

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LAKESIDE JOINT SCHOOL DISTRICT.

OAH Case No. 2018081191

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on August 29, 2018.

Administrative Law Judge Rita Defilippis heard this matter in Los Gatos, California, on October 23, 24, and 25, 2018.

James Sibley and Mark Wociechowski, Attorneys at Law, represented Student at hearing. Christina Maehr, a legal intern with their law office, attended day three of the hearing. Parents were present throughout the hearing.

Erin Frazor, Attorney at Law, represented Lakeside Joint School District. Shamaram Karim, Superintendent and Principal, attended all days of hearing on Lakeside's behalf.

OAH granted a continuance to November 16, 2018, at the parties' request, to submit written closing arguments. The parties timely submitted written closing arguments and the record was closed on November 16, 2018.

ISSUES

1. Did Lakeside deny Student a free appropriate public education during the 2018-2019 school year by:

- a. failing to convene an individualized education program team meeting within 60 days of Parent's consent to assessment in March 2018;
- b. failing to make an offer of a FAPE for the 2018-2019 school year; and
- c. failing to have an IEP in place before the beginning of the 2018-2019 school year?

SUMMARY OF DECISION

Student proved by a preponderance of the evidence that Lakeside failed to hold an IEP team meeting within 60 days of Parents' consent to the March 2018 assessment plan. Further, Lakeside failed to make an offer of a FAPE for the 2018-2019 school year, and failed to have an IEP in place for Student before the beginning of the 2018-2019 school year. Student was denied a FAPE due to these failures since he was denied special education services, and because Parents were denied meaningful participation in the IEP development process.

FACTUAL FINDINGS

JURISDICTION AND HISTORY

1. Student is eleven years old and in the sixth grade. He resides within Lakeside's boundaries and is eligible for special education under the categories of autism and speech and language impairment. Student's initial IEP, dated June 1, 2015, as amended September 10, and October 13, 2015, is Student's last consented to IEP.

2. Student's father testified at hearing regarding Student. Father is Student's primary caretaker and point of contact for school related matters. His testimony, which was heartfelt, detailed and credible, provided a window into Student and the effect that Student's unique disabilities have on his functioning. Father's testimony was given great weight.

3. Student is intellectually gifted, yet has significant challenges in the area of

social communication. By first grade, Student demonstrated social skill delays compared to his typically developing peers. He tended to play by himself, and lay on the floor sucking his thumb during classroom group activities. As a result, he was teased by, and isolated from his peers who were playing, making friends and interacting with each other. By second grade, Student gave up trying to socially interact with his peers. He continued to play alone and his responses to everyday social interactions were unusual. For example, during recess, instead of playing with other children, Student would walk the perimeter of the playground and engage in repetitive behavior including physical hand and arm movements described as imaginary swordplay. He had difficulty starting and completing assignments and understanding verbal directions. When home, Student was unable to talk about his school day without becoming emotionally overwhelmed. He was aware of his differences and the rejection by his peer group. He also experienced increasing difficulty with academic tasks, but lacked the skills to cope with the rejection and the academic and social demands at school.

4. In second grade, Student began engaging in self-injurious behavior, picking at his skin on his arms, legs and face until it bled. He required medical attention at school at times due to numerous open wounds on his arms. He arrived home most days with blood stained socks and t-shirts. Student became emotionally distressed at the prospect of leaving the house in the morning to go to school, and sometimes had to be carried to and from the car. He experienced sensory overload during times of increased activity, people, lights and noise. Parents expressed concern to Student's teachers. For first grade and most of second grade, Student was provided with general education social skill interventions and some speech and language supports.

5. In April 2015, of Student's second grade year, Parents had Student assessed through their private insurance and Student was diagnosed with Autism Spectrum Disorder. Parents shared Student's diagnosis with Lakeside. In May 2015,

Lakeside assessed Student for special education due to his autism diagnosis, and teacher and Parent concerns about Student's anxiety and academic challenges. On June 1, 2015, Student was found eligible for special education under the category of speech and language impairment due to his pragmatic language delays. The IEP team eventually found Student eligible for special education under the categories of autism and speech and language impairment, following addendum IEP's and further testing, including an independent educational evaluation.

6. Student exhibited anxiety and emotional stress in response to testing, according to the assessment reports in 2015. One assessor described Student as "inconsolable." The assessor observed Student at his desk with his head in his hands. The assessor had to coax Student to the testing room. Student cried and turned his back on the assessor for 10 minutes saying he just wanted to be home, he hated school, and hated being tested. Another assessor's report indicated that during a timed test, Student expressed that he did not like timed tests and he panicked that he did not have enough time.

7. Student's 2015 testing revealed his educational needs related to his disabilities. He tested in the superior range in some academic areas, but lacked many other skills that made the general education setting difficult for him. He had frequent behavioral outbursts including intense emotions, crying, withdrawal, and self-injury through skin picking. He was unable to identify emotions in others when depicted in pictures or stories; to see or consider a perspective that was not his own; or to identify, interpret, or understand directions when presented with a difficult task. Student was unable to express a solution to a problem if outside his personal experience, and would only respond to others if asked a question about which he was interested. The September 10, and October 13, 2015 addendum IEP teams, which included Parents, agreed that Student required a small structured educational setting. However, the team

could not agree about a particular placement.

November 20, 2015 Settlement Agreement

8. On November 20, 2015, the parties executed a settlement agreement whereby Student was considered parentally placed in at Skylar Hadden School, a private nonpublic school for special education students with mild to moderate disabilities. Lakeside agreed to reimburse Parents' cost for tuition and other educational costs and expenses. Lakeside agreed to directly contract with a nonpublic agency for speech and language and occupational therapy services for the settlement period which comprised the 2015-2016, 2016-2017, and 2017-2018 school years.

9. Pursuant to section 1(I) of the settlement agreement, Lakeside was entitled to reevaluate Student prior to developing an IEP for the 2018-2019 school year, pursuant to an assessment plan, which Parents agree to sign. Lakeside agreed to hold an IEP meeting, with Parents, no later than April 1, 2018, to review the reevaluation data and to develop an IEP for Student for the 2018-2019 school year.

10. Pursuant to section 1(K) of the settlement agreement, the parties agreed that if Lakeside failed to make a written offer of placement prior to April 1, 2018, Student's placement at Skylar Hadden would continue at the monthly rate set forth in the agreement for 60 days after a written offer was received by Parents. Section 9 of the settlement agreement stated that the agreement could not be changed or supplemented orally, and could be modified or superseded only by a written instrument executed by both parties.

11. The settlement agreement contained waivers of claims. Relevant here is section 2, which includes the following:

Parents expressly extend this general waiver to include all claims, demands and/or rights within the jurisdiction of the

Office of Administrative Hearings, the United States Department of Education, the California Department of Education, the District's Governing Board or any state or federal court of law or administrative body. Excluded from this General Release are any claims related to the enforcement or implementation of this agreement, and any claims related to any assessments conducted by the District or the IEP for the 2018-2019 school year that will be developed/offered at the IEP meeting referenced in subparagraph 1(I) above.

12. According to the settlement agreement, the issues raised in this case are outside the waivers contained in the settlement agreement.

