

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

POWAY UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018080795

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings on August 20, 2018, naming Poway Unified School District.¹ OAH continued this matter for good cause on October 3, 2018. Administrative Law Judge Linda Johnson heard this matter in Poway, California, on December 11, 12, 13, and 18, 2018.

Wendy Dumlao, Attorney at Law, represented Student. Student's Parents attended each day of the hearing. Student did not attend the hearing.

Justin Shinnfield, Attorney at Law, represented District and was assisted by Danielle Gigli, Attorney at Law, on the first day. Jodi Payne, District's Coordinator of Special Programs, attended each day of the hearing on behalf of Poway.

¹ District filed its response to Student's complaint on August 31, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

At the parties' request, OAH continued this matter to January 11, 2019, for closing briefs. Upon timely submission of written closing briefs, the record was closed and the matter was submitted for decision.²

ISSUES³

1. Did Poway deny Student a free appropriate public education during the 2016-2017 school year, starting August 20, 2016, by offering and implementing the individual education programs dated January 26, 2016,⁴ and January 24, 2017, and failing to:

- (a) offer and provide appropriate placement, specifically, NewBridge, a nonpublic school;
- (b) develop appropriate reading supports, specifically, research and evidence based reading supports, to ensure adequate educational progress was made on IEP goals; and for Student to obtain passing grades;

² On January 17, 2019, Student filed an objection to newly introduced evidence in Poway's closing brief. Student specifically objected to three statements Poway made in its closing brief and asked that OAH strike them from the record. Student's motion to strike is denied as Poway's closing brief is purely argument as to its view of the evidence presented at hearing.

³ Issue 1 has been rephrased for clarity. The ALJ has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

⁴ Student did not allege any issues prior to the statute of limitations; this Decision is limited with respect to the January 26, 2016 IEP to implementation issues.

- (c) develop appropriate writing supports to ensure adequate educational progress was made on IEP goals; and for Student to obtain passing grades;
- (d) offer and provide appropriate educational supports and services in math, and
- (e) offer, as of January 24, 2017, extended school year for summer, 2017?

2. Did Poway deny Student a FAPE during the 2016-2017 school year by failing to implement his IEPs dated January 26, 2016, and January 24, 2017, as written and agreed upon, causing Student to be deprived of educational benefit and significantly impeding Parents' opportunity to participate in the decision-making process regarding provision of a FAPE to Student specifically by failing to:

- (a) implement all IEP goals as written as of September 20, 2016;
- (b) implement IEP goals 1, 12 and 13, as written as of October 20, 2016;
- (c) implement IEP goals 10, 12, and 13, as written, as of January 24, 2017;
- (d) implement IEP goals 101 through 106 as written, as of June 2, 2017; and
- (e) provide access to typing technology for Student to use on his writing assignments between August 2016, and January 2017?

3. Did Poway deny Student a FAPE during the 2017-2018 school year by failing to:

- (a) offer and provide an appropriate placement, specifically NewBridge, a nonpublic school, as of August 28, 2017;
- (b) develop appropriate reading supports to ensure adequate progress was made as of August 28, 2017, on IEP goals; and for Student to obtain passing grades;
- (c) develop appropriate writing supports to ensure adequate educational progress was made as of August 28, 2017, on IEP goals; and for Student to obtain passing grades;
- (d) develop appropriate math supports to ensure adequate educational progress was made and passing grades were received as of August 28, 2017;

- (e) provide research and evidence-based reading intervention programs to ensure Student made adequate educational progress between August 28, 2017 and June 2, 2018; and
- (f) offer adequate educational supports and services to meet Student's needs in middle school as of January 2018?

(4) Did Poway deny Student a FAPE during the 2017-2018 school year and cause Student to be deprived of educational benefit and significantly impeded Parents' opportunity to participate in the decision-making process regarding provision of a FAPE to Student by failing to implement his IEPs dated January 24, 2017, December 12, 2017 and January 28, 2018, as written and agreed upon, specifically by failing to:

- (a) implement IEP goals 103, 104 and 105 as written as of August 28, 2017;
- (b) implement all of Student's IEP goals as written as of November 9, 2017;
- (c) implement all of Student's IEP goals as written as of January 9, 2018;
- (d) implement Student's IEP goals 2 and 4 as written as of June 11, 2018;
- (e) provide access to typing technology for Student to use on his writing assignments between October 2017 and January 2018; and
- (f) ensure that Student completed writing activities consistently; and
- (g) provide accommodations, as identified in Student's January 24, 2017 IEP?

SUMMARY OF DECISION

Student did not prove that Poway denied him a FAPE during the 2016-2017 or 2017-2018 school years with the exception of extended school year 2017. Poway offered Student appropriate supports and services to address his reading and writing deficits. Poway offered a program that was evidence based, direct, systematic, and multisensory and designed for Student to make educational progress. Student did not provide any credible evidence that he required support in mathematics outside of the accommodations he received in the general education classroom. Nor did Student

prove that he required a nonpublic school to access his education. Additionally, Student did not prove that Poway failed to implement his goals or accommodations in his IEPs.

Student proved he required extended school year services during summer 2017 due to the amount he regressed over summer 2016 and the length of time he took to recoup the knowledge. Student prevailed on Issue 1(e) and Parents are entitled to reimbursement for the tutoring they paid for during summer 2017.

FACTUAL FINDINGS

1. At the time of the hearing Student was an eleven-year-old male who resided with Parents within Poway's boundaries. Student first qualified for special education services on January 26, 2016, under the eligibility categories of specific learning disability and speech or language impairment. Penny Duarte, Poway's school psychologist, conducted Student's initial psychological assessment. Student had average cognitive functioning but a weakness in phonological processing and he struggled with segmentation. Student showed a discrepancy between intellectual functioning and academic performance in the areas of basic reading skills, reading comprehension, and written expression.

2. Student's initial IEP included 13 goals, 14 accommodations and modifications, as well as specialized academic instruction in a separate class and language and speech services. Student's accommodations and modifications were: preferential seating in the classroom; extended time on classwork; near point notes for copying; copies of teachers' notes; homework not to exceed one and a half times grade level expectation; access to a word processor to type assignments; extended time for writing tasks and or shortened assignments; content area tests read aloud; allowed to respond verbally instead of in writing for content area tests; opted out of grade level spelling tests; spelling mistakes on written work not to count toward grade; Student was not to be called on to read aloud unless he volunteered; he was to be provided audio

books; and directions to all class quizzes and tests to be read aloud.

