's proposed annual IEP goals.

129. During the transition assessment, Student had not informed Mr. Pierce that she wanted to obtain a diploma. Rather, as captured in the transition assessment report, she informed him that she wanted to attend college. The transition plan included activities and services to support her college plans. While Oakland did not add the specific goal of obtaining a diploma to the transition plan in response to Parent's concern, the proposed goal of taking courses in support of a career as personal trainer encompassed courses required to obtain a diploma, if Student elected to pursue these.

130. Mr. Pierce prepared a comprehensive transition plan for Student that identified numerous activities and community experiences to support each goal. The specific activities were responsive to Student's athletic training career goal, and her desire to attend college and live independently. For instance, the plan included activities such as visiting colleges, learning about course requirements and reading materials, practicing enumerated steps to develop social and self-advocacy skills, interviewing and job shadowing people in a career of interest, investigating volunteer positions such as an athletic coach for little league, obtaining a gym membership and contacting personal trainers, and organizing a personal portfolio. Each goal was additionally supported by the related service of specialized academic instruction. These transition services were designed to help Student reach a position from which she could move forward to achieve her goals through the exploration of both higher education and employment, and the development of adult skills required to function independently in the community.

131. The May 2018 individual transition plan was appropriate to Student's needs and responsive to her post-secondary goals. Oakland effectively planned for and offered a coordinated set of activities for Student focused on improving her academic and functional achievement to facilitate her progression from special education programming to adult life activities, based on her individual needs and interests. Student did not meet her burden of proving that Oakland either failed to prepare an appropriate transition plan, or unilaterally implemented modifications without Parent consent.

REMEDIES

1. Oakland did not meet its burden of proving that its academic, psychological, speech and language, occupational therapy, and transition assessments met all legal requirements as detailed herein. Oakland also failed to prove that its May 2018 IEP offer was procedurally compliant; therefore, it did not establish that it offered Student a FAPE. Oakland is awarded no remedy.

2. In summary, Student seeks independent educational evaluations; compensatory education including academic instruction, speech and language services, social skills training, counseling, transition services, and/or a non-public or private school placement; related transportation costs for compensatory services or placement; an educational fund for Student to access after the age of 22; extension of eligibility for special education beyond age 22 to allow Student to obtain a diploma; and an appropriate educational placement. Student proposes the following specific remedies in her closing brief: an educational fund of \$110,900 for Student to earn high school credits at Tilden for two years; remediation at Lindamood Bell for 54 weeks at 10 hours per week (compensation for the 2017-2018 school year and fall 2018), and 16 weeks at 20 hours per week (two extended school years) at the rate of \$129 per hour for a total of

\$110,940; \$19,600 for compensatory speech services, at a rate of \$140 per hour; \$12,600 for counseling; and transportation costs. Oakland opposes all requests.

3. The courts have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of the Town of Burlington, Mass. v. Department of Education of the Commonwealth of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) This broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School District v. T.A.* (2009) 557 U.S. 230, 243 fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) In remedying a FAPE denial, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d at p. 1496.)

4. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 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.) 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 v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, (*Reid*) citing *Puyallup, supra*, 31 F.3d 1489, 1497.) The award must be fact-specific and “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid, supra*, 401 F.3d 516, 524; *R.P. v. Prescott Unified School District* (9th Cir. 2011) 631 F.3d 1117, 1125.)

5. In general, a special education student who has not completed her prescribed course of study or graduated with a regular high school diploma is entitled

to receive a FAPE through the age of 21. (20 U.S.C. § 1412 (a)(1)(A); 34 C.F.R. §§ 300.101(a), 300.102(a)(3); Ed. Code, § 56026, subds. (a) & (c)(4).) In California, an eligible student who turns 22 years of age during the months of January to June, inclusive, may continue her participation in her educational program for the remainder of the current fiscal year, including any extended school year program. (Ed. Code, § 56026, subd. (c)(4)(A). A student's exit from special education programming does not absolve a district of its obligation to remedy a previous denial of FAPE, and can further the broader purposes of the IDEA including post-secondary education, employment and independent living. (*Letter to Riffel* (OSEP 2000) 33 IDELR 292; *Letter to Riffel* (OSEP 2000) 33 IDELR 189.)

6. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training is an appropriate remedy. (*Park, supra*, 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific student involved, or to remedy procedural violations that may benefit other students. (*Ibid.*) An independent educational evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 822-23.)

7. As equitable relief, an ALJ may also place a student in a non-public school certified by the California Department of Education under Section 56366.1. (Ed. Code, § 56505.2; see also 34 C.F.R. § 300.104; *Seattle, supra*, 82 F.3d at pp. 1498, 1501-1502.) The cost of a placement is a proper factor to consider when weighing the appropriateness of a placement. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404; see *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 16 [114

S.Ct. 361, 366, 126 L.Ed.2d 284] [total reimbursement for private school not appropriate if the cost of the private education is unreasonable]; *Ashland School District v. E.H.* (9th Cir. 2009) 587 F.3d 1175, 1184 [appropriate to consider cost where services are not educational].) A hearing officer may not order placement in a non-public school, or that services be provided by a non-public agency, if the school or agency is not certified by the state of California. (Ed. Code, § 56505.2.)

DENIAL OF SERVICES BY NONCERTIFIED PROVIDERS AND OF EXTENSION OF ELIGIBILITY

8. Tilden is not a certified non-public school. Further there was no evidence that Tilden was willing and able to accept Student, or able to serve her beyond her 22nd birthday. Finally, Student did not establish that Tilden's proposed two-year diploma program would compensate her for past denials of FAPE. As such, Student's request for an educational fund to enable her to obtain high school diploma credits at Tilden is denied. Student's request for Lindamood Bell services is also denied, as Lindamood Bell is not a certified non-public agency, and it does not provide academic instruction or any educational services by credentialed special education teachers. Finally, Student did not provide any legal authority for her requested relief of extending special education eligibility beyond age 22. OAH has no authority to confer benefits beyond the time limits set by Congress.

AWARD OF INDEPENDENT EDUCATIONAL EVALUATIONS AND STAFF TRAINING

9. Student's age, and the fact that her exit from special education programming is fast approaching, have been considered in determining the appropriate award for Oakland's failure to complete timely assessments. Student's transition assessment was appropriate aside from its untimeliness. It additionally formed the basis for an appropriate individualized transition plan. Similarly, aside from being late,

Student's occupational therapy evaluation was otherwise legally compliant. Parent questioned this evaluation primarily for its failure to address Student's memory deficits, an area beyond the scope of an occupational therapy assessment. Further, the assessor determined that Student did not have occupational therapy needs. Therefore, it is equitable to award Student a remedy of staff training regarding the legal timelines for conducting special education assessments, but not independent transition and occupational therapy evaluations.

10. While Student's speech and language assessment was otherwise legally compliant aside from its delay, it is equitable to award Student an independent speech and language evaluation in light of her acknowledged speech or language impairment, and her educational needs in this area, and as partial compensation for Oakland's failure to implement her September 2016 IEP speech services. Further, this Decision awards Student an independent psycho-educational evaluation, including academic achievement, given the deficiencies noted in Oakland's assessments. As Oakland will no longer be responsible for providing Student a FAPE beyond the extended school year 2019 following her 22nd birthday in May 2019, Oakland will only be required to convene an IEP team meeting to consider the results of these assessments if Student provides Oakland the written reports no later than March 29, 2019. These independent educational evaluations will be for the primary purpose of providing Student with information as to her own learning profile and needs.

AWARD OF COMPENSATORY EDUCATION

11. Compensatory services are awarded in lieu of Student's requested educational fund. Oakland's failure to assess Student's health and behavior needs beginning January 1, 2017, through the start of the 2017-2018 school year, denied her a FAPE for a period of 25 weeks (including extended school year). Oakland's overlapping violations of failing to offer and provide an appropriate program and placement from

the start of the 2017-2018 school year through the time of hearing, and failing to implement Student's April 2017 IEP with regards to a non-public school placement, and counseling and speech and language services, denied Student a FAPE for an additional period of 48 weeks (including extended school year).