13. Student attended Skylar Hadden throughout the time of the settlement agreement and continued to attend it through the dates of hearing in this matter. Lakeside funded tuition (\$31,500.00 for the regular school year, and \$1850.00 for the extended school year) and paid all submitted invoices from related service providers at a cost not to exceed \$120.00 per hour, including 45 minutes per week of direct speech and language therapy, 45 minutes per week of direct occupational therapy, and 15 minutes of consult per week by the occupational therapist, pursuant to the 2015 settlement agreement, for the 2015-2018 school years. Parents have privately paid for tuition for Skylar Hadden and nonpublic agency speech and language and occupational therapy services during the 2018-2019 school year. As discussed more fully below, Student received educational benefit Skylar Hadden.

LAKESIDE'S 2018 REEVALUATION OF STUDENT FOR THE 2018-2019 SCHOOL YEAR

14. On January 23, 2018, Father sent an email to Ms. Karim, Lakeside's

Superintendent, requesting Student's records to prepare for the evaluation process under the settlement agreement.

15. Ms. Karim began her position as Superintendent for Lakeside and as Principal of Lakeside Elementary School, in August 2017. She became aware of the settlement agreement related to this case, by December 2017 or January 2018. Ms. Karim did not respond to the request.

16. Ms. Karim signed out Student's special education file on February 26, 2018, so she could review it in preparation for Student's reevaluation for the 2018-2019 school year, as required by the settlement agreement. Pursuant to the settlement agreement, the team was required to meet by April 1, 2018, to discuss Student's completed reevaluation.

17. On February 27, 2018, Ms. Karim sent Parents an email introducing herself and acknowledging that Student's special education reevaluations were due soon. Ms. Karim advised Parents in the email that Rebecca Grandey, Lakeside's contracted school psychologist, would be contacting them soon to discuss the assessment plan. Ms. Karim instructed them to return the signed assessment plan to her as soon as possible after they received it.

18. On March 2, 2018, Ms. Grandey emailed Parents and attached the proposed assessment plan, and a copy of the notice of procedural safeguards. The assessment plan called for Student to be assessed in the areas of academic achievement, communication skills, motor skills, social/emotional/behavior, intellectual functioning, hearing/vision, and adaptive skills. Father consented to the assessment plan on March 16, 2018. Therefore, Lakeside was obligated to hold an IEP team meeting by May 15, 2018, which was 60 days from the date Father consented to the assessment plan. However, this was six weeks later than the April 1, 2018 IEP team meeting date, specified in the settlement agreement, so this meant the assessors had only a little more

than two weeks to conduct their assessments and write their reports if they were to comply with the settlement agreement.

19. As set forth below, there was no apparent planning or coordination of Student's assessments. This resulted in the occupational therapist, speech and language therapist, special education teacher and school psychologist individually contacting Parents and Skylar Hadden to complete each of their assessments in a very short period of time.

20. Kathy Audet is the sole proprietor of Skylar Hadden School. Ms. Audet was the only credentialed teacher, operating under an emergency teaching credential, throughout the 2017-2018 school year. Skylar Hadden is a one room schoolhouse in a converted residential home. The school follows the California state curriculum and also provides students social skills training and behavioral support. The staff reviews and discusses the curriculum, which is carried out under Ms. Audet's direction. At Skylar Haddon, Student has had two goals per subject, including science, math, history, and language arts, as well as two behavior goals. The goals are written for a six month period and implemented, but not pursuant to an IEP. Quarterly progress reports on goals are provided.

21. Currently, Skylar Haddon School has 10 students, one credentialed teacher, and four aides. Ms. Audet had to hire a credentialed teacher after the 2017-2018 school year because her credential expired.

22. Ms. Audet taught Student for the last three school years and knows him well. Student is most successful when provided with a structured routine. He needs to be prepared ahead of time if his routine is changed, and he can become overwhelmed by the presence of too many people, too much noise, and too many transitions. It takes conscious effort for Student to self-regulate. Ms. Audet confirmed that there was no coordination among the multiple Lakeside assessors, and the assessment process was

rushed and disjointed. Student tended to be anxious in the spring and fall and was already experiencing heightened anxiety now that it was spring. Student generally mistrusts strangers and needs preparation for known appointments with unfamiliar people. All of the Lakeside assessors were unknown to Student. During the assessment process, Student was engaged in negative self-talk and crying, and exhibited anxiety and feelings of hopelessness. Ms. Audet was concerned about Student's reaction to the assessment process.

23. Student could not be assessed on some days because he was so upset by the assessment process. Even if an assessor was able to successfully assess Student, he often became dysregulated following the assessment, requiring time in the school's quiet room to calm down. One of Ms. Audet's roles in relation to Student was to assist him when he became dysregulated by talking to him in order to help him verbally process his feelings and come up with a solution. Sometimes Student would be too upset to access his words and first needed to go to a quiet room and cry, yell, and throw things until he was calm enough to self-regulate through words. Student became so dysregulated during the April and May assessment process that he required medication and psychological intervention.

24. Regulating Student requires careful and conscious efforts. Student has anxiety in relation to being tested, of which Lakeside was aware through his prior assessments. Student associated Lakeside's testing with possibly returning to Lakeside Elementary School, which had not been a positive experience for him. Knowing that Student was going to be assessed by several people but not knowing exactly when such assessments would occur, was difficult for Father. He did not want to upset Student by over-preparing him for the assessment transitions, yet he needed to talk generally about the assessments so that Student would know what to expect. Although the assessors informed Father of the times they were available to assess Student, Father was not

informed of the actual timing of the assessments. He was also not aware that the assessments were actually completed, and reports generated, until the time of hearing in this matter.

Disjointed Scheduling of Assessments and IEP Team Meeting

25. On March 21, 2018, Ram Gangisetty, the speech and language pathologist assigned to assess Student, emailed Father asking to assess Student at Lakeside. He offered some dates for assessment including March 26 and 28, 2018. Father responded and asked that the testing occur at Skylar Hadden School, due to Student's negative feelings about Lakeside Elementary.

26. On March 22, 2018, Ms. Karim emailed the assessment team, including Mr. Ram, as well as Courtney Boitano, the occupational therapy assessor; Maegan Bright, the academics assessor; and Ms. Grandey. In the email Ms. Karim informed the assessors that Skylar Hadden is open from 9:00 a.m. to 3:00 p.m., and the only time that the team would not be able to assess Student was on Monday afternoons. Ms. Karim reminded the assessors that the deadline for the IEP team meeting was April 1, 2018. This meant the assessors had only six days to complete their assessments and written reports. The assessors all understood that they were to schedule their own assessments within the timeframe provided by Ms. Karim. None of the assessments had been started by the time of the March 22, 2018 email.

27. On March 22, 2018, Ms. Karim emailed Father asking if he was available to meet on April 2, 2018, for an IEP team meeting to discuss the assessment results. Father responded later that day inquiring when the assessment reports would be complete and seeking circulation of the reports prior to the IEP team meeting.

28. On March 26, 2018, Ms. Karim responded that Lakeside would be able to provide the reports for the psychoeducational and academic assessments by March 30, 2018, the Friday before the April 2, 2018 meeting and offered to move the meeting later

at Father's election. She told Father that she would check with Ms. Boitano and Mr. Gangisetty, to see if the occupational therapy and speech and language reports would be available for the meeting. Father responded by email that Friday should be enough time. When she testified, Ms. Karim could not explain how she was able to conclude that these two assessments would be completed in time to provide them to Parents by March 30, 2018, other than her belief that they would get done.