2016-2017 SCHOOL YEAR

3. Student started fourth grade in Poway on August 16, 2016. Student was in James Kolp's general education class and received pullout specialized academic instruction four times a week for 75 minutes each in Linda Ford's resource class room. Mr. Kolp reviewed and was familiar with Student's IEP and implemented all of the accommodations. Student had a distinct phonological processing deficit and he responded to the direct small group specialized academic instruction. Ms. Ford worked with Student on phonological processing which is an auditory activity. Ms. Ford spent hundreds of hours working with Student on phonemic awareness; she used multisensory and kinesthetic strategies including arm and finger movements to give a physical aspect to segmenting and blending. Ms. Ford also used colored tiles to mark sounds and words as Student had strong visual skills and the colored tiles helped with more advanced phonemic awareness such as deleting or substituting phonemes. Ms. Ford saw rapid improvement with Student's skills as he progressed through more difficult phonemic awareness activities and saw significant growth in his phonics skills. In addition to the multisensory and kinesthetic strategies, Ms. Ford used both the Read Naturally and Language! programs with Student.

4. Student's IEP team met on September 20, 2016, to address Parent's concerns regarding the IEP goals. Due to time constraints the IEP team only discussed goals one and two and continued the meeting to October 20, 2016.

5. Brittany Marker, Student's private tutor, tutored Student during summer 2016 and attended the IEP team meeting on September 20, 2016. Student made significant progress over the summer and Ms. Marker wanted the school to know where Student was currently performing. Ms. Marker was concerned that Student was ready for new material, specifically polysyllabic word decoding. Ms. Marker was also concerned

with using nonsense words with Student; although they can be helpful, nonsense words can make it seem as though student is struggling with sound patterns when the student is not. Student's specific shortcoming in reading was polysyllabic words.

6. The IEP team reviewed goal one, which was: when given 10 unpracticed monosyllabic words containing four phonemes and short vowel sounds Student will be able to segment each word into discrete phonemes and delete initial and ending phonemes with 90 percent accuracy. By September 20, 2016, Student could segment words with 87 percent accuracy and delete sounds with 40 percent accuracy. During the IEP team meeting Parents voiced concerns about the goal and if Student needed a more challenging goal. The IEP team decided they needed new baseline data for phonemic awareness.

7. During the September 20, 2016 IEP team meeting, the team also discussed goal two, which was: given a list of 10 single syllable nonsense words containing long vowel patterns and consonant blends Student would decode the word with 90 percent accuracy. At the time of the IEP team meeting Student was decoding the nonsense words with 67 percent accuracy. This was a regression from June 3, 2016, when Student could decode with 70 percent accuracy. However, the team agreed to modify this goal to mastery at 80 percent instead of 90 percent.

8. The IEP team met again on October 20, 2016, as a continuation of the September 20, 2016 IEP team meeting. The team reviewed progress on goals and agreed that Student met the two goals discussed at the September 20, 2016 IEP team meeting and discontinued those goals. The team reviewed Student's fluency goal, to read a third grade passage with 77 correct words per minute and 95 percent accuracy; Student was reading a third grade passage with 67 correct words per minute and 95 percent accuracy. The team agreed that Student would continue to work on the fluency goal. The team agreed Student met his reading goal, to respond to four comprehension

questions with 75 percent accuracy after independently reading a third grade passage. Student's new comprehension goal was to answer comprehension questions after reading a fourth grade passage. The team also agreed Student met his writing goal, to compose a single paragraph with a topic sentence and three to four supporting detail sentences and a concluding sentence. However, Student had regressed slightly from June 3, 2016, when he was at 70 percent accuracy to September 20, 2016, when he was at 67 percent accuracy. The team agreed to increase this goal for Student to write two to three paragraphs. Student also met his decoding goal, to decode 10 two syllable real and nonsense words with 90 percent accuracy; the team agreed to discontinue that goal. Student had not yet met his writing goals and had regressed in his writing mechanics goal from 50 percent accuracy on June 3, 2016, to 34 percent accuracy on September 20, 2016. Student also regressed in his spelling goal from 70 percent accuracy on June 3, 2016, to 20 percent accuracy on September 20, 2016, and on October 20, 2016, Student was at 67 percent accuracy. The team also proposed a new writing goal. Parents consented to the IEP amendment.

9. The IEP team met again for Student's annual review on January 24, 2017; at that time Poway gave Parents copies of the data collected regarding progress on goals and scheduled a continuation IEP team meeting. The IEP team met again on February 20, 2017, and reviewed the progress on goals and state testing. Student met all 15 of his goals. In addition to the goals Student met in October, he could read a third grade text with 82 correct words per minute and 97 percent accuracy. He could use correct capitalization with 85 percent accuracy and ending punctuation with 100 percent accuracy. Student could copy with correct spacing 85 percent of the time and correct horizontal alignment 92 percent of the time. Student could spell single syllable words with long vowel patterns and consonant blends with 90 percent accuracy and two syllable words with short vowel sounds and consonant blends with 80 percent accuracy.

Student could respond to fourth grade comprehension questions with 75 percent accuracy after reading a passage twice. Student could write a two to three paragraph composition that was 90 percent grammatically correct.

10. Poway provided work samples to show Student met his goals. Poway provided three passages that Student read to show he met his reading fluency goal. All three passages were read three times, once on June 6, 2016, again on August 23, 2016, and finally on October 17, 2016. For Student's two decoding goal, to decode two syllable words, Poway provided multiple words lists to show Student's progress then again to show he met the goal. To show progress on the goals in September 2016, Poway provided word lists from June 6, 2016, August 25, 2016, and August 31, 2016. Each word list had 10 words on them. Of the 40 words Student was tested on, six were single syllable words with an ending that did not add a syllable. The other 36 words were two syllable words. For Student's spelling goal, to spell two syllable words, Poway provided three word lists, each with 10 words on it. Of the 30 words Student spelled, 11 of them were single syllable words with an ending that did not add a syllable. Poway provided another three word lists, again each with 10 words, to show Student met the goal. Of the 30 words Student was tested on in January 2017, eight were single syllable words with an ending that did not add a syllable and 22 words were two syllable words. Dr. Kelli Sandman-Hurley, the owner of the Dyslexia Training Institute, reviewed Student's IEPs and progress on goals. Both Ms. Marker and Dr. Sandman-Hurley testified regarding "hot reads" or reading something more than once, and "cold reads" reading something for the first time. Both opined that hot reads were beneficial for teaching material but to test for fluency cold reads were important. After reviewing progress on goals the IEP team agreed to reconvene the annual review.