12. Student did not establish the required type or amount of compensatory services that would be necessary to place her in the position she would have occupied but for Oakland's denials of FAPE for 73 academic weeks, a period of one and a half years, including extended school years. Even so, she is entitled to an award of compensatory one-to-one specialized academic instruction, transition services including self-advocacy training, and speech and language services including social skills training. As there was no disruption to Student's educationally related mental health services, and given the purpose of school-based counseling services to address Student's physical and emotional dysregulation stemming from her medication-induced psychosis, there was no evidence that compensatory counseling services are warranted. On these facts, there was no educational harm, stemming from the failure to provide school-based counseling, to be rectified.

13. Although Student did not provide specific evidence regarding an award calculation, the ALJ carefully considered all admitted evidence and determined it is equitable to award Student one hour per day, five hours per week, for the entire 73-week period (365 hours) of one-to-one specialized academic instruction. Given the nature of academic instruction, which requires repetition and consistency to build and expand existing skills, this number will not be offset by the unknown number of days Student participated in her educational program during the spring and extended school year of 2017. These 365 hours shall be provided by a credentialed special education teacher of Student's choice, at an hourly rate not to exceed \$110 per hour. This rate is derived as a middle ground between the two hourly academic rates testified to at

hearing, namely \$129 per hour for Lindamood Bell instructors, and a \$90 per hour rate for Tilden instructors. Oakland shall contract directly with the special education teacher selected by Student. The provider and Student shall determine the appropriate schedule and location for service delivery.

14. To compensate Student for Oakland's failure to offer and provide 120 minutes per week of individual and group speech and language services, from the start of the 2017-2018 school year, through the time of hearing, including extended school year, a total of 48 weeks, Student is awarded 48 hours (60 minutes per week) of speech and language services, including social skills services. It is equitable to award Student half of her IEP minutes for this period as this service will be provided on an individual basis by a certified non-public agency provider chosen by Student. Cost is a factor that must be considered in awarding a remedy. Student did not establish the current hourly rate for individual speech and language services by a licensed speech-language pathologist employed by a certified non-public agency. However, based on the approximate \$140 per hour rate Bayhill paid to contract for speech services for its student population, it is equitable to restrict Student's hourly cost for compensatory individual speech services to \$160 per hour or less. The maximum rate was adjusted upward to account for the fact that Bayhill's stated rate was an approximation and that it is probable it will cost Student more money to obtain individual speech services than it would cost a non-public school that contracts for many students for both individual and group services. Oakland shall contract directly with the selected non-public agency. The provider and Student shall determine the appropriate schedule and location for service delivery.

15. Student is additionally entitled to compensatory transition services including independent living skills, career planning and job readiness skills, and post-secondary educational planning and readiness to make up for Oakland's failure to offer

or provide any transition services from the start of the 2017-2018 school year through the time of hearing, a period of 48 weeks. Absent an award calculation, and in light of Oakland's May 2018 IEP offer of eight hours per week of group transition services, it is determined equitable to award Student 1.25 hours per week of individual transition services for the 48-week period for a total of 60 hours. Student presented no evidence that services such as this are available on the open market. Oakland established, however, it has qualified instructors able to provide transition services. Therefore, a qualified Oakland staff member, either a credential special education teacher or personnel under the direct supervision of a credential special education teacher, will be permitted to provide these services. The transition services shall be provided at a time and location reasonably convenient for Student, on a schedule that does not conflict with her IEP services or other compensatory services. These services shall be made available to Student within 30 days of this Decision. Unless the parties mutually agree otherwise, Oakland shall provide no more than eight hours of transition services per week. Oakland shall fund the costs of public transportation required for Student to participate in travel training or to attend community activities associated with her compensatory transition services.

16. As this compensatory award is intended to put Student in the situation she would have been had Oakland provided her with appropriate services, and in light of the fact that Student was entitled to transportation as part of her IEP services, Oakland shall be responsible for the cost of transportation to Student's compensatory services. At Student's election, Oakland shall reimburse Student for the costs of public transportation (up to a 50-mile roundtrip) or mileage reimbursement (up to a 50-mile roundtrip) at the Internal Revenue Service rate.

17. The compensatory service hours shall be separate and apart from Student's IEP services. Given the amount of compensatory service hours, Student shall

be entitled to access these services through extended school year 2022, a period of three and one half years. Any cancellation by the service providers shall be credited to Student and re-scheduled. Similarly, scheduled Student absences with at least 24-hour notice or a verified medical absence shall also be credited to Student and made up.

ORDER

1. Within five business days of this Decision, Oakland shall provide Student with its Special Education Local Plan Area criteria reflecting current rates and standards for independent psycho-educational evaluations, including academic assessments, and speech and language assessments. Student shall select assessors who meet the specified criteria. Within 10 business days of receipt of the contact information for the qualified assessors selected by Student, Oakland shall send the assessors a contract to perform the independent assessments, and shall cooperate with all reasonable requests of the assessors. The assessors shall provide their reports directly to Student.

2. Oakland shall convene IEP team meetings to review the results of the psycho-educational, including academic, evaluation and/or speech and language evaluation if Student provides the written assessment report(s) on or before March 29, 2019. Oakland shall fund the attendance of the independent assessors at the IEP team meeting(s), which shall occur no later than April 19, 2019.

3. Oakland shall contract with a credentialed special education teacher of Student's choice, at a rate not to exceed \$110 per hour, to provide a total of 365 hours of one-to-one specialized academic instruction. Oakland shall contract with a certified non-public agency of Student's choice to provide 48 hours of speech and language services, including social skills training, by a licensed speech-language pathologist, at a rate not to exceed \$160 per hour. Oakland shall contact Student's chosen, qualified providers within 10 days of being provided the contact information to initiate the service contracts. The providers and Student shall determine the appropriate schedule and location for service delivery.

4. Oakland shall provide Student 60 hours of transition services. A qualified Oakland staff member, either a credential special education teacher or personnel under the direct supervision of a credential special education teacher, may provide these services. The transition services shall be provided at a time and location reasonably convenient for Student, on a schedule that does not conflict with her IEP services or other compensatory services. Oakland shall make these services available to Student within 30 days of this Decision. Unless the parties mutually agree otherwise, Oakland shall provide no more than eight hours of transition services per week. Oakland shall fund the costs of public transportation required for Student to participate in travel training or to attend community activities associated with her compensatory transition services.

5. All compensatory service hours shall be separate and apart from Student's IEP services. Student shall be entitled to access these services through extended school year 2022, a period of three and one half years. Any cancellation by the service providers shall be credited to Student and re-scheduled. Scheduled Student absences with at least 24-hour notice or a verified medical absence shall also be credited to Student and made up.

6. At Student's election, Oakland shall reimburse Student's roundtrip mileage costs or costs of public transportation to access her compensatory services. Oakland shall be responsible for transportation costs up to and including a roundtrip of 50 miles.

7. Within 90 days of this Decision, Oakland shall provide a two-hour training to members of Student's IEP team including her assessors or those identified as being responsible for assessing Student pursuant to the December 2017 assessment plan, Ms. Baskind or anyone serving in her capacity, Mr. Pierce, and any other administrative staff responsible for supervising her program, regarding the legal timelines for conducting

special education assessments. This training shall be provided by outside special education counsel who does not represent Oakland. Within 10 days of completing the training, Oakland shall provide Student a copy of the training agenda, the trainer's curriculum vita, any training materials, and a roster of attendees.

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. Student prevailed on Issues 1, 2, 3(b) and (c), 4, 5, 6, and (9). Oakland prevailed as to Issues 3(a), (d), and (e), 7, and 8.

RIGHT TO APPEAL

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

DATE: November 30, 2018

_____/s/_____
Theresa Ravandi
Administrative Law Judge
Office of Administrative Hearings