29. On March 26, 2018, Ms. Bright, Student's Lakeside special education case manager, emailed Parents and asked if they were available to attend Student's IEP team meeting on April 2, 2018. She informed them that an additional meeting would have to be scheduled to review the occupational therapist's report. She attached a notice of the meeting, a team member excusal form for the general education teacher, and a copy of the notice of procedural safeguards. On March 28, 2018, Father responded that he did not want to attend numerous IEP team meetings and would prefer to cancel the meeting until all the reports were ready. This email is deemed to be a request to reschedule the IEP team meeting to a time when all the reports were completed and available for review.

30. On March 27, 2018, after Student complained of feeling ill during academic achievement testing by Ms. Bright, Ms. Karim emailed Parent asking for an assessment timeline extension because Lakeside assessors were prevented from assessing Student due to Student's illness. Because Lakeside's spring break was the week of April 9, 2018, she proposed rescheduling the April 2, 2018 IEP team meeting, to April 16, 2018. Father responded in an email declining to waive his rights under the settlement agreement because Lakeside had three years to prepare for the assessment of Student. Father did, however, inform Ms. Karim that the Lakeside team was available to participate in an IEP team meeting on April 16, 2018, and he asked that it be held at Skylar Haddon. Ms. Karim replied that the meeting would be held at Skylar Haddon and

she would contact Parents when she could reschedule the meeting and coordinate dates, once the team had access to Student to complete all assessments. The meeting was never rescheduled.

Father's alleged Withdrawal of Consent to Communicate

31. On March 30, 2018, for reasons unrelated to Student, Father sent an email to Ms. Karim to stop all communication between Lakeside and Skylar Hadden or any other entity involved with his children, and underlining that to do so would be without Parents' consent. He also informed Ms. Karim that he was seeking an attorney for reasons that Ms. Karim should be aware of, and he suggested that she do the same. Ms. Karim testified that she understood the email to be a withdrawal of parental consent that would allow Lakeside personnel go communicate with Skylar Hadden personnel, and she concluded that this included any communications necessary to assess Student. However, Ms. Karim did not communicate the alleged withdrawal of consent to any other IEP team members or the assessors and therefore the assessments continued. Father continued to encourage Student to do his best on assessments after his March 30, 2018 email. Therefore, it is found that Father was aware that Student was still being tested by the Lakeside assessors, and thus he consented to Student being tested by Lakeside, after his March 30, 2018 email. Father's actions, coupled with Ms. Karim's failure to notify the assessment personnel of his purported withdrawal, vitiated what otherwise may have been considered a withdrawal of consent.

Lakeside's 2018 reevaluation/Triennial Assessments of Student¹

SPEECH AND LANGUAGE TESTING - MARCH 28 AND APRIL 3, 2018

32. On March 28, 2018, Mr. Gangisetty began his speech and language assessment of Student at Skylar Hadden School. To prepare for the assessment, Mr. Gangisetty reviewed Student's special education records, including Student's 2015 testing, and a progress report dated January 29, 2018, from Student's speech and language therapist at Pediatric Therapy Services. Mr. Gangisetty was aware that when Student was tested for the 2015 speech and language assessment, Student became emotionally upset. Therefore Mr. Gangisetty was prepared to take things slowly and provide breaks for Student. He completed one test session with Student and the testing session went well. Student was interested in the testing and rarely requested to have test questions or directions repeated. Student was offered a break after 20 minutes of testing, but he declined. Mr. Gangisetty contacted Skylar Hadden on a later date to continue his testing, but was informed that Student was not having a good day, so Mr. Gangisetty cancelled that test session. Mr. Gangisetty was able to complete his testing on April 3, 2018. Again, the testing of Student went well. Mr. Gangisetty also conducted interviews with Student and Ms. Audet.

33. Mr. Gangisetty accessed Student's electronic draft IEP created by Ms. Bright, the special education case manager, and added his assessment results to the draft IEP as part of the communication development section of present levels of academic achievement and functional performance.

¹ The appropriateness of Lakeside's assessments was not at issue in this case and therefore the legal sufficiency of the assessments will not be discussed, considered or decided in this decision.

OCCUPATIONAL THERAPY TESTING - APRIL 2, 2018

34. Ms. Boitano reviewed Student's records in preparation of her assessment. She was aware that Student had become inconsolable in a prior 2015 assessment session and she therefore arrived at Skylar Hayden with a bag of motivating items for Student to explore. This would help to establish rapport and make the assessment process enjoyable for Student. Ms. Boitano attempted to assess Student on March 26, 2018, but he was ill and was unavailable for assessment. She emailed and called Skylar Hadden on two separate occasions to schedule a testing session, on April 2, 2018, but did not receive a response. She went to Skylar Hadden on April 2, 2018, at lunch time and was able to observe Student as he finished his lunch and to assess him after lunch. Student transitioned smoothly to the testing room without hesitation and was pleasant and conversational. He responded positively to the motivational items that Ms. Boitano brought with her. The testing was completed in a little over an hour and Student took five breaks. Ms. Boitano completed her assessment report following spring break and sent it to Ms. Karim on April 20, 2018.

ACADEMIC TESTING - MARCH 27 AND APRIL 19, 2018

35. Ms. Bright, was the resource teacher at Lakeside Elementary School up until the end of the 2017-2018 school year in June, when she ended her employment with Lakeside. On March 27, 2018, Ms. Bright conducted testing to assess Student's academic functioning. Ms. Bright had already reviewed Student's special education file to prepare for her assessment. When she arrived, Student indicated that he was feeling dizzy and nauseous. When asked if he felt well enough to do the testing, he agreed to proceed. During the session he was cooperative and attentive to the tasks. Halfway through the testing, Student said that the fluorescent lights were bothering him, and they were turned off. After 35 minutes, Student said he was feeling worse, and the testing session ended.

36. Following Ms. Bright's assessment, Father was called to pick Student up at school. Father took Student to his medical doctor who could not find anything physically wrong with Student.

37. On March 28, 2018, Ms. Bright returned to Skylar Hadden to continue her testing, but Student was in the school's quiet room yelling, crying, and expressing profanity. After several minutes, he calmed down but was too upset to be assessed. Ms. Bright did not conduct any testing on this date.

38. On April 4, 2018, Ms. Bright telephoned Skylar Hadden School to see if Student was in an emotional space that would allow her to proceed with her testing. Ms. Audet informed her that Student had been dysregulated and displaying tantrum behaviors since the morning and could not be assessed until after the week of spring break. Spring break was the week of April 9, 2018.

39. On April 17, 2018, Ms. Bright received an email from Father informing her that Student has been talking about killing himself and asking her when assessments would end. He explained that the unfamiliar people and unannounced visits had taken a toll on him. Ms. Bright testified that she responded to Father's email with one of her own and expressed her condolences for the family. Parent credibly and adamantly testified that Ms. Bright never responded to his personal email. No evidence of Ms. Bright's email was presented at hearing. Ms. Bright did not convey the personal information contained in Father's email to anyone on the assessment team or to Ms. Karim.