11. The IEP team met again on March 10, 2017, as a continuation of the January 24, 2017 IEP team meeting. The IEP team reviewed Student's goals and agreed

on six new goals; two reading goals, two writing goals, and two communication goals. Student's reading baseline was that he could read a fourth grade passage with 87 correct words per minute with 96 percent accuracy out of 91 words attempted and could answer fourth grade comprehension questions with 75 percent accuracy after reading the passage twice and prompts to look back at the material. Student's reading fluency goal was to read a fourth grade passage with 105 correct words per minute and 95 percent accuracy. Student's reading comprehension goal was to answer comprehension questions with 85 percent accuracy after reading a fourth grade passage at least twice. Student's writing baseline was that he could compose two to three paragraphs that included an introduction, at least three supporting details, and a conclusion that was 90 percent grammatically correct. Student could also write a six sentence paragraph that had 83 percent grammatically correct sentences, 67 percent accuracy for beginning capitalization and ending punctuation, and 79 percent accurate spelling. Student's writing goal was to compose a two to three paragraph opinion with a thesis, two to three evidence statements, and a conclusion with 80 percent accuracy. Student's writing mechanics goal was to handwrite a five to seven sentence paragraph that was 90 percent grammatically correct with 90 percent accuracy for beginning capitalization and ending punctuation, and 85 percent correct spelling. The IEP team agreed that Student did not need a mathematics goal because it was a preferred area and a relative strength.

12. Poway offered 75 minutes of specialized academic instruction four times a week in a separate setting and 30 minutes of speech and language services 58 times a year. Both Ms. Ford and Mr. Kolp opined that the level of specialized academic instruction was appropriate because Student was making progress and able to access grade level curriculum in the general education classroom. Student's accommodations and modifications were: preferential seating in the classroom; an editing checklist for

writing; extended time on classwork; near point notes for copying; copies of teachers' notes; homework not to exceed one and a half times grade level expectation; access to a word processor to type assignments; extended time for writing tasks and or shortened assignments; grade level spelling tests not to be graded and returned to Student; spelling mistakes on written work not to count toward grade; Student was not to be called on to read aloud unless he volunteered; he was to be provided audio books; directions to all class quizzes and tests to be read aloud; and visual reminders for word finding strategies. Student was struggling to learn how to read due to his phonological processing deficit. The supports Poway provided were targeted to Student's specific areas of need such as extended time on tests, assignments, and homework and assistance with copying notes from the board to maximize Student's time in the general education environment. Poway also determined Student did not qualify for extended school year services. Parents consented to the IEP.

13. Poway reported Student's progress on goals on June 2, 2017. Student was reading 85 correct words per minute on a fourth grade passage with 95 percent accuracy. Student could answer comprehension questions with 76 percent accuracy after reading a fourth grade passage at least twice with the option of referring back to the text. Student could write a two to three paragraph opinion composition with a thesis, two to three evidence statements, and a conclusion with 70 to 80 percent completion of the required elements. Student could also handwrite a five to seven sentence paragraph that was 57 percent grammatically correct and 57 percent accurate for beginning capitalization and ending punctuation; Student's spelling on the composition was 90 percent accurate.

14. Student's end of the year grades for reading and writing were twos, progressing toward standards with partial mastery of skills dependent on support. Student received threes, achieving standards, in speaking and listening; science; history

and social studies; and most areas of mathematics. Student received twos in measurement and data and mathematical practices in mathematics. Student thrived in Mr. Kolp's fourth grade class. Student was an active participant and regularly raised his hand to participate. Student was conscientious and made progress in class. Mr. Kolp determined Student made progress because he moved toward achieving the state standards. Additionally, based on Student's performance in the classroom and informal assessments such as listening to Student read and reviewing writing samples showed Mr. Kolp that he made progress. Student's scores on the California Assessment of Student Performance and Progress were in the standard not met category for English language arts and the standard nearly met for mathematics. Additionally, Student's scores on the measure of academic progress for Poway decreased in all areas from winter to spring. Although Student's test scores did not increase, he made progress toward fourth grade level standards in reading and writing, met most of the fourth grade level standards in mathematics, and met all of his IEP goals.

15. Ms. Marker tutored Student again over summer 2017. Student attended tutoring on June 16, 19, and 22, 2017 for one hour each time and 40 minutes on June 23, 2017. Student also attended tutoring on July 6, 27, and 31, 2017, for one hour each. Finally, Student participated in one session on August 2, 2017, for one hour. Each hour long session was \$95, the 40-minute session was \$63. In total, Parents paid Ms. Marker \$728 for tutoring Student during summer 2017.

2017-2018 SCHOOL YEAR

16. Student started the 2017-2018 school year on August 23, 2017. He was in fifth grade in Erin Harms class. Ms. Harms was familiar with Student's IEP prior to the school year and provided him all of the accommodations during the school year. Poway provided Parents progress on Student's goals in writing on August 28, 2017. Student regressed in both reading goals; in fluency Student regressed from 85 correct words per

minute to 75 correct words per minute, and in reading comprehension Student dropped from 76 percent accuracy to 67 percent accuracy. Student maintained his progress on his opinion writing and improved on his sentence writing mechanics, however his spelling decreased from 90 percent accurate to 83 percent accurate. Ms. Rudolph, an aide in Ms. Ford's classroom, administered the three reading fluency passages to Student. Both Ms. Ford and Ms. Rudolph worked with Student during his specialized academic instruction, however, Ms. Ford was always in close proximity of Ms. Rudolph and provided direct supervision.

17. The IEP team met on September 18, 2017 to discuss Student's progress on goals. Parent was concerned about Student's specialized academic instruction in the resource classroom. Student was upset about missing class time and receiving support from an aide instead of Ms. Ford. The IEP team agreed to adjust Student's schedule so he would not miss mathematics instruction while he was in the resource room.