40. Ms. Bright returned to Skylar Hadden on April 18, 2018, early in the morning to complete her assessment. Student told Ms. Bright that he was not aware that she was coming and he was not in a good emotional space. He said that the day was already terrible and he was feeling depressed. When asked, Student declined Ms. Bright's request to assess. Ms. Audet telephoned Father, who talked to Student and

encouraged him to finish the assessment and do his best. When Student hung up, he said that he could do the assessment. When he began the assessment, Student had his hand on his neck in a hunched posture but he appeared focused, was cooperative, and put forth noticeable effort. After 15 minutes, Student appeared more relaxed and began telling jokes and talking to Ms. Bright. Student did not show any signs of frustration throughout the assessment and appeared to Ms. Bright to be confident in his answers. The assessment was completed in one hour with two breaks and two bathroom breaks. Ms. Bright chose not to administer any additional informal testing due to Parents' expressed concern about the stress the testing was having on Student.

41. Following her testing, Ms. Bright talked to Student's math and language arts teachers and to Ms. Audet, to get their input regarding Student. Ms. Bright emailed Student's assessment report to her personal email so that she could work on it over the weekend. She completed her assessment report and emailed it to Ms. Karim on April 23, 2018. She also created a draft IEP for Student. She drafted academic and social emotional goals and developed baselines based on her information from Student's teachers at Skylar Hadden. She never shared the draft IEP with anyone. No IEP team meeting was ever held for Student to discuss her report and the draft IEP. Ms. Bright left all of Student's records in Student's file in the resource room at Lakeside when she left the district in June 2018.

PSYCHOEDUCATIONAL ASSESSMENT- OBSERVATION- APRIL 19, 2018

42. Ms. Grandey was the school psychologist contracted to perform assessments for Lakeside and other school districts. She worked for Lakeside until the end of May 2018, at which time she ended her employment in California and moved out of state. Ms. Grandey reviewed Student's special education file, including his 2015 assessment reports, to prepare for her testing of Student. On March 21, 2018, Ms. Grandey emailed Parents, attaching a parent input form and a parent rating scale. She

asked Parents to complete them at their earliest convenience and return them by scan and email, or by drop off at Lakeside's district office. She informed Parents that she would like to observe Student at Skylar Hadden for 30 minutes and conduct testing for approximately an hour and a half. She attached a consent form allowing Lakeside to communicate with Skylar Hadden about Student's skills and progress. She proposed Thursday, March 22, either morning or afternoon; any time on Friday, March 23, 2018; or the following Monday, March 26, 2018, to conduct her assessment of Student.

43. On March 21, 2018, Father emailed Ms. Grandey to contact Skylar Hadden directly to make arrangements for testing Student. Ms. Grandey immediately emailed Ms. Audet to schedule her psychoeducational assessment of Student. She did not receive a response to that email. Ms. Grandey decided to go to Skylar Hadden to begin her testing on March 23, 2018, but the school was closed. She called Skylar Hadden on March 27, 2018, but was informed that Student was sick and was being sent home. She asked if she could come the next day on March 28, 2018 but someone else was testing Student then. She scheduled a testing session for March 29, 2018, but the session was cancelled by Ms. Audet because Student was agitated. Ms. Grandey went to Skylar Hadden on April 2, 2018, but Student had already required time in a calm-down area and was not able to be assessed. Ms. Audet suggested April 4, 2018, for testing, but when Ms. Grandey called before coming that day, she was told that it was not a good time for an assessment.

44. On April 19, 2018, Ms. Grandey decided to stop by the school to test Student without prior notice. Ms. Audet took her to Student's classroom, announced Ms. Grandey's presence and pointed Student out to Ms. Grandey while saying Student's name and telling her she can observe him. Ms. Grandey testified that this was not a preferred manner of conducting an observation because it is best if the student being observed does not know he is being observed. Ms. Grandey hoped to conduct formal

assessment of Student after her observation but Student declined. Ms. Grandey never completed her psychoeducational testing of Student and never wrote an assessment report.

45. Following Ms. Grandey's observation of Student, Father had to pick Student up just as he had done when Student's became anxious and upset following Ms. Bright's March 27, 2018 testing. Ms. Audet alerted Father that Ms. Grandey was returning the next day so that Father could prepare Student to be tested. Student displayed increased stereotyped behavior, common to people with Autism Spectrum Disorder, referred to as "stimming". When Student's anxiety increased, his "stimming" increased. Parents continued to be concerned about Student's well-being due to his talk of not wanting to live, his increased negative self-talk, worry, and sadness since the beginning of April, when testing began. Father was also concerned that Ms. Bright had not responded to his direct communication to her, expressing his growing concern for Student's well-being and inquiry as to how much more testing was necessary.

46. Parents were never aware that Lakeside had completed all but the psychoeducational assessment, including written assessment reports and a draft IEP, until the first day of hearing when Lakeside supplemented their evidence to include the documents.

Student's Mental Health Crisis

47. On April 20, 2018, Parents drove Student to school. Father walked Student through the school gate and Student proceeded to the playground area and continued to engage in "stimming" behavior. Father went to the office to inform Ms. Audet of Student's concerning behaviors and to tell her that there was not to be any testing of Student that day. Ms. Grandey appeared in the office to check in for her testing of Student. Father informed Ms. Grandey that there will be no more testing of Student. Ms. Grandey did not test Student and left the school.

48. While Parents were driving away from the school, they received a call from Ms. Audet. Parents heard sobbing and banging. Ms. Audet told them that they had to come immediately because Student was having a breakdown. They immediately returned to school. Student screamed, rocked and sobbed uncontrollably for over 40 minutes, then curled up in fetal position on the floor of the school's quiet room, and was not responsive. Ms. Audet informed Parents that Student needed psychiatric help immediately. She gave Parents two options. They could call Dr. Korb, a psychiatrist at the Center for Developing Minds to get an emergency consult, or Ms. Audet could call Eastfield Ming Quong's mobile psychiatric unit for a mental health assessment. Parents chose to call Dr. Korb. Dr. Korb prescribed an anti-psychotic for Student and offered to evaluate him the following Wednesday, once the medication had stabilized Student.

49. Parents took Student home and gave him continuous love and care. Parents followed Dr. Korb's instructions to not leave Student alone at any time, and to remove any sharp objects from his access. Student did not sleep and did not respond completely to the prescribed medication. Medications were adjusted after the evaluation by Dr. Korb. Student was not able to attend school or to be assessed by Lakeside during this time due to his instability. On April 25, 2018, Student was evaluated by Dr. Korb and was determined to no longer be suicidal.

PARENT COMMUNICATIONS WITH LAKESIDE FOLLOWING STUDENT'S MENTAL HEALTH CRISIS

50. On April 27, 2018, Father sent an email to Ms. Grandey informing her that Parents were available to meet with her to discuss Student on Monday May 30, 2018 in the morning at a nearby Starbucks location. The purpose of the meeting was to discuss Student's anxiety and triggers, his current mental health status, and to develop a path forward to complete the testing in a manner that protected Student's mental health. Father underlined to Ms. Grandey in the email that there would not be any dropping off

of information, or unannounced testing of Student. Father instructed Ms. Grandey to communicate directly with him if needed. He also informed Ms. Grandey that he would shortly be providing consent for her to speak to Dr. Korb, Director of Center for Developing Minds who provided service to Student in an emergency at school the Friday before and who assessed Student the following Wednesday.