18. Poway provided written progress on goals to Parents again on November 9, 2017. Student made progress on his reading fluency goal and recouped the amount lost over the summer. Student was reading a fourth grade passage at 95 correct words per minute with 99 percent accuracy. Student was responding to comprehension questions with 80 percent accuracy after reading a fourth grade passage twice. Student remained at the same 70 to 80 percent completion of the required elements when writing a two to three paragraph opinion composition. Student could also handwrite a five to seven sentence paragraph that was 80 percent grammatically correct and 100 percent accurate for beginning capitalization and 90 percent accurate for ending punctuation; Student's spelling on the composition decreased to 80 percent accurate.

19. Student's IEP team met on December 12, 2017, to discuss progress on goals. Parents were still concerned about who was working with Student during his specialized academic instruction. Ms. Ford confirmed that all instruction was provided by

credentialed staff, however, an aide worked with Student on editing his work. The IEP team agreed that Ms. Ford would work with Student for all of his instruction. Parents were also concerned that Student was not making progress on his opinion writing goal.

20. The IEP team met on January 9, 2018, for Student's annual review. After discussing the speech and language assessment Parents took the draft IEP home to review. The IEP team met again on February 6, 2018, and discussed progress on goals, present levels of performance, new goals, accommodations and modifications, and supports and services.

21. Student met his reading fluency goal, to read a fourth grade passage with 105 correct words per minute and 95 percent accuracy. However, the passages used to track progress each reporting period were the same. The goal did not specify if each passage was supposed to be new or if the same passages could be used every couple of months to assess progress. Student did not present any evidence that the passages were read any time other than at the progress reporting periods to assess for progress. Each passage was read four times, once on June 1, 2017; again on August 28, 2017; then on November 7, 2017; and lastly on or around January 9, 2018.

22. Student also met his reading comprehension goal, to answer comprehension questions with 85 percent accuracy after reading a fourth grade passage at least twice. For the June 2, 2017, progress reporting Student read an Amelia Earhart passage, a Myron passage, and a Calvin Passage. For the August 28, 2017 goal reporting period Student read the same Amelia Earhart passage, a Johnny Appleseed passage, and a Tomie de Paola passage. For the November 9, 2017 goal reporting period Student read an early railroads passage, a sky journeys passage, and the same Amelia Earhart passage he previously read. For the final goal reporting period Student read the same Amelia Earhart passage, the same Johnny Appleseed passage, and a passage about plant structures for survival. With the exception of the Myron and Calvin passages, the

rest were nonfiction. Parents were concerned about the accuracy of the goal progress as Student had strong foundational knowledge in many subjects and may have known the answers without reading the questions. Ms. Marker noticed this when she was tutoring Student; at times he could answer comprehension questions about the text before reading the passage. Student read the passage about Amelia Earhart for all four goal reporting periods and read the Johnny Appleseed passage twice. Student's goal was to independently read a selected fourth grade level passage; the goal did not specify if the passages could only be read once.

23. Student exceeded his writing goal, to compose a two to three paragraph opinion with a thesis, two to three evidence statements, and a conclusion with 80 percent accuracy. He could compose a two to three opinion composition with 100 percent completion of the required elements. Student also exceeded his writing mechanics goal, to handwrite a five to seven sentence paragraph that was 90 percent grammatically correct with 90 percent accuracy for beginning capitalization and ending punctuation, and 85 percent correct spelling. Student's five to seven sentence paragraph was 100 percent grammatically correct, his beginning capitalization was 95 percent accurate, his ending punctuation was 100 percent accurate, and his spelling was 90 percent accurate.

24. Student's IEP team created six new goals, three reading goals, two writing goals, and two spelling goals. For reading Student could read a fifth grade passage with 93 correct words per minute with 97 percent accuracy and could answer fifth grade comprehension questions with 50 percent accuracy after reading the passage twice and the ability to look back at the material; Student was only able to retell the story with 19 percent accuracy. Student's reading fluency goal was to read a fifth grade passage with 120 correct words per minute and 95 percent accuracy. Student's reading comprehension goal was to answer comprehension questions with 80 percent accuracy

after reading a fifth grade passage at least twice. Student also had a reading retell goal to retell the main ideas and details of a fifth grade level story he read twice with 70 percent accuracy. For writing Student could compose a two to three paragraph opinion composition that included an introduction, at least three supporting details, and a conclusion with 100 percent of the required elements. Student could also write a five to seven sentence paragraph that was 100 percent grammatically correct, 95 percent accuracy for beginning capitalization, 100 percent accurate for ending punctuation, and 90 percent accurate spelling. Student's writing goal was to compose a three to five paragraph composition with a topic sentence, concrete details, and examples with 80 percent accuracy. Student's writing mechanics goal was to handwrite or type a six to nine sentence paragraph and edit for mechanics using a word processor with a final draft 80 percent accuracy for beginning and noun capitalization, ending punctuation, and correct spelling. For spelling when verbally given words to spell with long vowel spelling and an "ing" ending Student does not drop the silent "e" before adding the "ing." Student also does not drop the "y" when spelling plural words that end in a consonant plus a "y". Student could spell the Poway high frequency word list from third to fifth grade with 91 percent accuracy. Student's first spelling goal was to drop the silent "e" before adding the "ing" with 80 percent accuracy and drop the "y" when spelling plural words that end in "ies" with 80 percent accuracy. The IEP team agreed that Student still did not need a mathematics goal.

25. Poway offered 60 minutes of specialized academic instruction four times a week in a separate setting and discontinued speech and language services. Student's accommodations and modifications were: preferential seating in the classroom; an editing checklist for writing; extended time on classwork; near point notes for copying; copies of teachers' notes; allow Student to take a photograph of notes on the board; homework not to exceed one and a half times grade level expectation; access to a word

processor to type assignments; extended time for writing tasks and or shortened assignments; grade level spelling tests not to be graded and returned to Student; Student was not to be called on to read aloud unless he volunteered; access to audio books; directions to all class quizzes and tests to be read aloud; visual reminders for word finding strategies; and graph paper for mathematics. Poway also determined Student did not qualify for extended school year services citing his regression was not more than expected and his recoupment was consistent with general education students. Parents consented to the removal of speech and language services but did not consent to the IEP.

26. On March 12, 2018, Student's Mother had Student read a fourth grade passage and answer comprehension questions. Mother found this passage on the internet and video recorded Student as he read and answered questions. Student required significant prompting to complete the passage and could only answer two of the five questions correctly. Mother is not a credentialed teacher nor has she ever taught elementary reading instruction. Student did not present any evidence of any other times he read with either Parent or any times either Parent asked him to complete such a task. Mother tested Student in this manner because she found an updated version of the Hasbrouck and Tindal oral reading fluency chart that showed Student's percentile was lower than what Poway reported. Poway referenced the 2006 oral reading fluency chart during IEP team meetings. The fluency chart was updated in 2017 and increased the number of words correct per minute it takes to reach the average oral reading fluency for students in specific grades.

27. The IEP team met again on April 23, 2018. Parents were concerned that they did not see Student making progress and that the goals were not challenging enough. Parents were also concerned that Student was not receiving writing instruction. Parents requested revisions to several goals. Parents requested goal one be increased

for Student to read a sixth grade passage at 160 to 170 correct words per minute with 95 percent accuracy. Parents requested goal two be increased to a sixth grade passage with 85 percent accuracy. Parents requested goal three be increased to a sixth grade passage with 80 percent accuracy. Parents requested goals four and five be combined and Student would be encouraged to use assistive technology. The IEP team ran out of time and agreed to reconvene the meeting.

28. The IEP team met again on May 3, 2018. Parents continued to be concerned about the amount of progress Student had made. Poway did not make the changes to goals one through five that Parents requested. Poway modified goal one and two to specify that the fifth grade passage would be unrehearsed. Poway added a specific editing checklist to goal six that Parents requested. Parents also requested that goal seven include a program that includes sequential instruction in spelling; Poway agreed. Parents only agreed that goal seven was appropriate. Parents requested extended school year services at NewBridge nonpublic school. Parents also requested placement for the 2018-2019 school year at NewBridge nonpublic school. Poway did not agree with the requests. Parent consented to implement the IEP but did not agree with progress on goals, placement, and new goals with the exception of goal seven.

29. Student's IEP team met again on May 9, 2018, to discuss Student's transition to middle school for the 2018-2019 school year. Poway offered a reading decoding elective for Student. The reading decoding class was still being formed so Poway did not know specifics on how many students would be in the class or who would be teaching it, but it would focus on decoding, fluency, and comprehension skills. The IEP team agreed Student would be in general education for social studies and science with note taking accommodations. Poway offered 98 minutes of specialized academic instruction 20 times a month beginning on August 22, 2018, when Student started sixth grade in middle school. This was an increase from the 60 minutes four

times a week that was previously offered for fifth grade. Parents did not consent to the IEP.

30. On May 14, 2018, Poway sent a letter denying Parents' request for placement at NewBridge nonpublic school for extended school year and the 2018-2019 school year. Poway cited Student's progress as a reason for denying the request. Poway also reiterated that Student did not qualify for extended school year services because he did not show regression or a lack of recoupment.

31. Poway sent a final progress on goals report to Parents on June 11, 2018. For goal one, reading fluency, Student made some progress, he still read 97 correct words per minute but his accuracy improved to 98 percent. Student improved his reading comprehension from 63 percent to 87 percent. Student did not make progress on his reading retell goal. Student appeared to have met his information writing goal as he wrote a four to six paragraph composition with 87 percent accuracy for including the required elements; the goal was 80 percent accuracy. Student made some progress on his writing mechanics goal, he could edit for punctuation with 72 percent accuracy as compared to 57 percent that was his baseline, however, his editing for capitalizations decreased from 67 percent to 52 percent. Student also made progress on both his spelling goals. Although Parents did not consent to Student's new goals being implemented until May 3, 2018, Student still made progress on his goals in the last month of school.

32. Over the course of the school year Student raised his hand and participated in Ms. Harms' class. Student made progress throughout the year and Ms. Harms saw that Student's needs were being met. Student participated in the end of the year project which was to video record himself reading a first grade level book that was then showed to first grade students to assist with their reading. Student did not present any evidence as to his year-end grades; his first and second trimester grades were twos

for reading and writing and threes for all other areas. Student's fifth grade California Assessment of Student Performance and Progress scores were in the "standard not met" range for English language arts with below standard scores in reading and writing and near standard scores for listening and research. Student was also in the "standard not met" range for mathematics with below standard scores in concepts and procedures and problem solving and near standard for communicating reasoning. However, Student's scores on Poway's measure of academic progress increased in reading and mathematics.

33. Parents sent a 10-day letter notifying Poway they were privately placing Student at NewBridge nonpublic school in August 2018. Student did not return to Poway for the 2018-2019 school year. Parents enrolled him at NewBridge nonpublic school.

34. Dr. Sandman-Hurley observed Student at NewBridge in November 2018, reviewed the Comprehensive Test of Phonological Processing scores that Student received in 2015 and 2018, and she reviewed Student's IEPs. Dr. Sandman-Hurley did not assess Student but did form opinions based on the documents she reviewed regarding the progress he made while attending school in Poway. Dr. Sandman-Hurley opined that based on Student's spelling alone he could not complete any writing independently. Dr. Sandman-Hurley opined that Student needed the Orton-Gillingham approach because it would teach him the structure of the English language in an explicit manner that is taught by someone who really understands the English language. The only school program that Dr. Sandman-Hurley was aware of that teaches the Orton-Gillingham approach is NewBridge. Dr. Sandman-Hurley formed these opinions without observing Student while he was at Poway or observing the classes he was in at Poway.

NEWBRIDGE NONPUBLIC SCHOOL

35. Student began attending NewBridge during summer 2018 and continued

on for the 2018-2019 school year. NewBridge is a nonpublic school designed to work with students with language based learning disabilities. Not all of the students who attend NewBridge have an IEP and not all are placed through a school district. Steven Mayo, the owner and director of NewBridge, testified at hearing. One of the reading programs that NewBridge has used is Read Naturally.

36. Student had a five-day trial at NewBridge in April 2018. Mr. Mayo met Student during that trial visit. Student's reading was choppy and disfluent, he had limited word attack skills, and his reading fluency impacted his comprehension. Mr. Mayo opined that Student would need two years at NewBridge to prepare him for a transition back to a comprehensive school.

37. Student's reading and writing were areas of concern for NewBridge when he started school in August 2018; however, his mathematics skills were generally at grade level. On Student's first trimester progress report from NewBridge, he received a B in written language, an A- in mathematics and phonics/vocabulary, and A's in reading, science, and organizational skills. It is undisputed that Student received educational benefit from NewBridge.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000 et seq.; Cal.