51. On April 30, 2018, Father signed a release for Ms. Grandey to communicate with Dr. Korb at Center for Developing Minds.

52. On May 2, 2018, Ms. Grandey replied by email informing Parents of her availability to meet on May 7 or May 10, 2018, at the suggested Starbucks. She also inquired about the parent input form and parent survey she had provided to Parents after the assessment plan was signed. Lastly, she requested a copy of Parents' signed consent for her to communicate with Dr. Korb. Father replied by email on May 3, 2018, agreeing to meet on May 7, and also May 10, 2018 if needed. Father informed Ms. Grandey that Center for Developing Minds is waiting for her to contact them, provided her with a copy of the signed release, and to set up a time to consult with Dr. Korb.

53. On May 7, 2018, Father, Ms. Audet, and Ms. Grandey met at a Starbucks to discuss Student and next steps. Ms. Grandey learned for the first time of events contributing to Student's increase in anxiety and worry. She learned that Student's time at Lakeside Elementary school up to 2015, resulted in his being placed on home hospital instructional status due to his inability to cope in that educational setting. She learned that Student recently lost two of his related service providers, one who left without saying goodbye. Ms. Grandey was told that one of these service providers told Student that he would not be attending Skylar Hadden after the 2017-2018 school year. Ms. Grandey also learned for the first time, of Student's April 20, 2018 mental health crisis necessitating the services of Dr. Korb.

54. Ms. Grandey told Father that she was unaware that he had told Lakeside to

stop sending people to assess Student, and she told him she did not require any more visits to observe Student or conduct any further testing of Student. The meeting ended after an hour. Ms. Grandey had some ideas regarding ways she could safely assess Student, but did not discuss or set up further meetings with Father because she felt such decisions were in the hands of others at this point. Ms. Grandey obtained a copy of Parent's consent to communicate with Center for Developing Minds, but took no further action to follow up and contact Center for Developing Minds, as she was busy wrapping up her work with Students and getting ready for her move from California.

55. Ms. Grandey left her employment with Lakeside at the end of May 2018. Before leaving her employment at the end of May, she placed the red file that she created for Student, including her notes from her observation of Student, her notes from the May 7, 2018 meeting with Father and Ms. Audet, and the parent rating scale and background questionnaire, in the resource room on Ms. Bright's desk. Ms. Grandey did not complete a psychoeducational evaluation of Student before she left her employment with Lakeside and Lakeside took no steps to assign another psychologist to complete the psychoeducational assessment of Student.

PARENT'S NOTICE OF UNILATERAL PLACEMENT AT SKYLAR HADDEN AND INTENT TO SEEK REIMBURSEMENT

56. It is undisputed that, as of August 14, 2018, the first day of the 2018-2019 school year, Lakeside never informed Parent of any IEP team meetings after the April 2, 2018 meeting was cancelled, never provided Student with an offer of a FAPE for the 2018-2019 school year, and never offered a placement for Student for the 2018-2019 school year. On August 16, 2018, Parents emailed Lakeside giving written notice of unilateral placement of Student in the nonpublic school, Skylar Hadden, for the 2018-2019 school year and their intent to seek reimbursement from Lakeside.

LAKESIDE'S PRIOR WRITTEN NOTICE

57. On August 24, 2018, Lakeside provided Parents with prior written notice declining Parents' request for public funding of Student's placement at Skylar Hadden School for the 2018-2019 school year. In the prior written notice Lakeside claimed Parents had not been cooperative with its attempts to obtain their consent to allow private providers and private school teachers to release and exchange information with Lakeside which would have allowed it to obtain and consider relevant and accurate information regarding Student's present levels of performance. The prior written notice attached releases for Parents to sign for Skylar Hadden and Student's physician, and requested that Parents return them at their earliest convenience.

58. In its prior written notice, Lakeside claimed that because of all of the above factors, it was prevented from holding an IEP team meeting, developing an IEP and offering a FAPE to Student for the 2018-2019 school year. The evidence does not support Lakeside's contention. As discussed more fully below, it was the unnecessarily compressed and aggressive assessment schedule and Student's emotional and behavioral response thereto that caused Lakeside's untimely assessment and IEP team meeting completion.

INCONSISTENT TESTIMONY REGARDING KNOWLEDGE OF AND LOCATION OF STUDENT'S RECORDS

59. Ms. Bright testified at hearing. Except for Ms. Bright's April 17, 2018 email condolences claim, she provided credible and detailed testimony regarding Student's testing and submitting her written report. Her assessment testimony was therefore given great weight. Ms. Bright worked on Student's assessment report over the weekend and submitted her report to Ms. Karim on April 23, 2018. When Lakeside was preparing for hearing, Ms. Bright was asked to send her assessment report to Ms. Karim. Ms. Bright located Student's assessment report in her personal email and sent it to Lakeside. Ms.

Bright left all of Student's special education records, in the locked file cabinet in the resource room in June at the end of the 2017-2018 school year before leaving her employment with Lakeside.

60. Ms. Grandey testified at hearing. Ms. Grandey's testimony was consistent, detailed and sincere. Her testimony was therefore credible and was given great weight. Ms. Grandey took notes while observing Student and while meeting with Father and Ms. Audet. All of her notes, as well as the parent information and rating scale which were completed and provided to her by Parent at the May 7, 2018, meeting, were kept in a red student file which she placed in the resource room, along with other student files, before leaving her employment at the end of May, 2018.

61. Ms. Karim testified at hearing. Ms. Karim's testimony was inconsistent and unpersuasive and she appeared nervous and unsure when presented with questions requiring her explanation for her claimed late discovery of Student's records and decisions made during the time at issue in this case. Ms. Karim did not appear to be knowledgeable about Lakeside's procedures to ensure the confidentiality of student records, including the check-out procedure for Student's special education records; or requirements of contracts for student services, including Student's related services for the 2017-2018 school year. Ms. Karim's testimony was accordingly given little weight.

62. Ms. Karim testified that she never provided assessment reports to Parents because she only became aware of Ms. Bright's written assessment report, test materials, and draft IEP shortly before hearing. She testified that Student's working special education file was found on October 19, 2018, in the special education resource room by the current resource teacher. Ms. Karim testified that Ms. Bright took Student's confidential special education file, including her written assessment report, with her when she left her employment with Lakeside at the end of the 2017-2018 school year. Ms. Karim testified that she was unaware of Ms. Bright's draft IEP, claiming that she did

not have access to the electronic special education information system. Ms. Karim claimed that she did not get Ms. Bright's assessment report, because it was found just before hearing by Ms. Bright in Ms. Bright's personal email.

63. Ms. Karim offered no explanation as to why Ms. Bright's use of her personal email resulted in Ms. Karim supposedly not receiving the report. At hearing Ms. Karim conceded that, as Lakeside's Superintendent, Principal, and direct supervisor to the resource teacher, she actually could have accessed the electronic special education information system containing Student's records.