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further 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 the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled 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 Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme

Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School Dist.*, the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S.____ [137 S.Ct. 988]. The Ninth Circuit recently affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; *see* 20 U.S.C. § 1415(i)(2)(C)(iii))

[standard of review for IDEA administrative hearing decision is preponderance of the evidence].) By this standard, District had the burden of proof for the issue it alleged in this matter, and Student for the issues he alleged.

6. A procedural violation results in liability for denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*.)

ISSUES 1(A) AND 2(A): FAILURE TO OFFER PLACEMENT AT NEWBRIDGE NONPUBLIC SCHOOL

7. Student alleged that Poway denied him a FAPE by failing to offer placement at NewBridge nonpublic school. Poway argued that NewBridge was not the least restrictive environment for Student.

8. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403 (*Rachel H.*); *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137 (*Vashon Island*.)

9. Placement in the least restrictive environment is not an absolute. In an

appropriate case, it must yield to the necessity that a student receives a FAPE: The IDEA does not require mainstreaming to the maximum extent possible or to the maximum extent conceivable. It requires mainstreaming to the maximum extent appropriate. Mainstreaming is an important element of education for disabled children, but the IDEA does not permit, let alone require, a school district to mainstream a student where the student is unlikely to make significant educational and non-academic progress. (*D.F. v. Western School Corp.* (S.D.Ind. 1996) 921 F.Supp. 559, 571 [citation omitted].)

10. The IDEA recognizes that some students should not be placed in general education. Despite this preference for “mainstreaming” disabled children, that is, educating them with nondisabled children, Congress recognized that regular classrooms simply would not be a suitable setting for the education of many disabled children. The Act expressly acknowledges that “the nature or severity of the disability [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” § 1412(a)(5). The Act thus provides for the education of some disabled children in separate classes or institutional settings. (*Rowley, supra*, 458 U.S. at p. 181, fn. 4 [citation omitted].)

11. Consequently, in appropriate cases, courts have approved placements outside of general education. When it is clear that a student cannot benefit academically or socially from general education, the Ninth Circuit has interpreted its decision in *Rachel H., supra*, 14 F.3d 1398, to approve placements for all or part of a school day in other than general education settings. (*Vashon Island, supra*, 337 F.3d at pp. 1118, 1136-1138 [approving temporary placement of student with Down syndrome and IQ between 50 and 70 in self-contained special education classroom]; *Clyde K. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1398, 1400-1402 (*Puyallup*) [approving placement of student with Tourette’s Syndrome in private school for disabled].)

12. In *Rachel H., supra*, at p. 1398, the Ninth Circuit Court of Appeal set forth

four factors that must be evaluated and balanced to determine whether a student is placed in the least restrictive environment: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom.⁷ (*Id.*, at p. 1404.)

13. Here, Poway crafted an offer of placement designed to meet Student's unique needs and offer meaningful educational benefit. Poway offered placement in a general education classroom with pullout specialized academic instruction to support Student's deficits in reading and writing. Student did not prove he required placement at any nonpublic school, or specifically NewBridge for the 2017-2018 school year. Student was an active participant in class while attending Poway. Parents raised concerns at IEP team meetings that Student did not want to be pulled from class because he did not want to miss anything. Student argued that NewBridge is not too restrictive of a placement because not all of the students who attended school there had IEP's. This argument was not persuasive. By definition NewBridge was a nonpublic school which removed Student completely from the general education environment and access to his general education peers. Student did not provide any persuasive evidence that he needed such a restrictive environment. Student was an active participant in the general education classroom, he met all of his IEP goals, and was working toward grade level standards in reading and writing and at grade level standards for mathematics. Student did not meet his burden on Issues 1(a) or 2(a).

ISSUES 1(B), (C), AND (D), AND 3(B), (C), (D), (E), AND (F): DENIAL OF FAPE FOR

⁷ Neither party introduced evidence that a general education setting would be appropriate for Student.

FAILING TO OFFER APPROPRIATE SUPPORTS, AND SERVICES IN READING, WRITING, AND MATHEMATICS, AND TO SUPPORT STUDENT'S TRANSITION TO MIDDLE SCHOOL

14. Student alleged that Poway denied him a FAPE by failing to develop appropriate reading supports using research and evidence based programs; develop appropriate writing supports; offer and provide appropriate educational supports and services in mathematics; and offer adequate educational supports and services to meet Student's needs in middle school. Poway argued that Student's program and supports and services were appropriate as evidenced by him meeting his goals and making grade level progress or progressing toward grade level standards.

15. An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a).) The IEP must also contain: (i) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3); (ii) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4); (iii) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5)); and (iv) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

16. In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

17. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

18. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported

with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*) School districts need to "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Endrew F., supra*, 580 U.S. ___ [137 S.Ct. 988].)

19. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the school cannot be judged exclusively in hindsight. An IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann, supra*, 993 F.2d 1031, 1041.)

20. Student's IEP team met four times during the 2016-2017 school year and seven times during the 2017-2018 school year. Each time the team discussed Student's progress on goals. Student had goals in all his areas of need, specifically in reading, writing, and spelling. Poway provided specialized academic instruction to address these goals and offered accommodations to support Student in the classroom.

21. Regarding Issues 1(b) and 3(b) and (e), Student's reading supports. Student argued that the reading supports Poway provided were not appropriate and were taught by someone who did not understand reading because not all of the words tested for the goal working on two syllable words were actually two syllable words. Student also argued that some of the nonsense words used would never appear in the English language therefore using them does not teach a reading skill. Student further argued that some of Student's reading instruction was provided by an aide without a teaching credential and that should not have been allowed. An instructional aide may provide instructional support to a student as long as the aide is working under the

direction and support of a teacher, the teacher plans the lessons, the teacher evaluates the student's achievement, and the aide is in close proximity of the teacher. (34 C.F.R. § 200.59; Ed. Code, § 45330, subds. (a) and (b).) Student's argument was not persuasive. Simply because Parents preferred the Orton-Gillingham methodology does not mean the programs Poway used were inappropriate. Poway's program was reasonable calculated to provide Student with meaningful educational benefit. Ms. Ford used programs that were evidence-based, direct, systematic, and multisensory. Ms. Ford credibly testified that she spent hundreds of hours working with Student and saw tremendous growth. Additionally, Ms. Ford provided unrefuted testimony that she always directly supervised the aide working with Student. Moreover, Student met all of his IEP goals during the 2016-2017 school year and the 2017-2018 school year and he continued to progress toward grade level standards.

22. Regarding Issues 1(c) and 2(c), Student's writing supports. Student's argument that the writing supports Poway offered were inadequate was also not persuasive. Student alleged that his writing sample from September 20, 2016, looked like something a first grader would write. However, Student did not provide any evidence that supported his contention. Student also argued that if one compared his writing samples from NewBridge to his writing samples from the end of fifth grade there was a significant difference; therefore, he did not receive appropriate writing instruction. Although Student may have received more educational benefit from NewBridge that does not mean Poway's program was inappropriate or deprived him of educational benefit as contemplated by *Andrew F., supra*, 137 S.Ct. at p. 1000-1001. Poway offered supports and services designed to meet Student's needs, appropriately challenging, and allowed him access to the general education environment.

23. Regarding Issues 1(d) and 2(d), Student's supports in Mathematics. Student also did not prove that he required support outside the general education

classroom for mathematics. At every IEP team meeting the team agreed that mathematics was a relative strength for Student. Although Parents had concerns about Student's test scores in mathematics, he met most grade level standards in fourth grade and all grade level standards in fifth grade. Neither Mr. Kolp nor Ms. Harms observed student struggling with mathematics. Moreover, NewBridge assessed Student's mathematic abilities at grade level.

24. Regarding Issue 3(f), Student did not offer any evidence as to what he required at middle school that Poway did not offer. Student's IEP team met to discuss his transition to middle school for the 2018-2019 school year on May 9, 2018, with a representative from the middle school. Poway offered specialized academic instruction and accommodations designed for Student to access general education. The services and accommodations and services were similar to those Student had during elementary school when he met all of his IEP goals and either met or made progress toward grade level standards. Although Poway was unsure of how many students would be in the reading decoding class or who would be teaching it, that alone does not amount to a denial of FAPE. Poway did explain that the reading decoding class would focus on decoding, fluency, and comprehension skills.

ISSUE 1(E): FAILURE TO OFFER EXTENDED SCHOOL YEAR 2017

25. Student alleged that Poway denied him a FAPE by failing to offer extended school year services for summer 2017. Poway argued that Student did not require extended school year services because his regression and recoupment was not greater than what you expect from a general education student.

26. In addition to special education instruction and services during the regular school year, extended school year services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5,

section 3043, provides that extended school year services shall be provided for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. Students, to whom extended school year services must be offered under section 3043, must have disabilities which are likely to continue indefinitely or for a prolonged period; and a pupil's educational programming may cause regression if interrupted, when coupled with the pupil's 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. The lack of clear evidence of such factors may not be used to deny an individual an extended school year program if the IEP team determines the need for such a program and includes extended school year in the IEP pursuant to subdivision (e)." *Ibid.* (See also *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1209-1210.)

27. Student showed significant regression in several areas after summer 2016, and he did not recoup the skills until nearly November 2016. Additionally, Student showed actual regression after returning to school in August 2017. Student suffered a loss of educational benefit because of Poway's refusal to offer extended school year services for summer 2017. Based upon these facts, Poway's argument that Student did not require extended school year services in 2017 because he did not show regression that could not be recouped in the same manner as general education students was not persuasive. Poway's rationale that Student was able to recoup skills lost at the same rate as his general education peers was also unpersuasive, for the same reasons.

ISSUES 2 AND 4: FAILURE TO IMPLEMENT STUDENT'S IEP GOALS AND ACCOMMODATIONS

28. Student contends Poway failed to implement his IEP goals, failed to provide access to typing technology, failed to ensure he completed writing activities

consistently, and failed to provide the accommodations listed in his January 24, 2017 IEP, which deprived him of educational benefit and impeded Parents' opportunity to participate in the IEP process. Poway argues it consistently implemented all parts of Student's IEP and held numerous IEP team meetings to facilitate parent involvement.

29. A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569, *7.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn, supra*, 502 F.3d at p. 822.)

30. Student argues that Poway did not implement all of his goals because the data on the goal progress reporting did not always match the exact wording of the goal. Student specifically alleged in Issue 2(a) that all of the goals written as of September 20, 2016, were not implemented, however, at hearing Student only presented evidence regarding goal implementation for goals one, three, four, five, nine, 10, and 13 during the September 20, 2016 goal reporting period.

31. Student's goal one was phonemic awareness; when given 10 unpracticed monosyllabic words Student would respond with 90 percent accuracy. Student argues this goal was not implemented because the same word lists were used multiple times.

32. Student's goal three was reading fluency; when given a third grade passage he would read 77 correct words per minute with 95 percent accuracy. Student argues that the passages were practiced and rehearsed so there is no way to know if he made progress or simply memorized the words. Poway provided three passages that Student read to show progress on the goal. Both passages were read twice before September 20, 2016, once on June 6, 2016, and again on August 23, 2016. Both Ms. Marker and Dr. Sandman-Hurley testified regarding "hot reads" or reading something more than once, and "cold reads" reading something for the first time. Both opined that hot reads were beneficial for teaching material but to test for fluency cold reads were important.

33. Student's goal four was reading comprehension; Student would respond to four explicit comprehension questions after reading a third grade text. Student makes the same argument as for goal three, that the passages were repeated therefore Student could have memorized the information rather than understanding what he read. However, none of the work samples Student provided are duplicative.

34. Student's goal five was a writing goal; to compose a single paragraph. Student argues that because only one work sample was provided that must mean that the goal was not properly implemented. Student's argument is not persuasive as this is a progress reporting period and Student had only been back in school for just over one month.

35. Student's goal nine and goal 13 tested Student's decoding and spelling of two syllable words. Student argues not all of the words tested were two syllables and therefore the goals were not implemented. Dr. Sandman-Hurley's testimony was

persuasive and undisputed that not all of the words on the word lists were provided to show progress on goals that were two syllable words. However, Dr. Sandman-Hurley did not speak to Ms. Ford about the implementation of the goals to know if those were the only words used throughout the year.

36. Student's goal 10 was a writing goal. Student argues that this goal was not implemented because he was allowed to use an editing checklist but the goal did not specify that he could use one. Even if this deviation from the goal amounted to a material failure Student's argument lacks weight as this is a goal progress reporting period and Student did not present any evidence that an editing checklist could not be used to teach the underlying skills necessary to meet the goal.

37. Student did not meet his burden on Issue 2(a). Student did not prove that Poway did not implement Student's IEP goals during the September 20, 2016 progress reporting period.