64. Compared to Ms. Bright's and Ms. Grandey's credible testimony, Ms. Karim's claim that Lakeside did not have Student's special education records until days before hearing, is rejected. Lakeside had access to Student's records, including three completed assessment reports; assessment protocols; completed forms and questionnaires from Parents; input from Skylar Haddon staff; draft IEP with goals and present levels, detailed notes of a classroom observation, notes of an hour long Parent interview gathered by Ms. Grandey in the course of her partial testing of Student; and a signed release to communicate with Student's treating psychiatrist.

65. Lakeside had ample assessment information, and access to all of Student's assessors, by April 23, after Parent temporarily revoked his consent to assess Student due to Student's expressed thoughts of suicide. Lakeside had even more information after May 7, 2018, as well as a new signed consent to communicate with Student's treating psychiatrist, to go forward with an IEP team meeting to discuss an appropriate program and placement for Student and to make a FAPE offer. Over 13 weeks elapsed between Father's communication consent and the first day of the 2018-2019 school year. Yet, Lakeside took no steps to communicate with Parents or Student's treating psychiatrist; to schedule an IEP team meeting; or to make a written offer of FAPE for the 2018-2019 school year. Instead, Lakeside waited until after the 2018-2019 school year

began, and sent a prior written notice, based on inaccurate and incomplete information, denying funding for Student's placement at Skylar Haddon.

STUDENT'S CURRENT FUNCTIONING

66. Student's 2018 standardized test scores establish that Student has made educational progress while at Skylar Hadden. However, Student continues to demonstrate significant deficits in his social communication, social relationships, ability to identify perspectives other than his own, and his ability to self-regulate and cope with the anxiety that results from these deficits as demonstrated in his day to day functioning at home and at school.

67. Student has an inability to cope with the uncertainty regarding his educational placement, which has contributed to his escalated anxiety and emotional dysregulation. Transitions require pre-planning to meet his behavioral and mental health needs.

68. Student received A's and B's and Passes in all of his classes and had a 3.3 grade point average at Skylar Hadden during the 2017-2018 school year.

LEGAL CONCLUSIONS

LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special

² Unless otherwise indicated, the legal citations in this section are incorporated by reference into the analysis of each issue decided b/below.

education and related services designed to meet their unique needs and prepare them for higher education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9)(A-D); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031, subd. (a).) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child 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 child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. In *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. __ [137 S.Ct. 988, 996], the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” Put another way, “[f]or a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” (*Id.* at 999 (citing *Rowley, supra*, 458 U.S. at pp. 203-204).) The Court went on to say that the *Rowley* opinion did not “need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.” (*Id.* at 1000.) For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances” (*Ibid.*) Importantly, “[t]he adequacy

of a given IEP turns on the unique circumstances of the child for whom it was created.”
(*Id.* at 1001.)

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

ISSUE 1A: FAILURE TO HOLD A TIMELY IEP TEAM MEETING AFTER PARENTS’ CONSENT TO ASSESS

6. Parents contend that Lakeside was legally required to have an IEP team meeting within 60 days of Parents’ March 16, 2018 consent to Lakeside’s assessment plan, and to reevaluate Student’s educational needs and offer Student a FAPE before the start of the 2018-2019 school year.

7. Lakeside contends that Parents waived any FAPE claims, including claims related to the 60 day timeline to assess Student, when they signed the settlement agreement which settled claims for the 2015 through 2018 school years. Lakeside asserts that Parents engaged in unreasonable acts which impeded the assessment process and prevented Lakeside from completing its assessment, holding an IEP team

meeting, and making an offer of a FAPE. Lakeside questioned whether Student had a mental health crisis, and instead asserts that Parents withdrew consent to assess, and made Student unavailable for assessment, as a legal strategy and should therefore be denied any equitable remedies. As found below, the evidence supported Parents' claims and not Lakeside's.

Reevaluations

8. Reevaluation of a special education student must be conducted no more than once a year, unless agreed by parent and the local educational agency otherwise, and at least every three years, unless the parent or the local educational agency agrees that a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(i) and (ii).). The reevaluation must be conducted, and an IEP developed, within 60 days of receiving parental consent for the assessment. (20 U.S.C. §1414 (a)(1)(C)(I); Ed. Code § 56344(a).).

9. In the present case, Student has been attending a private nonpublic school for the last three school years, pursuant to a settlement agreement between Parents and Lakeside, with no Lakeside service providers. A reevaluation of Student and an IEP team meeting to discuss the results of the reevaluation was permitted and an IEP team meeting required under the settlement agreement by April 1, 2018. Pursuant to IDEA, an IEP team meeting was required within 60 days of parental consent to the reevaluation. Lakeside failed to comply with its duty under both. The settlement agreement expressly states that the reevaluation shall be completed pursuant to an assessment plan which Parents agree to sign. Lakeside subsequently implemented this provision by sending Parents an assessment plan and a copy of Lakeside's procedural safeguards pursuant to IDEA. There was no evidence presented at hearing that the parties executed a written agreement modifying the terms of the settlement agreement or waiving or extending the timelines for assessment under the agreement.

10. Lakeside's reliance, set forth in its closing brief, on the case of *Parent v. Los*

Angeles Unif. Sch. Dist. (2013) OAH Case No. 2013071241 for their waiver argument is rejected.³ In that case, the ALJ found that Parents waived any FAPE claim to an IEP meeting required by a settlement agreement and during the time period covered by the agreement, because the district was not otherwise legally required to have the agreed upon IEP team meeting. That case is not relevant here because the settlement agreement's waiver clause in this case expressly carves out assessment issues.

11. There was also no evidence presented that Student's catastrophic reaction to the assessment process was contrived or over reported. Additionally, Lakeside's claim that Parents prevented assessments and scheduling an IEP team meeting is also unpersuasive. Father made a records request in January 2018, which was ignored by Lakeside. Ms. Karim knew of the settlement agreement by December 2017 or January 2018, yet she made no effort before February 26, 2018, to review Student's file and start the assessment process so a timely IEP team meeting pursuant to the settlement agreement occurred by April 1, 2018. Due to this delay, Parents consented to Lakeside's reevaluation assessment plan on March 16, 2018, leaving only two weeks for the assessments to be completed and reports written, and an IEP team meeting to be held. The assessments were not completed by April 1, and no IEP meeting was held by April 1, 2018.

12. Although three out of four assessments had been completed and a draft IEP had been developed by the end of April 2018, Lakeside failed to provide Parents with copies of the written assessment reports, and failed to schedule an IEP team meeting by May 15, 2018, 60 days following Parents' consent to assess.

13. The evidence presented at hearing established that Parents consented to

³ OAH cases are not precedential. While they may be considered, there was no showing by Lakeside that the cited case is relevant to the issues in the present case.

assessments and encouraged Student to complete assessments up until April 20, 2018, when Father temporarily stopped the assessment process due to Student's mental health crisis. Although Father sent an email to Ms. Karim on March 30, 2018, purportedly revoking consent for Lakeside to communicate with any of his children's service providers, Father's subsequent efforts to encourage Student to cooperate with the assessment process, and subsequent communications with Lakeside personnel, vitiated his March 30, 2018 email revocation of consent. Moreover, Ms. Karim never communicated a revocation to the assessors and they continued uninterrupted.

14. Father's April 20, 2018 revocation of consent to assess Student was temporary and directly related to Student's mental health crisis which rendered Student unable to be assessed. Once Student began to stabilize, Father proceeded to work with Lakeside to discuss next steps in the process to assess Student and develop a plan for the 2018-2019 school year. On April 27, 2018, Father initiated email communication with Ms. Grandy to discuss Student's history of school related anxiety and triggers for Student's anxiety to inform the process going forward so that Student could be safely assessed without jeopardizing his mental health. On April 30, 2018, Father signed a release for Ms. Grandey to communicate with Student's treating physician to gather information regarding Student's condition and treatment. On May 7, 2018, the meeting with Ms. Grandey was productive and cooperative but Lakeside never followed up thereafter. These facts are not consistent with Lakeside's portrayal of Parent as preventing Lakeside from accessing Student, and holding a timely IEP team meeting following the assessment process.

15. The evidence established that Lakeside failed to assess and hold an IEP team meeting within 60 days of Parent's consent to reevaluate Student. Even with Student's illness, anxiety, mental health crisis and Parent temporary revocations of consent, Lakeside assessed Student and had ample information to proceed with a timely

IEP team meeting.

16. Lakeside's failure to complete the psychoeducational assessment, provide Parents with copies of the written assessment reports that were completed, and to hold a timely IEP team meeting to discuss the assessment results, was a procedural violation of the IDEA.

17. Not all procedural flaws result in a denial of a FAPE. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute (*Target Range*).) A procedural violation of the IDEA results in a denial of a FAPE only if the violation: (1) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (2) caused a deprivation of educational benefits to the student, thus denying her a FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d 1479, 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

18. The informed involvement of Parents in the IEP process is among the most important procedural safeguards under the Individuals with Disabilities Education Act. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [167 L.Ed.2d 904]; *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.). Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

19. Due to these procedural violations, Parents lacked the necessary

information to plan for Student's upcoming school year, which denied them meaningful participation in the IEP development process. In this case, the procedural violations found above substantively denied Student a FAPE.

ISSUES 1B., AND 1C.: FAILURE TO MAKE A TIMELY OFFER OF A FAPE TO STUDENT FOR THE 2018-2019 SCHOOL YEAR, AND TO HAVE AN IEP IN PLACE BEFORE THE BEGINNING OF THE SCHOOL YEAR.

20. Parents contend Lakeside was required to make an offer of FAPE to Student and to have an IEP in place before the start of the 2018-2019 school year. Lakeside claims it was prevented from holding an IEP team meeting and making an offer of a FAPE to Student due to Parents' lack of cooperation, and Student's illness and unexpected test anxiety, which delayed the assessment process and thus prevented them from convening an IEP team meeting and developing an IEP for the 2018-2019 school year. Lakeside claims the failure to develop an IEP for the 2018-2019 school year was not due to any action or inaction of Lakeside.

21. Each local educational agency shall have an IEP in effect for each individual with exceptional needs at the beginning of each school year. (20 U.S.C. §1414(d)(1)(D)(2); 34 C.F.R. § 300.323(a) and (b); Ed. Code § 56344(c).). A local educational agency has an affirmative duty to review and to revise, at least annually, an eligible child's IEP. (20 U.S.C. §1414(d)(2)(A), 4(A); 34 C.F.R. §§ 300.323(a) and 300.324(b)(1).). Nothing in the statutes makes that affirmative duty contingent on Parental cooperation. (*Anchorage School District v. M.P.* (9th Cir. 2012) 689 F.3d1047, 1055.). In *Anchorage*, despite the district's constraints of a stay put order and Parents' zealous and litigious advocacy, the court held that the school district nonetheless had an affirmative duty to revise an outdated IEP and to have a legally compliant IEP in place at the beginning of each school year. The court held that the district had two options in such a situation. It could continue to work with Parents to obtain approval for a proposed IEP, or unilaterally

revise the IEP and then file an administrative complaint to obtain approval of the proposed IEP. The court underlined that the district could not ignore its affirmative duty under the IDEA by postponing its obligation to revise the outdated IEP. (*Id.* at p. 1056)

22. Lakeside's contention that it was relieved of its affirmative duty to hold an IEP team meeting or make an offer of a FAPE to Student before the start of the 2018-2019 school year because of Student's illness and Parents' lack of cooperation or consent, was not supported by the evidence at hearing. To the contrary, Parents were not willing to waive their procedural rights under IDEA or under the settlement agreement, and they never declined to attend an IEP team meeting beyond the April 1, 2018 date, provided for in the settlement agreement. Instead, other than Ms. Bright sending out the notice for an April 2, 2018 IEP team meeting, Lakeside never offered another IEP team meeting to discuss the results of the assessments, and develop an IEP for the 2018-2019 school year. Part of this was due to the lack of coordination among the assessors, and with Ms. Karim. While various dates were suggested at different times by Ms. Karim, there was no formal follow through, or attempt to obtain Parents' agreement to a suggested date.

23. Even if, *assuming arguendo*, Parents were uncooperative and made Student unavailable for assessment, choosing instead to pursue administrative legal remedies, *Anchorage (Ibid.)* makes clear that Lakeside's affirmative duty to develop an IEP and offer a FAPE before the beginning of the 2018-2019 school year would not be relieved. Lakeside should have taken steps to communicate with Parents to reschedule the IEP team meeting or Lakeside could have filed an administrative complaint to obtain approval to complete its assessment of Student without Parent consent, following Father's April 20, 2018 revocation of consent to assess. Instead Lakeside ignored its affirmative duty and took no action to schedule an IEP team meeting or make an offer of a FAPE for Student for the 2018-2019 school year before the school year began.

24. Because no IEP team meeting was held to discuss the evaluations and develop an IEP for Student for the 2018-2019 school year, Parents were deprived of meaningful participation in the IEP process, and Student was denied a FAPE. Lakeside failed to present any persuasive evidence or legal authority which would relieve Lakeside of its affirmative duty to comply with these important procedural requirements. Lakeside argued at hearing and in its closing brief that Lakeside was ready and willing, through hearing, to reimburse Parents, for the cost of tuition and related services upon Parents' request for reimbursement. Any such expectation that Parents would request reimbursement is unreasonable given Lakeside's failures set forth above, and Lakeside's August 24, 2018, prior written notice declining such reimbursements.

25. Lakeside also argued that even if Lakeside did fail to assess, hold a timely IEP team meeting, Student was not denied a FAPE because he was not deprived of educational benefit because he was entitled to attend Skylar Hadden and receive related services at public expense if Lakeside failed to hold an IEP team meeting or make an offer of FAPE by April 1, 2018, for 60 days after the written offer of FAPE is received by Parents. This argument is also rejected as unreasonable because of Lakeside's prior written notice declining to fund Student's placement at Skylar Hadden and failing to mention the alleged rights to placement under the settlement agreement. Parents therefore had no reasonable expectation that Lakeside would reimburse Student's educational expenses.

REMEDIES

1. Student prevailed on Issues 1a, b and c. As a result of Lakeside's failures, Student was deprived of a free appropriate public education for the 2018-2019 school year. Parents requested remedies include Lakeside's funding of Student's continued placement at Skylar Hadden School for the 2018-2019 school year, including 45 minutes per week of occupational therapy services, and 60 minutes per week of speech and

language/social thinking therapy support to be provided by a nonpublic agency. Parents also request reimbursement for any and all costs associated with securing educational services for Student for the 2018-2019 school year, including Student's unilateral placement at Skylar Hadden School, including transportation, and the costs of privately funding Student's occupational and speech and language therapies. Lastly, Parents request Lakeside fund independent educational evaluations in areas including psychological, speech and language and academics.

2. Lakeside asserts that Student's request for reimbursement for Student's placement at Skylar Hadden and for his related speech and language and occupational therapy must be denied as Student failed to introduce any evidence of expenditures for such expenses at hearing. Lakeside asserts that Student should also be denied reimbursement for Student's placement at Skylar Hadden because Lakeside was prevented by Parents from timely assessing Student, holding an IEP team meeting and making an offer of a FAPE for the 2018-2019 school year. Lakeside asserts that Student failed to prove that Skylar Hadden placement is appropriate.

INDEPENDENT EDUCATIONAL EVALUATIONS

3. To compensate for Lakeside's failure to complete all assessments required by the assessment plan consented to on March 16, 2018, to identify Student's eligibility for special education and educational needs for the 2018-2019 school year, Lakeside shall fund independent educational evaluations of Student. IEE's are ordered in speech and language, psychological, and academics by appropriately trained assessors of Parents' choice. The assessments shall be scheduled and facilitated in coordination with Student's treating mental health providers, Parents and Skylar Hadden staff, to ensure that they are done in a manner consistent with Student's unique needs. Lakeside shall also fund the cost of the attendance of these assessors at an IEP meeting to review the assessment results.

4. Within 10 days of the date of this decision, Lakeside shall provide Parents the special education local plan area guidelines for independent assessments. Parents are to provide their selected assessors by January 30, 2019, and thereafter, Lakeside shall expeditiously contract with the assessors to conduct the ordered independent assessments.

5. The assessments must be completed, and an IEP team meeting held, no later than April 15, 2019, to review the results of the evaluations and to make an offer of a FAPE to Student for the 2019-2020 school year. Lakeside shall fund the reasonable costs for the assessors to attend and participate in the IEP team meeting.

REIMBURSEMENT AND STUDENT'S PLACEMENT DURING 2018-2019 SCHOOL YEAR

6. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra* 557 U.S. 230, 240.)

7. 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); *Burlington, supra*, at p. 374 [the purpose of the IDEA is to provide students with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs."].) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

8. A parent may be entitled to reimbursement for placing a student in a

private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (Ed. Code, §56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra*, at 471 U.S. 359, 369-370 (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 36, 1126 L.Ed.2d 284] (*Florence County*) (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

9. A hearing officer may not order placement in a nonpublic, nonsectarian school if the school has not been certified by the California Department of Education. (See Ed. Code, § 56505.2, subd. (a).)

10. Skylar Hadden provides a small structured educational setting with a predictable routine, social skills training, and behavior supports for coping and self-regulation. Skylar Hadden individualized instruction for Student through individual goals and provided quarterly progress reports. Lakeside's 2018 assessments established that Student made progress at Skylar Hadden. Accordingly, Skylar Hadden was appropriate for Student and substantially complied with the IDEA requirements. Student received passing grades and progressed grade to grade.

11. To compensate for Lakeside's failure to hold a timely IEP meeting, and to

have an IEP in place before the start of the 2018-2019 school year, Lakeside shall reimburse Parents for their out of pocket cost of Student's placement at Skylar Hadden School, including transportation. Additionally, to compensate for the denial of FAPE, Student is permitted to remain at Skylar Hadden through the 2018-2019 school year. Student will remain at Skylar Hadden throughout the assessment and IEP process. That alone is insufficient to compensate Student for the denial of FAPE given his catastrophic negative reaction to Lakeside's compressed and aggressive assessment process. Student will be permitted to remain at Skylar Hadden through the end of the 2018-2019 school year, unless the parties agree otherwise following the April 2019 IEP team meeting.

12. Student failed to provide invoices or receipts for Skylar Hadden's tuition for the 2018-2019 school year. The reimbursement for Student's tuition for Skylar Hadden through the April 2019 IEP team meeting is necessary to remedy the denial of FAPE and maintain Student's placement throughout the assessment process. The award of continued placement through the 2018-2019 regular school year is an equitable remedy based on Student's stress and anxiety that resulted from the uncertainty of his educational placement for the 2018-2019 school year. Parents' reimbursement shall be limited to the tuition reimbursement agreed to in the November 20, 2015 settlement agreement: THIRTY ONE THOUSAND FIVE HUNDRED DOLLARS (\$31,500.00) for the 2018-2019 academic year.

13. Parents are also entitled to reimbursement for all out of pocket expenses for the related services including 45 minutes per week of occupational therapy by a nonpublic agency, 45 minutes per week of speech and language/Social Thinking Therapy support by a nonpublic agency. Reimbursement for these related services shall not exceed ONE HUNDRED TWENTY DOLLARS (\$120.00) per hour. Parent is also entitled to reimbursement for round trip transportation, for each session attended.

14. As with reimbursement at Skylar Hadden for the remainder of the 2018-

2019 regular school year to complete assessments and maintain stability in Student's educational program, Student is entitled to receive the same level of related services.

15. Lakeside shall hold an IEP team meeting no later than April 15, 2019, including Parents and Student's service providers from Skylar Hadden School, to discuss the results of the independent educational evaluations and to make an offer of a FAPE for the 2019-2020 school year. As an equitable remedy, Student is entitled to remain at Skylar Hadden for the 2018-2019 school year, including all related services and transportation called for in the prior settlement agreement through that time.

ORDER

1. Lakeside shall fund independent educational evaluations of Student in areas of speech and language, psychological, and academics by appropriately trained assessors of Parent's choice. Within 10 days of the date of this decision, Lakeside shall provide Parents the special education local plan area guidelines for independent assessments. Parents are to provide their selected assessors by January 30, 2019, and thereafter, Lakeside shall expeditiously contract with the assessors to conduct the ordered independent assessments. The assessments must be completed, and an IEP team meeting held, no later than April 15, 2019, to review the results of the evaluations and to make an offer of a FAPE to Student for the 2019-2020 school year. Lakeside shall fund the reasonable costs for the assessors to attend and participate in the IEP team meeting.

2. Lakeside shall reimburse Parents' out of pocket costs of tuition at Skylar Hadden for the 2018-2019 school year, up to the amounts detailed above. Payment shall be made within 45 days of Parents' submission of proof of payment, Student's attendance, and mileage.

3. Until the IEP team meeting is held to review the independent educational evaluations, Lakeside shall reimburse Parents for their out of pocket expenses incurred

for 45 minutes per week of private speech and language therapy services and 45 minutes per week of occupational therapy services, by a nonpublic agency, including transportation. Payment shall be made to Parents within 45 days of submission by Parents of their proof of payment, Student's attendance, and proof of mileage.

4. Lakeside's transportation reimbursements shall include reimbursement for the mileage expenses of one round trip per day, to transport Student to and from school, and to and from Student's related services, for each day of Student's attendance, according to the federal mileage reimbursement rate. Lakeside shall reimburse Parents within 45 days of Parents' submission of their proof of Student's attendance and round trip mileage.

PREVAILING PARTY

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

RIGHT TO APPEAL

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

DATED: November 30, 2018

/s/

RITA DEFILIPPIS

Administrative Law Judge

Office of Administrative Hearings