38. Regarding Issue 2(b), Student alleges goals one, 12, and 13 were not implemented during the October 20, 2016 progress reporting period. However, of those three goals, goal one was the only goal Student's IEP team determined that he met on October 20, 2016. Poway provided three word lists to show Student met goal one. One of the word lists used to show that Student met the goal on October 20, 2016, was previously used on August 22, 2016, and the other two were previously used on June 6, 2016. The goal specified that the words would be unpracticed, however, the fact that they had been used once several months before does not make the words practiced. Student did not provide any evidence that the specific words used to show Student met the goal were used any other time throughout the year. Furthermore, Student's private tutor, Ms. Marker, testified that Student already mastered this skill during Summer 2016. As for goal 12, Student did not provide any testimony or evidence that the goal was not implemented. As for goal 13, student's argument is the same as above and again not

persuasive. Student did not meet his burden on Issue 2(b).

39. Regarding Issue 2(c), Student alleges goals 10, 12, and 13 were not implemented as of his annual review on January 24, 2017. Student's IEP team determined that he met all of his goals, including goals 10, 12, and 13 at his annual review. Student continues to argue that goal 10 was not implemented because he was allowed to use an editing checklist and the goal did not state he could use an editing checklist. However, Student did not provide any evidence or testimony how that materially changed the goal. As for goal 12, Student did not provide any evidence or testimony as to how the goal was not implemented. As for goal 13, Student makes the same argument he did for the previous two goal reporting periods, that not all of the words he was tested on were two syllable words. Student was tested on 30 words to show he met goal 13. Of those 30 words, eight deviated from the wording of the goal in that they were not two syllable words but rather single syllable words with an "ed" ending that did not add a second syllable. However, Student did not prove that the deviation from the goal in the data used to report progress and that he met the goal meant the goal was not implemented. Student did not meet his burden on Issue 2(c)

40. Regarding Issue 2(d), Student alleged Poway did not implement goals 101 through 106 during the June 2, 2017 progress reporting period. Student argued that because only one work sample was included for goals 102 and 103, and no work samples were included for goal 104 that must mean that the goals were not fully implemented. Student's argument is not persuasive. Student did not provide any testimony that the only times the goals were worked on corresponded to the work samples provided. Student did not allege that he missed any specialized academic instruction and Ms. Ford testified that she worked with Student on his goals during his specialized academic instruction time. Student did not meet his burden on Issue 2(d).

41. Regarding Issues 4(a), (b), and (c), Student alleged Poway failed to

implement goals 103, 104, and 105 during the August 28, 2017 reporting period, and alleges Poway failed to implement all of Student's goals during the November 9, 2017, and January 2, 2018 reporting periods. Student's only argument is that Poway did not provide work samples for these goals, or if it did, there was only one or the work samples were not dated. Student's argument is not persuasive for the same reasons the same argument failed in Issue 2(d). Student did not meet his burden on Issues 4(a), (b), and (c).

42. Regarding Issue 4(d), Student alleged Poway failed to implement goals two and four during the June 11, 2018 reporting period. Student's argument as to how these goals were not implemented relates only to goal two. Student argues that because there were only five comprehension questions, that those questions have hints, and Student has a great fund of knowledge about the subject matter that he probably could have answered the questions without reading the text. Student did not provide any evidence that he answered the questions without reading the text, nor did he provide any evidence that the work samples provided were the only times he worked on the goal. Student did not meet his burden on Issue 4(d).

43. Regarding Issues 3(e), and 4(e) and (g), Student argued that Poway did not provide Student with all of his accommodations in the January 24, 2017 IEP. Student claimed he must not have had access to a word processor because only four of his writing samples from January 24, 2017, to June 2017 were typed and there are "not too many" typed writing samples after June 2017. Both Mr. Kolp and Ms. Harms provided unrefuted testimony that they implemented all of Student's accommodations in class. Student did not provide any evidence for his contention that his accommodations were not implemented.

44. Regarding Issue 4(f), Student alleged that Poway did not ensure that Student completed his writing activities consistently. Student did not provide testimony

or evidence regarding his completion of writing activities.

45. Although Student did show that not all the data associated with the progress on goals perfectly aligned with the wording of the goals, he did not prove that discrepancy was a material error or amounted to a denial of educational benefit. Student also did not prove that any lack of data Poway provided impeded Parents' opportunity to participate in the decision making process regarding Student's IEP. Student did not argue that he did not receive the specialized academic instruction provided for in his IEP, but rather speculates that because the data is not exactly aligned Poway must not have implemented the goals. Poway provided unrefuted testimony from Ms. Ford that she spent hundreds of hours working with Student in the resource room on his goals. Moreover, Poway provided regular progress reports to Parents and held numerous IEP team meetings to discuss Student's progress toward his goals. The inconsistencies in the goal progress reporting data was not a material failure to implement the IEP. Student did not prevail on Issue 2 or Issue 4.

REMEDIES

1. Student prevailed on Issue 1(e). Parents seek reimbursement for private tutoring by Ms. Marker, and prospective tuition reimbursement for his private placement until Student completes the eighth grade.

2. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)).) When a school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light

of the purposes of the IDEA. ALJs have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at pp. 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

3. Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Puyallup, supra*, 31 F.3d at p. 1496.) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Ibid.*)

4. The remedy of compensatory education depends on a “fact-specific analysis” of the individual circumstances of the case, and the conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at p. 1497.) There is no obligation to provide day-for-day compensation for time missed. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

5. Student proved he should have been offered extended school year services during summer 2017. Because Poway did not offer Student extended school year services, Parents paid Ms. Marker a total of \$728 for eight sessions of tutoring during summer 2017. Poway did not offer any evidence or otherwise challenge that the amount was unreasonable. Therefore, Parents are entitled to reimbursement of \$728 for tutoring services for summer 2017.

6. However, because Student did not prove that Poway otherwise denied Student a FAPE, Student did not prove he was entitled to an award of prospective private placement with tuition reimbursement until he completes eighth grade.

ORDER

1. Within 45 calendar days of the date of this decision Poway shall reimburse Parents \$728 for the cost of Brittany Marker’s tutoring services during summer 2017.

The documentary evidence of payment provided at hearing is sufficient evidence of costs incurred by Parents and no further documentation is required.

2. All of Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue 1(e). Poway prevailed on all other issues heard in this case.

RIGHT TO APPEAL

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

DATED: February 6, 2019

/s/
LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings