

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

LOS ALAMITOS UNIFIED SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018081156

DECISION

Los Alamitos Unified School District filed a due process hearing request with the Office of Administrative Hearings on August 29, 2018. On September 17, 2018, OAH continued Los Alamitos's case for good cause.

Administrative Law Judge Laurie Gorsline heard this matter in Los Alamitos, California on November 28 and 29, and December 11 through 14, and 18 through 21, 2018.

Attorney Courtney Brady represented Los Alamitos. Los Alamitos's Director of Special Education, Heidi Olshan, Ed.D. attended all days of hearing. Parents represented Student. Student did not attend the hearing.

At the close of hearing on December 21, 2018, the ALJ granted the parties' request for a continuance to January 22, 2019, for the parties to file written closing arguments. The parties timely filed written closing arguments, the record was closed and the matter was submitted for decision on January 22, 2019.

## ISSUE<sup>1</sup>

Did Los Alamitos Unified School District offer Student a free appropriate public education in the individualized education program dated March 13, 2018, as amended on August 27, 2018, if any, which was developed at the IEP team meetings held between March 13, 2018, and August 27, 2018, such that it may be implemented notwithstanding the lack of parental consent?

## SUMMARY OF DECISION

Los Alamitos failed to prove that the IEP dated March 13, 2018, offered Student a FAPE. Los Alamitos did not comply with the procedures set forth in the IDEA in developing the IEP. Los Alamitos failed to prove that the assessments upon which the offer of special education and related services was based complied with law. The evidence did not establish Student was appropriately assessed in 2018 in the area of cognition. Los Alamitos occupational therapists failed to seek or obtain Parent input with regard to the 2018 occupational therapy evaluations and their reports did not include the requisite information to meet legal standards. Los Alamitos held an IEP team

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<sup>1</sup> On the record, prior to the parties' opening statements, Los Alamitos withdrew the January 2018 IEP from the issue as stated in the November 19, 2018 Order Following Prehearing Conference and further clarified its issue for hearing. After a discussion with the parties before opening statements or testimony from any witness, the ALJ rephrased the issue, which was later clarified in the Order Clarifying Issue for Hearing dated

December 10, 2018, and as reflected in the record. The ALJ has authority to 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.)

meeting in July 2018 without Parents, where it finalized the March 13, 2018 IEP, and failed to prove its conduct in meeting without Parents was reasonable. It conducted a subsequent August 27, 2018 amendment IEP team meeting without giving written notice to Mother. Los Alamitos failed to have an occupational therapist at all of the IEP team meetings where the occupational therapy evaluations were discussed, including the August 27, 2018 IEP team meeting at which it agreed to obtain information from the occupational therapist. Instead of convening another IEP team meeting to convey the information it could not provide at the prior meeting, Los Alamitos filed this action on August 29, 2018, before Father's questions had been answered. Los Alamitos's multiple procedural violations significantly impeded parental participation in the IEP formulation process, and as such, the March 13, 2018 IEP denied Student a FAPE.

## FACTUAL FINDINGS

1. Student was a 16-year-old male at the time of the due process hearing. At the time of hearing, Student was eligible for special education and related services under the primary category of intellectual disability and secondary eligibility under autism. Parents divorced in 2005 and shared joint legal and physical custody and educational rights over Student. At relevant times, Student resided part-time within Los Alamitos Unified School District with Father. Parents' judgment of divorce stated that all major decisions pertaining to education were to be made jointly by Parents and that neither Parent could submit the child to any psychological/psychiatric testing evaluation or to any extended course of treatment/counseling without prior consent of the other Parent. Los Alamitos was never provided with a copy of Parents' judgment of divorce prior to the hearing, and its staff was unaware of the contents of the judgment.

## BACKGROUND

2. Student was diagnosed with autism in February 2005. He attended pre-

school at a regional autism program at a Los Alamitos elementary school and transitioned to a non-public school in 2007 at age five. He remained at that non-public school through May 2014 when he was 12 years old and in the sixth grade, where he received 75 minutes of individual occupational therapy and 30 minutes of group occupational therapy per week.

3. A 2014 occupational therapy triennial evaluation conducted by the non-public school he attended at that time, concluded Student benefited from occupational therapy intervention, and needed moderate to extensive assistance, depending on the task, to function effectively in his environment, and recommended the same level of services he had been receiving.

4. In July 2014, Student began attending a different non-public school, Del Sol School, and he continued to attend school there through the due process hearing.

#### DEL SOL NON-PUBLIC SCHOOL

5. Del Sol was a non-public school, certified by the California Department of Education. Its purpose was to provide an education program to children with disabilities with challenging behaviors to help them manage their behaviors and then return to public school. It was located on what used to be an elementary school, a large fenced campus with about eight classrooms. Del Sol operated a preschool of about 20 students and approximately 50 students attended the non-public school, ranging from first graders to students who attended the adult programming.

6. All of the students who attended Del Sol beyond first grade through age 22 had IEPs. They had disabilities such as autism and other mild to severe developmental disabilities, and had been placed at Del Sol because of challenging behaviors. Del Sol provided related services in the areas of behavior intervention, speech therapy, occupational therapy, and physical therapy. Del Sol did not offer community-based instruction.

7. Kim Bea Huynen, Ph.D. known and referred to as Dr. Kim, founded Del Sol between 2006 and 2009. Dr. Kim held a doctorate in clinical psychology, was licensed in California as a clinical psychologist since 1997, and was a board certified behavior analyst since 1999. Dr. Kim was the president of and a licensed psychologist at Vista Behavior Consulting since 1991. Vista was a non-public agency certified by the California Department of Education. Del Sol contracted with Vista to provide its behavior intervention program, which included behavior training, behavior intervention plans, behavior data, and consulting. Dr. Kim was an agent of Del Sol.

#### STUDENT'S PLACEMENT THROUGH HEARING

8. Student's annual IEP was held in September 2015. Both Parents attended the IEP team meeting. Student's areas of need were identified as occupational therapy, speech, behavior, organization, communication, academics, personal identity, pre-vocational, social skills, and self-help. Los Alamitos offered Student a non-public school placement; specialized academic instruction for 120 minutes per month which consisted of consultation with a Los Alamitos educational specialist to support mobility instruction; a full-time one-to-one instructional assistant; three individual speech therapy sessions for 30 minutes per week and one 30-minute session per week of augmentative and alternative communication classroom consultation; individual occupational therapy at Del Sol for 45 minutes, twice per week; behavior intervention services outside of the school day for 120 minutes at any other location or setting, three times per week; behavior supervision support for 360 minutes per month and behavior intervention and consultation by a board certified behavior analyst for 1020 minutes monthly; transportation; accommodations; extended school year services, and annual goals. Los Alamitos offered eligibility under intellectual disability, primarily, and autism, secondarily, and the alternate curriculum leading to a certificate of completion. On September 23, 2015, Father agreed to the IEP for a period of six weeks.

9. On November 9, 2015, Los Alamitos convened an amendment IEP team meeting with Parents in attendance to review community-based instruction opportunities and programming. Parent consented to the November 9, 2015 amendment without making any changes. Student's weekly behavior intervention services included after-school community-based instruction. Community-based instruction was instruction delivered outside the classroom in the community. Student's community-based instruction included, on average, a trip to the community snack shop, once a week.

10. On January 25, 2016, the IEP team convened an amendment meeting with Parents in attendance to review Student's progress in the after-school community-based instruction. On March 18, 2016, the IEP team convened an amendment meeting with Parents in attendance to review Student's functional behavior assessment and behavior intervention plan. On March 18, 2016, Parent agreed to the amendment.

11. Student's annual IEP was held on September 9, 2016 for attendance only, and on October 25, 2016, with both Parents in attendance. Father expressed an interest in having Student on the Los Alamitos High School campus. Mother's goal was to have Student on a comprehensive campus with more social opportunities. The team discussed moving an additional occupational therapy service location to the public high school campus. The IEP team agreed to reconvene in April or May 2017 to review and consider Student's extended school year program.

12. On March 22, 2017, Los Alamitos sent Parents a letter offering two IEP team meeting dates to discuss the outstanding offer of special education and related services to which Parents had yet to provide consent and to discuss Student's extended school year program.

13. On March 27, 2017, Mother requested that two of the three days of afterschool behavior intervention services be provided at Los Alamitos High School.

14. On April 13, 2017, Los Alamitos notified Mother by letter that it agreed to implement the change in service location, requested that Parents consent to the September/October 2016 IEP, and requested a mutually agreeable date for an IEP team meeting to discuss Student's program.

15. After April 13, 2017, Los Alamitos continued to provide Student behavior intervention services after school in three two-hour sessions per week. Two sessions were delivered at the public high school campus and one session continued to be delivered at the Los Alamitos district office in the adult transition program room. The behavior services provided at the high school campus were provided one-on-one in a special day classroom. Student worked with Los Alamitos credentialed special education teacher Richard Rauscher and aides from either Los Alamitos or the Greater Anaheim Special Education Local Plan Area, of which Los Alamitos was a member.

16. Mr. Rauscher was a special education teacher at Los Alamitos since 2012. He earned a bachelor's degree in psychology in 2009, and a master's degree in special education and a moderate/severe teaching credential in 2012. He was authorized to teach in a self-contained classroom for children with a range of disabilities including autism and had training in applied behavior analysis. During the regular school year, he taught at the high school in a non-categorical self-contained moderate/severe special education classroom with an emphasis in life skills, which was composed of students ranging from freshman to seniors. The classroom engaged in community-based instruction, including travel to nearby shops.

17. Mr. Rauscher was responsible for providing afterschool behavior services to Student from about June 2016 until September 2018. Mr. Rauscher's off-campus community-based instruction between June 2016 and September 2018, included walking Student to the store from the office campus to buy food or a drink. The goal was to do community-based instruction weekly, but the frequency was dependent on

Student's behavior.

#### ASSESSMENT PLAN FOR 2018 TRIENNIAL IEP

18. On October 31, 2017, Los Alamitos sent Mother an assessment plan requesting consent for assessments in the following areas by the following professionals: academics, intellectual development, social emotional/behavior, and adaptive behavior by the school psychologist; health (limited to vision and hearing) by the school nurse; language/speech communication development by the speech-language pathologist; and motor development by the occupational therapist; as well as evaluation for alternative and augmentative communication/assistive technology, but did not identify the assessor.

19. On November 17, 2017, Mother signed the assessment plan but did not agree to any of the assessments as proposed, crossing out all of the assessments offered. Instead, she indicated consent to the health assessment by the school nurse for overall physical health, and an alternative and augmentative communication/assistive technology assessment by Assistive Technology Exchange Center, a private assessor.<sup>2</sup> Assistive Technology Exchange Center was a part of Goodwill Industries of Orange County.<sup>3</sup> Mother requested that the IEP team consider assessment information from a functional behavior assessment.

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<sup>2</sup> The terms "assistive technology" and "alternative and augmentation communication" were used interchangeably during the hearing to refer to one or both types of assessments.

<sup>3</sup> The terms ATECH and Goodwill were used interchangeably during the hearing to refer to the alternative and augmentative communication/assistive technology assessor.



20. Andrew Sellers prepared the assessment plan sent to Mother. Mr. Sellers was a program specialist with the Greater Anaheim SELPA. He held a master's degree in educational psychology and was in the process of completing his doctorate degree in education and educational leadership. He also held a pupil personnel services credential in school psychology and a preliminary administrative services credential. He was authorized to work in public education to administer and review results for standardized assessments for special education eligibility. As a program specialist, he was assigned to Los Alamitos to facilitate IEP compliance to ensure special education timelines were met and case management duties within Los Alamitos were maintained, worked with staff for training and developing interventions, and worked with IEP teams to draft IEP documents to meet student needs. Prior to 2015, he was employed as a school psychologist for another school district. His duties as a school psychologist included administering and interpreting standardized assessments, developing present levels of performance and IEP goals, determining interventions, and providing counseling services. Mr. Sellers was Student's program specialist and case manager since August 2017.

21. At hearing, Mr. Sellers testified that the assessment plan sent to Mother did not include an alternative and augmentative communication/assistive technology evaluation; however, that evidence was not persuasive because the box which applied to the alternative and augmentative communication/assistive technology evaluation had been checked and Mr. Sellers failed to explain what Mother had crossed out next to that box if it was not "AAC/AT."

#### JANUARY 2018 ANNUAL IEP

22. On January 18, 2018, Los Alamitos held Student's annual IEP team meeting. Those in attendance included, among others, Father, and occupational therapist Patricia Polcyn. The IEP team reviewed Student's progress on goals, including

his occupational therapy goals. The IEP team reviewed Student's behavior at Del Sol. His aggression had decreased; however, his self-injurious behavior of biting his hand had increased to approximately eight times per day. Student's intellectual disability and autism adversely impacted his ability to participate at his public school of residence. Student required individualized instruction within a consistent routine with visual cues and repetition. He required consistent adult support for most to all activities. The IEP team discussed the need for a triennial assessment. Father signed the same assessment plan provided to Mother, but without making any changes.

23. Los Alamitos offered the following special education and related services: full-time group specialized academic instruction in a non-public school under contract with Los Alamitos or the Greater Anaheim SELPA; individual speech and language services three times per week for 30 minutes and 30 minutes per week of augmentative and alternative communication classroom consultation provided by the non-public school or Los Alamitos; a full-time instructional assistant provided by the non-public school or Los Alamitos, 45 minutes per week of individual occupational therapy twice a week provided by the Greater Anaheim SELPA; individual behavior intervention services provided by Los Alamitos outside of the school day at any other location or setting for 120 minutes three times per week; behavior supervision support and consultation provided by Los Alamitos for 240 minutes monthly; behavior intervention development and consultation provided by a board certified behavior analyst provided by Los Alamitos or the non-public school for 1020 minutes monthly; and work experience education and agency linkages, each for 120 minutes yearly provided by the non-public school or Los Alamitos. Los Alamitos also offered transportation, extended school year services, and accommodations. Los Alamitos offered Student a modified curriculum leading to a certificate of completion at age 22. Los Alamitos offered 12 goals, five of which the occupational therapist was also responsible for implementing. Los Alamitos

offered a transition plan based upon a screening using a transition assessment matrix, which included three separate post-secondary goals.

## TRIENNIAL ASSESSMENTS

### Multi-disciplinary Assessment

24. Los Alamitos conducted a multi-disciplinary assessment of Student between January 18, 2018, and March 13, 2018, as part of his triennial review, which was summarized in a written report. The report reflected assessments in academics, health, intellectual development, language and speech, social emotional functioning/behavior and adaptive behavior, by the following assessment team: school psychologist Marla Kennedy, special education teachers Mr. Rauscher and Marie Raz, speech-language pathologist Vicki Young, and school nurse Dominique Jorgensen. Only Mr. Rauscher testified at hearing.

25. Parents were provided with a health history questionnaire, but it was not returned prior to the assessment. Nurse Jorgensen completed a vision screening, and sent home a referral because Student's vision was not within normal limits. Regarding the hearing screening, the report stated that the nurse was "unable to condition" because Student did not tolerate headphones on his ears or an ear piece.

26. Los Alamitos's speech and language assessment used no formal standardized measures. The speech-language pathologist used the following assessment tools: parent/staff questionnaires; a Functional Communication Profile survey used as an informal probe to gather information on Student's communication functioning; observations; staff feedback; and a review of records.

27. The written report stated the psychoeducational/academic assessment consisted of a review of records; observations; teacher and parent reports; a health and developmental history questionnaire; Comprehensive Test of Nonverbal Intelligence,

Second Edition; Woodcock-Johnson Tests of Achievement, Fourth Edition; Vineland Adaptive Behavior Scales, Third Edition; Behavioral Assessment for Children, Third Edition; and Gilliam Autism Rating Scale, Third Edition.

28. The report stated Student's 2005 and 2008 composite cognitive assessment results on the Developmental Assessment of Young Children were in Significantly Below Expected Level, with standard scores of 64 and less than 50, respectively. For Student's 2014 triennial evaluation, the assessor unsuccessfully attempted to administer the Universal Nonverbal Intelligence Test to Student. Student demonstrated a high level of non-responsiveness and disregard for the gestures displayed to communicate the instructions. He did not attempt to respond to any of the items and the assessment was discontinued. The assessor in 2014 used previous cognitive assessments to estimate Student overall cognitive functioning.

29. Under cognitive abilities, only one test was listed for 2018. Student's nonverbal intellectual ability was assessed with the Comprehensive Test, which did not require Student to respond with oral language, but to point to answers. Student was unable to respond to the standardized directions. He required a visual prompt to point to a response and was able to point to the page, but not to specific answers. Ms. Kennedy discontinued the assessment because Student was not able to respond to the directions. The report referred to the prior 2014 cognitive assessment, which estimated Student's ability to be within the significantly below average range, and noted that his skills appeared to be evenly delayed across all areas.

30. The Woodcock Johnson assessed academic achievement. The assessor discontinued the test because Student was unable to respond with standardized instructions. In the area of pre-reading, Student's teachers reported that he was able to identify seven of 26 letters in the alphabet when given two visuals to choose from, 12 sight words among a field of two visuals to choose from, and could distinguish between

his first name and last name when presented with a visual of his first and last name. In writing, when provided with hand-over-hand prompting, he was able to trace letters, write his first and last name, copy his personal information, and copy sentences. He showed strength in attendance, and performed adequately in starting and completing tasks, work accuracy, punctuality, and participation. He demonstrated more difficulty in his attention to instruction, time on task, and independent work.

31. Student was observed doing laundry, and completing a project during his art class. During observations, the behavior analyst reported Student often participated in on-campus jobs at the school including doing laundry, setting up and cleaning up lunch, and throwing away garbage. Student did well tolerating walking with others, but sometimes engaged in grabbing or lunging at others. The art classroom was much noisier than his other classroom, and was comprised of 10 students and five aides. He grimaced and covered his ears periodically. Student's aide reported he became more agitated and exhibited more aggressive behavior when in a large versus a small group. He engaged in self-injurious behaviors (e.g., biting his knuckles) periodically, and his aide indicated holding a tennis ball helped Student decrease these behaviors. Student followed one-step directions; benefitted from verbal, visual, and physical prompts; required one-on-one support; and tolerated transitions and a large group setting.

32. The Gilliam Autism Rating Scale was a norm-referenced screening instrument designed to identify behavioral challenges that may be indicative of autism. In the school setting, the Autism Index indicated a Very Likely probability of autism. Student's teachers indicated it was Very Much Like or Somewhat Like Student to engage in restricted/repetitive behaviors such as staring at his hands, objects, or items in the environment for at least five seconds, flap his hands or fingers, make high pitched sounds or vocalizations for self-stimulation, and to engage in the following emotional responses: becoming frustrated quickly when he could not do something, and having

temper tantrums when he was frustrated, did not get his way, or was told to stop doing something he enjoyed.

33. The Vineland was a standardized measure used to assess a Student's independent functioning. Adaptive behavior referred to an individual's typical performance of the day-to-day activities required for personal and social sufficiency. Mr. Rauscher and each Parent completed the rating forms. Student's composite scores and all of his scores across all domains fell in the Low range, with the exception of one score by Mother in the socialization domain within the Moderately Low Range, indicating she reported that Student demonstrated more skills in socialization compared to communication and daily living skills.

34. The Behavior Rating Scale evaluated perceptions of Student's emotional and social functioning. Mother rated Student within the Average Range on all composite indexes. Teachers and Parents rated Student within the average range in internalizing problems (anxiety, depression, and somatization) and externalizing behaviors (hyperactivity, aggression, conduct problems). Teachers and Father rated Student in the at-risk range on the behavioral symptoms index (hyperactivity, aggression, depression, atypicality, withdrawal, attention problems), and in the Clinically Significant range in Adaptive Skills (adaptability, social skills, functional communication, activities of daily living, leadership). Teachers also rated Student in the Clinically Significant range in School Problems (attention problems, learning problems).

35. Based on the assessment results, Los Alamitos reported Student presented with severe deficits in receptive and expressive language. He was a nonverbal communicator and predominately used an application on an iPad to communicate, although he required heavy prompting and physical guidance and manipulation, at times, for him to attend to the screen and make selections. He previously attempted learning signs as well as using a picture exchange communication system. He had

shown moderate progress in responding to yes or no questions involving offers of food and other common items; however, his most reliable means of communicating his actual wants and needs was through his physical actions. He enjoyed being outside and eating, and was highly motivated by both as rewards. He made occasional vocalizations, mostly when happy in the form of a squeal; however he showed very minimal communicative intent. He continued to demonstrate deficits in social interaction and engaged in repetitive activities and stereotyped movements and behaviors characteristic of autism. The assessment results indicated Student continued to demonstrate well below average intellectual abilities in addition to deficits in adaptive behavior skills. These deficits significantly affected Student's educational performance. Student presented with severe receptive and expressive language impairments consisting of limited attention to and ability to comprehend verbal language as well as a lack of oral expressive language. He showed potential for using gestures and signs and/or an augmentative and alternative communication device to communicate his basic needs (toileting or food), yet continued to need heavy verbal and physical prompting for most communicative acts. He was able to use an augmentative and alternative communication device to successfully request food items from a field of three approximately 30 percent of the time and improved in his ability to understand the correspondence between icons on his iPad and the actual items they represented.

36. The report stated that Student met special education eligibility criteria as an individual with "Intellectual Delay" and autism. It concluded Student continued to demonstrate well below average intellectual abilities in addition to deficits in adaptive behavior skills. The report recommended use of visuals, visual physical prompting, repeating instructions, modeling new tasks/activities, breaking down tasks/activities, and providing reinforcement particularly for difficult or non-preferred tasks/activities.

37. At hearing, Mr. Sellers testified about the Multi-Disciplinary Report. He was

familiar with the Comprehensive Assessment because he had administered the assessment to other students. It typically generated a cognitive ability score. Student's inability to respond to the directions could have meant a number of different things, including that Student had difficulty with receptive and expressive language at the very least, and the assessor would potentially look at other ways to assess that skill area.

38. Mr. Sellers was also familiar with the Developmental Assessment of Young Children because he had experience administering it. He explained that a score of 64, Student's score in 2005, was at the first percentile. Regarding the standard score of "less than 50" Student achieved in 2008, Mr. Sellers explained it meant Student's performance on the assessment instrument at that time was so low a score could not be generated. Mr. Sellers opined that for the most part, cognitive scores stay stable over time. He did not explain the change in scores between 2005, at 64, and 2008, at "less than 50," or otherwise discuss the discrepancy. In Mr. Sellers's opinion, based on Student's scores on the Developmental Assessment of Young Children and the 2018 assessment, Student's cognitive abilities were at the lower extreme range and he was significantly cognitively impaired. In making progress, Student needed frequent repetition of any new information to acquire that skill, and even after he acquired some level of proficiency with that skill, regression was always an issue and he would need to be taught again.

#### Occupational Therapy Assessment

39. Student's 2018 triennial evaluation included an assessment by occupational therapist Patricia Polcyn. Ms. Polcyn was an occupational therapist since 1979 and licensed by the state of California since 1980. She held a bachelor's degree in occupational therapy and certificates in two sensory integration tests. She was employed as the lead occupational therapist by the Greater Anaheim SELPA since 1992. The SELPA provided all of the occupational therapy and physical therapy services for all of the school districts which were part of the SELPA, including Los Alamitos. Before



1992, Ms. Polcyn worked as a school-based staff therapist for another school district. As lead therapist, she conducted not less than 100 evaluations per year and provided direct services to eight students.

40. Ms. Polcyn was the occupational therapy service provider for Student from 2014 to March 2018. She provided Student at least one of the two weekly 45-minute occupational therapy sessions. According to Ms. Polcyn, school-based occupational therapists focused on three target areas: fine motor skills, gross motor skills, and sensory processing. Sometime in 2016, Mother requested that Ms. Polcyn be removed from Student's case. Los Alamitos declined to remove Ms. Polcyn.

41. Ms. Polcyn assessed Student in February and March 2018 and prepared a written report dated March 8, 2018. She reviewed Student's file; observed Student in the classroom and at recess and lunch; conducted teacher and staff interviews; and administered the Benbow Observations of Hand Skills, the School Function Assessment, and the Southern California Ordinal Scales of Development subtests for Fine Motor Abilities and Practical Abilities. She twice attempted to administer the Bruininks-Oseretsky Test of Motor Proficiency 2, a standardized test with precise instructions.

42. In conducting her assessment, Ms. Polcyn did not interview either Parent and did not ask either Parent for input or information for her assessment. She admitted she obtained no input from Parents for her 2018 assessment because she did not feel it was necessary. At hearing, she claimed she knew Parents' concerns from her conversations with them during prior IEP team meetings, but she was unable to identify any specific meeting.

43. Ms. Polcyn's written report stated Student did not appear to understand the complex verbal instructions required of the standardized testing she attempted. Even when provided with additional demonstrations, verbal prompts, reinforcing

incentives, and hand-over-hand learning, Student was unable to perform as required for scoring. The test tools used gathered information based on demonstrations of the task and observations of Student's performance. These tests did not require expressive language skills to perform the expected tasks and Ms. Polcyn used a familiar tokens system to motivate Student to perform to the best of his ability. The report did not explain the effect of Student's inability to complete the standardized testing on the assessment findings or evaluation of his need for occupational therapy services.

44. The School Function Assessment was completed to gather information regarding Student's present level of motor function in the school environment. Student required supervision throughout the school day, but he was independently mobile and moved around the campus without physical assistance. He was able to maintain a seated position without adaptive equipment. He was able to open most containers and packages once loosened by an adult. He could not fasten a zipper, button, snap, or tie shoes. He was toilet trained. He lacked social skills to play productively with peers, although some reciprocal skills were seen with some activities. He did not know how to use tools such as a stapler, eraser, paperclip, or hole punch. He did not read or write. He sometimes traced basic shapes and letters. He could scribble but did not make shapes with clear intention. He had fine motor skills to produce legible handwriting, but it appeared he had not yet learned the representation value of letters and sounds. At hearing, Ms. Polcyn opined that although Student had fine motor skills to copy a circle, he lacked motivation to do the task because he lacked the ability to set goals. He was significantly delayed in his ability to be independent. She described his scores on the School Function Assessment as "significantly low," although this was not stated in her report.

45. The report did not comprehensively explain the purpose of the Benbow or set forth any criteria for evaluating the assessment results. It stated Student was

right-hand dominant. He held a pencil with an inefficient tripod grasp. He did not isolate his index finger to point but he could activate an iPad. He developed a full range of appropriate grasp patterns. He was able to cut when scissors were positioned in his hand. He demonstrated bilateral coordination.

46. There was no comprehensive description in the report as to the purpose of the Ordinal Scales or explanation of what it measured as related to assessing needs addressed by occupational therapy. The report listed various tasks for which Student was unable to demonstrate independence, including coordinated bilateral hand use, cutting shapes, writing his name, drawing a human figure or geometric shapes, duplicating a simple block bridge and train, using simple tools, securing clothing fasteners, doing simple grooming independently, travelling in the immediate neighborhood independently, putting shoes on the correct feet, and performing basic hygiene. At hearing, Ms. Polcyn explained that the results indicated Student was able to perform 100 percent of the tasks on the fine motor subtest up to age 24 months, and only 66 percent of the skills up to age four years. On the practical abilities subtest, he was able to perform 100 percent of the skills up to 12 months-old level, and 66 percent of the tests up to age two.

47. The report conclusions were cursory. It stated that the School Function Assessment and the Benbow indicated that Student had adequate fine motor skills to access education, but the report set forth no explanation for this conclusion. It also stated Student scored significantly low on the Ordinal Scales. A "significantly low" score was not defined or explained in relation to the need for occupational therapy services. The only recommendation offered in the report was that the IEP team take these test results into consideration when developing an educational program.

48. At hearing, Ms. Polcyn claimed she presented her assessment report at Student's IEP team meeting. She was impeached on this issue. She did not attend any

IEP team meeting in 2018 at which she presented her report. She developed goals following his triennial assessment by collaborating with the IEP team members through informal discussions prior to March 2018. She recommended 45 minutes of occupational therapy consultation in the classroom with teachers and staff based on the assessment results. Consultation would have consisted of an occupational therapist going to Student's classroom and collaborating with staff during the school day to assist them in improving Student's performance. She did not recommend direct services to Student because she thought his goals could better be met through consultation at Del Sol where he was exposed to occupational therapy strategies and opportunities for learning throughout his school day.

49. According to Ms. Polcyn, Student was not retaining the skills learned in pull-out occupational therapy sessions and was not generalizing the skills he learned to the classroom. His attending had improved, but he still had a significant challenge with attention span and struggled to retain information. The 90 minutes per week of direct service was not an effective model of service for Student. He had not been meeting his occupational therapy goals and objectives for quite some time. Ms. Polcyn explained that Student's learning style was such that he performed best in a setting where what he was taught had purpose and meaning. At school, he could practice washing his hands and opening his lunch containers, independently. Bringing the skills into a more natural environment would allow Student to maintain and acquire additional skills because the more meaningful the task, the more likely he would be able to recall it and demonstrate independence. Ms. Polcyn unpersuasively opined at hearing that she did not think his lack of progress indicated that more services were necessary. This information is not in the report.

50. Ms. Polcyn conducted no assessment specific to sensory processing. At hearing, she agreed that Student benefited from sensory input during his school day to

help him stay calm. She attempted to explain the lack of a specific assessment in that area; her testimony was unpersuasive because it was evasive, inconsistent, and her demeanor and tone were defensive. Ms. Polcyn unpersuasively explained that there were a number of testing tools for evaluating sensory processing skills. She claimed that the only one within Student's age range was the Adult Adolescent Sensory Profile, which required an interview with Student. She claimed that since Student did not have that language communication skill ability, she was unable to use that test. There were other methods to obtain that information from Student, which she claimed she explored. Her testimony was evasive as to whether she used his augmentative and alternative communication device to obtain input from him. She said she used his augmentative and alternative communication device, but then said she determined his input from observations. She falsely claimed this evaluation was in her report and unpersuasively asserted she executed an alternative method to obtain the information necessary to obtain Student's sensory needs and input to assess his sensory needs.

#### Functional Behavior Assessment

51. A functional behavior assessment was conducted between January and May 2018 as part of Student's triennial evaluation, and was summarized in a written report. The functional behavior assessment team consisted of school psychologist Ms. Kennedy, a school psychologist intern, and program specialist Jenny Bain, who consulted with the assessment team. The purpose of the assessment was to assess the severity of maladaptive behaviors reported in the school environment, determine factors/antecedents related to these maladaptive behaviors, and determine if supports were warranted. The measures used included review of records, parent and teacher input, behavior observations, behavior data collection and analysis, and consideration of the findings in the multi-disciplinary assessment. The report contained recommendations for a behavior intervention plan, which was attached to the

assessment.

52. The targeted behaviors were identified as: aggression toward others, defined as physical contact with others, including grabbing; frustration, defined as invading personal space of others paired with high vocal/hand motor stimulation; self-injurious behavior; non-compliance; and eloping from an assigned area. The antecedent behavior was identified as presence of physical symptoms, Student's lack of understanding regarding expectations or expectations being unclear, changes in school routine, transitioning from a preferred to a non-preferred activity, and not wanting to engage in a non-preferred task.

53. The 15-page report included one page of graphs prepared by Dr. Kim, based upon data collected at Del Sol between June 2017 and February 2018 by staff supervised by Dr. Kim. As of March 2018, the report stated Student was exhibiting few challenging behaviors and had also been successful at toileting, having had very few accidents in the prior eight months. The report also included behavior data collected by Los Alamitos or the Greater Anaheim SELPA during Student's afterschool behavior program between March 28, 2018 and May 3, 2018.

54. At hearing, Dr. Kim explained that although the challenging behaviors decreased in November and December 2017, they were still occurring about once per day, and although they decreased even more in January and February 2018, they were still occurring about once per week. She insisted that all of the behaviors were concerning because they could be dangerous. Dr. Kim claimed she witnessed Student's self-injurious behaviors, more often when he was in a larger group setting when there were more or louder students. She also maintained that she observed aggressive behavior by Student several times between June 2017 and February 2018 in the form of Student grabbing another person and that the antecedent for this behavior was others standing in close proximity to him.

55. Ms. Kennedy discussed her functional behavior assessment with Dr. Kim in March 2018, and helped in the development of a behavior intervention plan for Student. The behavior intervention plan gave a list of ways to modify the antecedent events and ecological factors to prevent challenging behaviors and modify consequent events to teach replacement behaviors. According to Dr. Kim, this plan could be implemented at Del Sol and some of the items listed were already being used except for the following: a visual schedule; encouraging Student to express his feelings through the use of his device, gestures, non-verbal communication, or verbal approximations; teach, model, or facilitate regulation and stress management; continuously assessing current reinforcement/motivation through sampling and exploration; and incorporating a heavy sensory diet into Student's sessions allowing breaks that involved tactile and soothing tasks/feedback.

#### EVENTS PRIOR TO IEP TEAM MEETING

56. On March 5, 2018, Mother signed and returned to Los Alamitos an authorization form dated February 26, 2018, for release of information and documents between Los Alamitos and Goodwill.

57. Heidi Olshan, Ed.D. was Los Alamitos's Director of Special Education and Mental Health since July 2017. She held a doctorate degree in education in organizational leadership and a master's degree in education, educational psychology, counseling, and guidance. She also held pupil personnel services and administrative credentials, and until 2000 held a special education teaching credential. She had over 30 years of work experience in the field of education, including five or six years as a teacher, 10 years as a counselor at Los Alamitos and five years as a Los Alamitos administrator, including as an assistant principal between 2012 and 2017 at the high school where part of her duties included direct oversight of the special education department on campus. Her duties as Director included oversight of the special

education and mental health programs and she worked closely with program specialists (case managers) who were conduits for providing services to students placed at non-public schools.

58. In March 2018, Ms. Polcyn told Dr. Olshan that Student was able to perform the various tasks in listed in her report under “[Student] does not yet demonstrate independence in,” but that he was not able to perform them independently. At hearing, Dr. Olshan claimed that from speaking to “occupational therapists,” Student needed ongoing prompting to move through the steps to unbutton his pants, but he was physically capable of using his hands to perform the task.

59. Dr. Olshan reviewed all of Student’s educational records. She never interacted with Student. She was familiar with Student through review of his educational records and speaking to others and her occasional informal observation of him.

#### THE MARCH 2018 IEP TEAM MEETINGS

60. Student’s triennial IEP team meeting took place over the course of five days: March 13 and 27, May 10, July 18, and August 27, 2018. Mr. Sellers took the notes at all of the meetings he attended. He agreed that the notes were more accurate than his memory.

61. Those in attendance at the March 13, 2018 IEP team meeting included, among others, Parents, a representative from the Regional Center, Dr. Olshan, Los Alamitos’s special education teacher Mr. Rauscher, school psychologist Ms. Kennedy, a Los Alamitos speech-language pathologist, and program specialist Mr. Sellers, as well as representatives from Del Sol. No occupational therapist attended. Parents were provided with a copy of parents’ rights.

62. The IEP team reviewed the current psychoeducational assessment, occupational therapy assessment, speech and language assessment, and functional behavior assessment and a draft of the new behavior intervention plan. Mother shared



that she did not have an opportunity to complete the questionnaires for the psychoeducational assessment because they were sent to an incorrect email address. The IEP team reviewed the referral for the assistive technology assessment. The Los Alamitos members of the IEP team shared that the reports were used to identify if Student continued to qualify for special education services and to help identify areas to target with goals. The IEP team discussed the importance of Student having regular sensory opportunities throughout his day. The IEP team agreed to have Student's education focus on vocational and life skills instead of academics. Mother stated that she did not believe many deficit areas identified in the occupational therapy report were addressed with goals or specifically taught. The IEP team discussed Student's eligibility and concluded he qualified for special education as a child with autism primarily and intellectual disability secondarily. The IEP team reviewed Student's aggression, defined as hitting or grabbing. In the past year, he only hit three times. The IEP team agreed to differentiate the data in the functional behavior assessment to reflect incidents as a result of excitement versus frustration. The IEP team reviewed the goals Los Alamitos team members drafted in January 2018.

63. At hearing, Father explained that since Student was five years old, Father wanted Student to have goals that would improve Student's activities of daily living. At the March 2018 IEP team meeting, Father was excited that Los Alamitos wanted to shift Student away from an academic program in favor of activities of daily living.

64. The IEP team reconvened on March 27, 2018. Parents, Dr. Kim, Ms. Kennedy, Mr. Rauscher, Ms. Bain, Mr. Sellers, Dr. Olshan, a Del Sol speech-language pathologist, representatives from Del Sol, and a representative from the Regional Center attended. Ms. Polcyn did not attend. The IEP team discussed Student's behaviors and the behavior intervention and support services he received at Del Sol. Mr. Rauscher shared that there had not been a need to put hands on Student to intervene to address

a dangerous behavior in the past 12 months. The Regional Center representative shared that Student used two agencies to receive 12 hours of applied behavior analysis respite per week. The respite support typically had Student walk around, walk to the park, use crosswalks, and get something to eat. The IEP team described the benefits and purpose of community-based instruction. The IEP team discussed the occupational therapy report without an occupational therapist present, and agreed to have a different assessor conduct a new occupational therapy assessment. The IEP team agreed to reconvene on May 10, 2018. The IEP notes stated that Parents signed the assessment plan authorizing a new occupational therapy assessment, but District did not offer any evidence at hearing as to the contents of the assessment plan.

#### MOTHER'S REQUEST TO REMOVE MS. POLCYN FROM STUDENT'S CASE

65. Mother again requested that Los Alamitos remove Ms. Polcyn from Student's case sometime in March 2018. Los Alamitos removed Ms. Polcyn from Student's case.

#### SECOND OCCUPATIONAL THERAPY ASSESSMENT

66. Delilah Cerillo conducted a second occupational therapy evaluation of Student in April 2018, and prepared a written report dated May 2, 2018. Ms. Cerrillo earned a master's degree in occupational therapy in 2013 and a bachelor's degree in psychology in 2007. She had been employed as licensed occupational therapist since 2013, and at the time of hearing had been an occupational therapist for the Greater Anaheim SELPA for almost three years. She was authorized to provide occupational therapy services and conduct assessments, which were also part of her employment duties.

67. She provided occupational therapy services to Student occasionally for a short period of time in 2015. She provided services to him again for one session per

week from January 2016 through May 2016. During the 2016-2017 school year, she provided Student one session per week. Ms. Cerrillo worked on Student's attending/participation during her pull-out sessions, which she claimed was still an issue in May 2018. He made progress in his goals and abilities during the time she worked with him. She never saw him use his iPad after 2015.

68. The purpose of Ms. Cerrillo's evaluation was to determine if Student continued to require school-based occupational therapy to access an educational program. She understood that Parents did not want Ms. Polcyn to perform the occupational therapy assessment. Ms. Cerrillo used one standardized measure, the Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition, but she was unable to score two of the supplemental subtests that screened for general visual perceptual functioning and whether motor coordination difficulties were contributing to delays in visual-motor integration. Student was unable to follow the standardized instruction on both subtests, requiring more visual and physical prompts than the publisher's instructions permitted during testing. He scored in the very low range for visual-motor skills, and Ms. Cerrillo reported that he was able to scribble within the boundaries of a paper but unable to copy a vertical, horizontal, and circular stroke within a designated area. Her report also stated that "he was observed imitating a vertical stroke and circular strokes during the assessment." At hearing, she contradicted that statement, explaining that he was unable to imitate during the assessment, and it was only after the assessment, when he was involved in other activities that he was able to imitate two items on the assessment. At hearing, Ms. Cerrillo explained that the results of the Beery indicated in the area of fine motor skills, Student had difficulty following through with one-step instructions and did not demonstrate skills consistently. This information was not in her report. The assessment report erroneously conveyed that Student demonstrated the ability to imitate during the standardized assessment.

69. Ms. Cerrillo also used non-standardized measures, specifically the Sensory Integration Inventory - Revised. It was a non-standardized assessment designed to gather information regarding a person's ability to process sensory information from the environment. The assessment was conducted by observation and interviews with Student's Del Sol teacher and Mr. Rauscher. Her observations took place in two different settings, Student's Del Sol classroom and a community outing with Mr. Rauscher. Ms. Cerrillo found that Student did not seek tactile input, but he had needs in the vestibular area since he sought that type of stimulation. Regarding proprioceptive input, she determined that he bit his hand and wrist when he was frustrated or over-stimulated, which appeared to be a method of coping and self-regulating. At hearing, she explained that Student liked that deep pressure on his body when he was upset.

70. There was no evidence that Ms. Cerillo interviewed either Parent or otherwise obtained input from Parents as part of her assessment. There was no evidence presented at hearing that explained the absence of parental input.

71. Ms. Polcyn was Ms. Cerrillo's supervisor. During her assessment, Ms. Cerrillo discussed Student with Ms. Polcyn and collaborated with her in conducting her assessment. She reviewed Ms. Polcyn's assessment report as part of her assessment.

72. In her findings and recommendations, Ms. Cerrillo concluded that Student had the fine motor skills to participate in his school environment. She also concluded that he demonstrated difficulty using both hands simultaneously for activities affecting his ability to participate in self-care and academic activities. The report stated that Student exhibited self-stimulatory behavior for vestibular input and would continue to benefit from movement activities throughout the day to assist with regulation. She found that Student's daily schedule at Del Sol reflected his current needs and recommended only that the IEP team consider the evaluation findings in determining educational planning. Ms. Cerrillo's report did not include any specific recommendation

for occupational therapy services.

73. Ms. Cerrillo stated her recommendation and explained the basis of that recommendation at hearing. She recommended occupational therapy services in the form of 45 minutes of consultation per month where the occupational therapist would consult with and train teachers and staff in working with Student, but Student would receive no direct services. She did not believe school-based activities were meaningful to Student and thought he was making little progress at school in the areas which had been addressed by occupational therapy. In her opinion, Student did not require direct occupational therapy service as of May 2018 because he was not demonstrating the progress “we” wanted to see during his two 45-minute per week individual sessions, he was not meeting his goals consistently, he was having to work on the same skill sets, and skills were not being generalized session-to-session or to the classroom. She thought it would be more beneficial if Student’s occupational therapy services were provided by classroom teachers and support staff as part of his embedded routine. Sensory strategies were already part of Student’s school day as of May 2018, including frequent breaks, walks around the quad, access to a spider web chair and other sensory materials, and “hopefully” staff could develop a sensory diet schedule through collaboration and consultation. Based on her recommendation, Student would still be working on attending, but it would be during a group setting in the classroom. The explanation she offered at hearing as to the basis for her recommendation for occupational therapy services was not in her report.

74. When Ms. Cerrillo was asked at hearing if Ms. Polcyn had made the same consultation only service recommendation, Ms. Cerrillo claimed to be unaware of Ms. Polcyn’s recommendation. Her testimony was implausible, and her implausible denial adversely affected the credibility of all her opinions and testimony. Ms. Polcyn was her supervisor, and Ms. Cerrillo admitted she had read Ms. Polcyn’s report, collaborated with

Ms. Polcyn, and had discussions with her as part of her assessment. In addition, Ms. Polcyn's and Ms. Cerrillo's occupational therapy service recommendation was identical. Both recommended only 45 minutes of consultative services per month. Ms. Cerrillo also testified inconsistently and evasively about her reliance upon and her contacts with Ms. Polcyn during her assessment, but she ultimately admitted she considered Ms. Polcyn's assessment in coming to her conclusions. Her evasiveness negatively impacted her credibility. It was not believable that Ms. Polcyn never shared her recommendations with Ms. Cerrillo.

75. Ms. Cerrillo's report did not disclose that she consulted with Ms. Polcyn, collaborated with her, or that she read Ms. Polcyn's report. It did not disclose that she adopted or agreed with Ms. Polcyn's service recommendation.

#### MAY 2018 IEP

76. In May 2018, Ms. Cerrillo told Dr. Olshan the same thing Ms. Polcyn had told Dr. Olshan in March 2018: Student was able to perform the various tasks in listed in Ms. Polcyn's report under "[Student] does not yet demonstrate independence in," but he was not able to perform them independently.

77. The IEP team reconvened on May 10, 2018. Those in attendance included Parents, Dr. Olshan, Ms. Cerrillo, Ms. Bain, Mr. Sellers, Ms. Kennedy, Mr. Rauscher, a Del Sol teacher, Dr. Kim, and a Regional Center representative. The IEP team reviewed Ms. Cerrillo's occupational therapy report, the updated functional behavior assessment and behavior intervention plan, and the status of the assistive technology assessment. Student's present levels of performance were updated and new goals were discussed. The IEP team agreed that new goals would be added, including a goal to address Student's rate of walking speed and cleaning up after himself, and draft goals would be sent to Parents. The IEP team agreed to reconvene on June 7, 2018.

78. During the meeting, Father discussed the development of a goal to

address Student's failure to raise his hand from the side of his body when he used a sign because no one could see that Student was trying to communicate. Student used signs, his device, picture exchange, and gestures, all to a certain extent in order to communicate. Student used about 10 signs regularly, including the sign for bathroom. However, Student had habit of using signs without raising his hands. Father believed it was important for Student to be able to get someone's attention to let them know he was asking for something. Mr. Rauscher said this was a definite need for Student and Los Alamitos agreed to develop that goal as part of Student's IEP. Father believed a goal addressing Student raising his hands when signing was being developed for review at a later IEP team meeting, but Los Alamitos never drafted a goal for that. Although this discussion was not reflected in the IEP team meeting notes, Los Alamitos did not rebut Father's testimony. Father's testimony was credible because his testimony was candid, offered details, and his demeanor demonstrated certainty in recollecting the substance of the discussion.

#### CONTACT WITH GOODWILL REGARDING ASSISTIVE TECHNOLOGY ASSESSMENT

79. On May 16, 2018, Goodwill contacted Los Alamitos confirming Los Alamitos's referral of Student for an augmentative and alternative communication evaluation, and that Student communicated primarily using gestures, sign, and an iPad with a Proloquo2Go communication application. Goodwill advised Los Alamitos that it did not currently have a speech-language pathologist on staff, and that if Student wanted to remain on the waiting list, his would be the first case scheduled once a pathologist was on staff.

80. On May 25, 2018, Goodwill notified Los Alamitos that it had hired a new speech-language pathologist to start work on June 25, 2018 and that augmentative and alternative communication services would resume in the fall. Mr. Sellers informed Goodwill that Los Alamitos intended to use a different agency to conduct the assistive

technology assessment. Goodwill removed Student from its waiting list on May 29, 2018.

#### JUNE 2018 IEP TEAM MEETING

81. On June 6, 2018, Mother advised Los Alamitos that she could not attend the June 7, 2018 IEP team meeting. After speaking to Mother, Father believed the meeting was being rescheduled.

82. On June 7, 2018, Los Alamitos reconvened the IEP team meeting with some members of the IEP team. When Los Alamitos contacted Father during the meeting to determine if he planned to attend, he stated that he believed the meeting was being rescheduled and that he was out of town and unable to attend. The IEP team agreed to reschedule the meeting at a time when Parents could attend. No educational decisions were made during the meeting.

#### AFTER THE JUNE 2018 IEP TEAM MEETING

83. Del Sol's last day of school for the 2017-2018 regular school year was June 8, 2018.

84. On June 12, 2018, Los Alamitos asked Goodwill to put Student back on the waiting list for an assistive technology assessment because its other vendor was unable to conduct the assessment.

85. Los Alamitos's last day of school for the 2017-2018 regular school year was June 14, 2018.

86. On June 25, 2018, Goodwill put Student back on its waiting list, and informed Los Alamitos augmentative and alternative communication services would resume in the fall.

87. On June 26, 2018, Los Alamitos sent a letter to Parents in response to a June 21, 2018 email from Mother regarding Student's stay put placement and the



pending augmentative and alternative communication assessment. Los Alamitos's letter notified Parents adapted physical education was not a component of Student's stay put placement and would no longer be provided, and asserted Student received appropriate physical education through his educational programming at Del Sol. The letter also confirmed that Student's after-school behavior intervention services were currently being provided at Los Alamitos's office and proposed having the services provided at Del Sol.

88. The June 26, 2018 letter also notified Parents that the IEP team needed to complete Student's triennial review and offered the following dates to reconvene:

July 10, 17, or 18, 2018. District warned Parents that if they "continue to refuse to participate in [Student's] triennial IEP" and/or did not provide their availability for an IEP team meeting, Los Alamitos would proceed with the IEP team meeting on July 18, 2018 without Parents' attendance. Los Alamitos also advised Parents that although it had previously denied Parents' request for an alternate assessor for the augmentative and alternative communication assessment because Goodwill informed Los Alamitos that it could not complete the assessment within statutory timelines, Los Alamitos was now agreeable to using Goodwill as the assessor on the condition that Parents waived the statutory timeline regarding assessment completion and IEP team review. Enclosed with the letter was a Notice of Procedural Safeguards.

89. On July 3, 2018, Los Alamitos sent Parents an email stating that it had

attached to its email three meeting notices corresponding to the three proposed IEP dates indicated in the June 26, 2018 letter, and asked Parents to advise Los Alamitos which date was acceptable. At hearing, District did not offer any evidence as to the contents of the July 2018 meeting notices.

90. Father subsequently advised District he was unable to attend an IEP team meeting on any of the offered dates and did not offer alternative dates.

91. Mother responded by email on July 5, 2018. Mother stated her family was on summer vacation, and that she was agreeable to an IEP team meeting in the fall after Goodwill completed its assessment. Mother also stated she did not agree with Student's goals and Los Alamitos's assessments and opted to stay with Student's established services through the summer and thanked them for respecting their family summer vacation.

92. Mother thereafter told Father the July 18, 2018 IEP team meeting was going to be rescheduled after summer.

93. Los Alamitos inquired of Goodwill about the status of the assistive technology assessment on July 17, 2018. The same day, Goodwill notified Los Alamitos that augmentative and alternative communication services would begin in the fall and that a new referral packet needed to be filled out and returned to Goodwill, and as soon as the paperwork was received, Student would be one of the first assessments to be scheduled for fall.

#### THE JULY 18, 2018 IEP TEAM MEETING AND OFFER OF SPECIAL EDUCATION AND RELATED SERVICES

94. The IEP team reconvened on July 18, 2018. The IEP team members who attended included among others, Dr. Olshan, Ms. Bain, Mr. Sellers, a Del Sol teacher, and a Del Sol speech-language pathologist. Parents did not attend. There was no occupational therapist in attendance. The notes reflect that Mother told District she

“was unavailable during the summer (June and July 2018).”

95. The IEP team members in attendance reviewed Student’s present levels of performance. The IEP reflected the following: Student enjoyed interacting with staff and familiar peers. He was able to express his wants and needs by leading an adult to the desired item or location. His preferred learning style was visual and hands-on with use of manipulatives. It was noted that Parent had concerns with Student’s ability to take care of his personal toileting needs, and self-help skills such as grooming. In academics/functional skills, Student was able to identify seven of 26 letters in the alphabet among a field of two. He could identify 12 sight words among a field of two. He could identify his first and last name among of field of two. In the areas of writing, when provided with physical prompting he was able to trace letters, write his name, and copy sentences. He primarily used gestures and signs to communicate. He was emerging in his ability to request desired items using his augmentative and alternative communication device. He used an iPad with a communication application. He made gains in demonstrating an understanding of the correspondence between an object and a picture on his device. He was able to express certain wants and needs when provided prompts and was emerging in his ability to answer yes/no questions about a desired item. He was able to follow five simple one-step commands. It was reported that he demonstrated fine motor skills to participate in his current school environment. He had range of motion and purposeful grasp. He had difficulty with bilateral coordination, which affected his ability to participate in self-care and academic activities. In the classroom, he was performing adequately in his relationships with peers and adults, following rules, and acquiring self-confidence. He demonstrated difficulties in achieving independence, leadership skills, coping with frustration, making adequate decisions, and communicating with others. He engaged in self-stimulatory behaviors, and completed various vocational jobs around campus with moderate assistance and visual cues. His

behaviors impeded his learning, which included looking away from instructional materials during small group and one-to-one academic time, eloping from the work area in the classroom, and pushing items away when presented with non-preferred tasks. Areas of need were identified as functional academics, vocational tasks/self-help, communication, behavior, social, mobility, and motor planning. Student required assistive technology devices and/or services for communication, and the IEP noted that he used an iPad and a low tech communication system for daily communication at school.

96. The IEP team members in attendance discussed proposed goals and services. They discussed applied behavior analysis support and how it could support Student's mobility, workspace, laundry, time on task, independence, and employment goals on the Del Sol campus. A Del Sol speech-language pathologist discussed the speech services. The IEP team discussed the assistive technology assessment that was to be completed by Goodwill sometime during the beginning of the 2018-2019 school year. The IEP team agreed to send home an assessment plan for adapted physical education services and the 2018-2019 consent form for Goodwill to work with Student.

97. Los Alamitos developed an offer of special education and related services, which consisted of the following: full-time group specialized academic instruction in a non-public school under contract with Los Alamitos or the Greater Anaheim SELPA, i.e. Del Sol; individual speech and language services three times per week for 30 minutes and 30 minutes per week of augmentative and alternative communication classroom consultation provided by the non-public school or Los Alamitos; a full-time instructional assistant provided by the non-public school or Los Alamitos; occupational therapy consisting of the occupational therapist providing consultation in the classroom to teachers and staff regarding Student for 45 minutes monthly; individual behavior intervention services provided by Los Alamitos at the non-public school and in the

neighborhood for 60 minutes five times per week; behavior supervision support and consultation by a board certified behavior analyst provided by Los Alamitos for 240 minutes monthly; and work experience education and agency linkages, each for 120 minutes yearly provided by the non-public school or Los Alamitos. A behavior intervention plan was also offered, which was the plan proposed as part of the functional behavior assessment. Los Alamitos offered 18 goals and a transition plan based upon a screening using a transition assessment matrix, which included three separate post-secondary goals linked to Student's annual goals.

98. At hearing, Dr. Olshan explained that instead of the after-school services Student had been receiving at the high school and the district office, Los Alamitos was proposing the individual behavior intervention services be provided by Los Alamitos at Del Sol and in the neighborhood for 60 minutes five times per week, to begin one half-hour prior to the end of the Del Sol school day through one half-hour after the end of the school day. She explained Los Alamitos's rationale for the change in location: Dr. Kim told her that instead of leaving Del Sol and going to the other Los Alamitos locations, Student was more familiar with Del Sol and the services would be more meaningful if embedded into the day at Del Sol instead of in a vacuum, resulting in a greater educational benefit to Student. Another consideration was safety for Student and others. Del Sol was more secure than the high school campus and school district office, which were open and lacked any gates. Dr. Olshan claimed Student had a history of elopement, and it was more appropriate for Student to practice his behavior skills on a more secure campus. Del Sol could provide Student with a full program to help him become as independent as possible as he grew up.

99. Los Alamitos also offered transportation, and extended school year services consisting of: full time specialized academic instruction at a non-public school, i.e. Del Sol, for 20 days; individual speech and language services for 30 minutes twice a

week provided by the non-public school or Los Alamitos; a full-time instructional assistant provided by the non-public school or Los Alamitos; occupational therapy services in the form of consultation to the teacher and staff, the frequency of which was stated as "45 min served Any [sic] other frequency or as needed" to be provided by Greater Anaheim SELPA; and behavior supervision services by a board certified behavior analyst, which was stated both as "240 minutes during ESY period" and as "240 minutes served Any [sic] other frequency or as needed."

100. Los Alamitos offered accommodations which included frequent breaks that included use of a spider web chair/trampoline; access to sensory materials; use of an iPad for communication; and visual materials, step-by-step instructions, one-on-one instruction, kinesthetic learning, frequent reviewing, visual schedule, prompting, signals, priming, and visual cues. A modified curriculum was offered and participation in a curriculum leading to a certificate of completion.

#### EVENTS AFTER THE JULY 2018 IEP TEAM MEETING

101. On July 24, 2018, Los Alamitos sent a letter to Parents advising them it did not agree to wait to finalize Student's IEP in the fall after the conclusion of the assistive technology assessment. The letter advised Parents that the IEP team met on July 18, 2018, to "finalize" Student's IEP. Los Alamitos stated it would reconvene the IEP team meeting to review the completed IEP, enclosing three IEP team meeting notices for August 20, 21, and 22, 2018, respectively, and advising Parents to propose new dates if those dates did not work. Los Alamitos also advised Parents it would not proceed with the assistive technology assessment until it received Parents' consent to waive the statutory timelines, and that it would convene an IEP team meeting once that assessment had been completed. The letter enclosed a Notice of Procedural Safeguards and the IEP finalized on July 18, 2018, an assessment plan dated July 18, 2018, for a motor development assessment by the adapted physical education teacher, an

authorization form dated July 20, 2018 for release of information and documents between Los Alamitos and Goodwill, and the three Notice of Meeting forms for IEP team meeting dates on August 20, 21, and 22, 2018. Each of the meeting notices stated that those in attendance would include a general education teacher, a special education teacher, an administrative designee, a speech-language pathologist and an occupational therapist.

102. On July 24, 2018, Mother advised Los Alamitos that she was on summer vacation and was agreeable to an IEP team meeting in the fall. She stated she already consented to the Goodwill assessment and Goodwill indicated it could complete the assessment in the fall. Mother notified Los Alamitos she did not agree with the July 18, 2018 IEP and was waiting for the assistive technology assessment Los Alamitos approved. She also notified Los Alamitos that she filed a formal complaint with the State of California Department of Education to investigate the matter and believed Los Alamitos was attempting to have Student removed from the school district.

103. Father did not read Los Alamitos's July 24, 2018 letter carefully and misunderstood its contents.

104. On July 25, 2018, Los Alamitos sent an email to Mother notifying her that Goodwill was requesting a new release signed by the family to proceed with the testing.

105. On August 1, 2018, Los Alamitos sent the referral packet to Goodwill and inquired when the assessment would take place.

106. On August 3 and 10, 2018, Los Alamitos inquired of Goodwill about the status of the scheduling of the assistive technology assessment. Los Alamitos informed Goodwill that Parents were extremely concerned about this assessment, which they hoped would have been completed last spring.

107. August 8, 2018, was Los Alamitos's first day of school for the 2018-2019 school year.

108. On August 13, 2018, Los Alamitos sent a letter to Parents, again notifying them that it had convened a July 18, 2018 IEP team meeting in their absence where the IEP team completed Student's triennial review and offered special education and related services because of Parents' "refusal to attend the triennial review IEP meeting." Los Alamitos told Parents it had not received parental consent to the offer for special education and related services in the IEP completed on July 18, 2018, and that it would be filing a request for a due process hearing to implement the IEP without parental consent. The letter stated that prior to filing, Los Alamitos wanted to give Parents an opportunity to attend an IEP team meeting to review Student's IEP, offering three additional IEP team meeting dates and inviting Parents to propose alternative dates if those were not workable. Enclosed with the letter was a Notice of Procedural Safeguards and again, three Notice of Meeting forms for August 20, 21, and 22, 2018. Each of the meeting notices stated that those in attendance would include a general education teacher, a special education teacher, an administrative designee, a speech-language pathologist and an occupational therapist.

109. Prior to August 27, 2018, Father spoke to the Los Alamitos assistant superintendent and explained that he thought the meeting on July 18, 2018, had been cancelled, and arranged to meet with District on August 27, 2018.

110. Father never said he would not attend any IEP meeting. At hearing, Dr. Olshan admitted Father never said he would not attend any IEP team meeting and that Father had typically been very responsive. She asserted Father never responded to Los Alamitos's August 13, 2018 letter, but admitted that others at Los Alamitos could have received a response from Father. When reminded of the August 27, 2018 IEP team meeting, Dr. Olshan feigned ignorance of the meeting being referred to and was otherwise evasive in her response, which adversely impacted her credibility.

111. On August 14, 2018, Mother sent Los Alamitos an email stating that her



position and experience of the situation was much different than Los Alamitos's and that due process seemed appropriate if that was the proper procedure. At hearing, Dr. Olshan claimed Mother said she was not going to come to any more meetings. This was a mischaracterization of Mother's statement.

112. On August 14, 2018, Goodwill notified Los Alamitos that the speech-language pathologist hired in June 2018 was no longer with Goodwill and that Goodwill was working hard to resume the augmentative and alternative communication services. Goodwill also advised Los Alamitos that Student would remain at the top of the waiting list and would be the first case to be scheduled once a new pathologist was hired.

113. The first day of school at Del Sol for the 2018-2019 school year was August 15, 2018.

114. On August 15, 2018, Los Alamitos notified Parents that Goodwill did not have appropriate personnel on staff to conduct the assessment and suggested using another vendor. Los Alamitos advised that it would reach out to other vendors to get the assessment scheduled.

115. The same day, Mother notified Dr. Olshan she wanted Student to remain on Goodwill's waitlist because there was not another service provider comparable to and as fully equipped as Goodwill. Mother stated she would follow up with Goodwill and thanked Los Alamitos for its efforts.

#### AUGUST 27, 2018 IEP TEAM MEETING

116. On August 27, 2018, the IEP team reconvened with the following people in attendance: Father, Dr. Olshan, Mr. Rauscher, Ms. Bain, Mr. Sellers, Dr. Kim, a Del Sol administrator, and a Del Sol speech-language pathologist. Mother did not attend. There was no evidence Los Alamitos ever notified Mother of the August 27, 2018 IEP team meeting. District did not offer any evidence that Parents were provided with written

notice of the August 27, 2018 IEP team meeting.

117. Although the IEP team meeting was documented as an IEP Amendment with the purpose stated as a continuation of Student's annual and triennial IEP, no amendments were made to the IEP completed on July 18, 2018. At hearing, Dr. Olshan explained that the purpose of the amendment meeting was only to review the offer of special education and related services with Parents which had been finalized at the July 2018 IEP team meeting.

118. The IEP team discussed that Goodwill did not have appropriate staffing to complete the assistive technology assessment and that alternative assessors would be offered to Parents. The IEP team discussed the one-hour per day behavior intervention services outside of the school day, beginning at 1:30 p.m. Father stated he wanted to be copied on all communications and instructed Los Alamitos to ignore all information provided by others purportedly on his behalf.

119. Occupational therapy services were discussed. Father was surprised by Los Alamitos's occupational therapy services offer, which he was unaware of prior to this IEP team meeting because he did not fully understand or carefully read the July 24, 2018 letter. It did not make sense to Father that Student's direct services were being removed because attending was still an issue for Student and Father had been told that the occupational therapist was the person working on Student's attending. Several people at the meeting were uncertain as to what occupational therapy services Student was receiving, what was being proposed, and whether there was a mistake on the "Offer of FAPE" "Special Education and Related Services" page of the IEP. No one at the August 27, 2018 IEP team meeting could explain the reduction in occupational therapy services, removing all direct service to Student.

120. Father's questions could not be answered because there was no occupational therapist at the meeting. The IEP team agreed to follow up with the

occupational therapist to get clarification on the amount of services previously provided and the recommended amount of occupational therapy services now offered. Los Alamitos indicated it intended to convene another IEP team meeting with the appropriate team members present to explain why the occupational therapy services were being changed from a direct individual service to consultation. Father stated he wanted to review the documents before consenting to the IEP.

121. At hearing, Dr. Olshan admitted she could not answer Father's questions about the occupational therapy services because she was not an occupational therapist, including what the services would look like and why Los Alamitos proposed to reduce Student's services. She wanted to get specific clarifying information from the occupational therapist about the services and she wanted to make sure Parents got that information from a proper source. She wanted clarification from Ms. Cerrillo, to understand exactly why she had made the recommendation for only an occupational therapy consultation once a month and make certain that actually was her recommendation. Los Alamitos never provided that clarification to Father.

122. Los Alamitos considered the IEP "finalized" at the July 18, 2018 IEP team meeting it held without Parents, and Los Alamitos had no intention of changing its offer at the August 2018 IEP team meeting. At hearing, Dr. Olshan asserted there was no need to hold another IEP team meeting after the August 27, 2018 meeting because the offer "was not going to change." She claimed that occupational therapy services were offered in the IEP "finalized" on July 18, 2018, and that the occupational therapy services offer was not going to change.

#### THE DUE PROCESS COMPLAINT

123. Neither Parent signed consent to any component of the offer of special education and related services finalized at the July 18, 2018 IEP team meeting and further discussed at the August 27, 2018 amendment IEP team meeting.

124. Only two days later, on August 29, 2018, Los Alamitos filed its due process complaint with OAH without providing Father the clarifying information about the occupational therapy services and without convening another IEP team meeting.

125. At hearing, Dr. Olshan explained why Los Alamitos filed for due process. According to her, there was an inability to reach agreement and Mother had indicated by her August 14, 2018 email that she did not want to attend any more IEP team meetings because Los Alamitos was going to file for due process. Although Los Alamitos had attempted to provide the augmentative and alternative communication assessment, Goodwill had not been able to complete it, so Los Alamitos had to "move forward." However, she admitted Mother had waived the timeline for the augmentative and alternative communication assessment and acknowledged the Goodwill assessment could have been a pivotal assessment affecting any IEP Parents signed. She maintained that while the services Student received were available at the comprehensive public high school campus, it was Los Alamitos's opinion that it was more appropriate that Student receive his services at the non-public school placement. Los Alamitos did not have a program that met Student's needs at the high school campus. According her Dr. Olshan, Student's unique needs were better served at a non-public school, on a smaller, well-contained campus. The public high school had 3,200 students, and was an open campus with many entries and exits. Student's cognitive ability was well below ability of students Los Alamitos could have effectively serviced at the local high school. Student did not meet the profile of student to whom the public high school could provide educational benefit, because of his behavior, mobility, toileting, and self-help needs.

#### STATUS OF THE ASSISTIVE TECHNOLOGY ASSESSMENT

126. At the time of the hearing, Goodwill's assistive technology assessment was in the process of being completed. Goodwill had proposed two different dates for the assessment and Mr. Sellers was working with Parents to schedule the assessment. There

was no evidence at hearing as to when Goodwill last notified Los Alamitos that it was able to conduct the assessment and offered specific assessment dates.

#### MOTHER'S TESTIMONY REGARDING HER DISAGREEMENT WITH THE OFFER OF SPECIAL EDUCATION AND RELATED SERVICES

127. Mother earned a bachelor's degree in social work in 2002, a master's degree in education in 2015, and held a substitute teaching credential since 2004. Between 2005 and 2018, Mother was employed or took assignments as a substitute teacher, para-educator, and instructional aide in special day classes in other school districts. She worked in residential treatment centers prior to 2003 as a youth worker. She had some social work training and training from the Institute for Applied Behavior Analysis.

128. Mother disagreed with Los Alamitos's offer of special education and related services because it was based on "mock" assessments. According to Mother, the assessments, including the occupational therapy assessment, were deficient, biased, and completed without parental input for the purposes of providing an inappropriate offer of placement and services to force Student out of Los Alamitos. Since January 2018, Los Alamitos wanted Student out of the school district because Mother was advocating for Student. Mother wanted an independent augmentative and alternative communication assessment before any other assessment was completed so Los Alamitos could not "muddy" the augmentative and alternative communication assessment with biased information. The other augmentative and alternative communication assessors Los Alamitos recommended were not appropriate. The September 2015 IEP presented a more accurate picture of Student and the January 2018 IEP was vastly different in terms of baselines as compared to the March 2018 IEP. She disagreed that there was a valid offer of special education and related services completed or developed at the July 18, 2018 IEP team meeting because of procedural violations.

129. Mother did not believe Student belonged in a restrictive environment, but in a public high school program at Los Alamitos. She wanted him in a moderate/severe classroom at the local high school as of August 2018 and to have all related services delivered at the high school, in addition to an after-school component delivered at the school district office. Mother admitted she never observed Mr. Rauscher's classroom during the regular school day. Mother believed Student would not be able to develop social skills or interact with typical peers at Del Sol. She claimed Del Sol was distressing to Student as of August 2018 because of the population and behaviors he was around. Her testimony was not persuasive because her testimony was not sufficiently specific and was not corroborated by any other evidence.

130. According to Mother, Student had a history of being around typical peers, including his brothers. Student enjoyed being in the community. He was very friendly and teachable and needed to learn the skills to access his community environments. His family facilitated community outings. Student participated in a special needs church program, and community team sports. He also received one-to-one community respite from the Regional Center since he was young. He needed goals that permitted him to be in the community so he could advance to an offsite vocational program, with more inclusive opportunities. Student had to be functional in the world and Del Sol did not offer that type of program. Del Sol did not offer community-based instruction. Student had never demonstrated any challenge in the community. Mother dealt with Student's behaviors by anticipating his behaviors, taking a break, giving him access to sensory items, providing reinforcement, leaving, or not going somewhere. Mother communicated with Student using his iPad and his body language. Student used his iPad to independently ask for items if it was available to him and that was the expectation, including to request food or drink, playground time, and to leave.

131. In Mother's opinion, Student still needed occupational therapy services

and a sensory diet to regulate his day. The Del Sol program did not offer a balance to address both Student's functional and academic needs. Student demonstrated he had some academic skills and he needed more support in that area. He needed applied behavior analysis services, which he did not get at Del Sol. He received applied behavior analysis services in the home when he was in elementary school. He responded to those methodologies and made gains, including meaningful skill acquisition and behavior change. Del Sol was not addressing his health needs in that he did not have aerobic activities at school.

#### FATHER'S TESTIMONY REGARDING HIS DISAGREEMENT WITH LOS ALAMITOS'S OFFER OF SPECIAL EDUCATION AND RELATED SERVICES

132. Father disagreed with the offer of special education and related services because Los Alamitos removed Student's direct occupational therapy services and failed to develop the communication goal Los Alamitos agreed to develop at the May 2018 IEP team meeting, to have Student raise his arm when he signed so adults could see he was communicating. Father took issue with the occupational therapy assessments. He was unaware of Ms. Cerrillo's communications with Ms. Polcyn. He credibly testified he never knew about Ms. Polcyn's recommendation until she testified at the hearing, and Parents had asked for a new occupational therapy assessment, only to find out at hearing that Ms. Cerrillo not only spoke to Ms. Polcyn, but reviewed her report, and then came up with the very same recommendation. Father did not believe this passed the "sniff" test, especially considering Student had been receiving direct individual services as part of his stay put placement.

133. Father was disturbed by the lack of occupational therapy services offered in the 2018 IEP because Los Alamitos had been telling him for years that Student's largest problem was attending and he needed to increase his attending to benefit more from his education. Multiple members of the IEP team told him over the years during

IEP team meetings that the occupational therapist was not only working on fine motor skills, but on increasing Student's ability to attend.

134. On August 27, 2018, Los Alamitos told Father Student would not be leaving campus unless he was with a Parent. During the proceedings, the witnesses testified to something different, which was not discussed at the IEP team meetings. Father did not agree with the IEP if there was no community-based instruction off campus, but he was open to idea of moving the behavior services to Del Sol at the time and the behavior supervision offered. Father did not understand the services offered for work experience and agency linkages.

135. Father routinely took Student out in the community. They went to restaurants once per week for over 10 years, to the store to buy things, to family functions, to the park, and to the public pool. Father avoided very crowded places like the County Fair because of the noise and it was too crowded. Father tried to treat Student like he would a typical child. Father never had to remove Student from a situation during 2017-2018 school year. Student occasionally got loud; Father told him to be quiet and calm down, and Father usually had to repeat those instructions a couple of times a few minutes later. Student's behavior improved a lot over the past four years, and the 2017-2018 school year was the best year Student had behaviorally for community outings. He believed Student made more behavioral gains when his after-school behavior services were provided in the home, prior to 2013. Since 2011, Student received behavioral respite services from the Regional Center, where Student went to the park, got lunch, or took walks. Student had input as to where he went on his community outings. He made progress in some areas since 2014, including using a fork, and in self-care.

136. Student used his iPad to communicate with Father. He initiated communication on his iPad to request food, and occasionally for other items, such as



asking to go to Target twice the last year, the park a few times, and to go home. He used the bathroom on his own at home. When in the community, he used sign language to indicate his need for the bathroom. He also used gestures to indicate what he wanted. Student had speech therapy through Kaiser on the weekends for the last year, which Los Alamitos was informed about. His receptive language had really grown but his expressive language needed a lot of work, and self-care and developing independence was very important to Father. Father credibly testified that Student understood more than people thought he did. If asked a question, Student indicated "yes" if he wanted the offered item or location. He did not use "no," although he used to indicate "no" all of the time before Los Alamitos stopped working on that skill.

137. Father estimated he dropped off and picked up Student from school two days per week. A couple of times Student did not want to get out of the car, but Father did not know if that was a sign of distress and he could think of nothing distressing to Student about Del Sol during the 2017-2018 school year. With the exception of the occupational therapy services and the community-based instruction, Father did not specifically disagree with the services offered by Los Alamitos in the July 18, 2018/August 27, 2018 IEP.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

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

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

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, which meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v.*

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

*Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) In a recent unanimous decision, the United States Supreme Court clarified FAPE as "markedly more demanding than a 'merely more than the de minimus test' . . . ." (*Endrew F. v. Douglas School Dist. RE-1* (2017) 580 U.S. \_\_\_ [137 S.Ct. 988, 1000] ("*Endrew F.*").) School districts must "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

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

identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (j).) 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, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Los Alamitos bears the burden of proof.

#### ISSUE: 2018 TRIENNIAL IEP

5. Los Alamitos contends that its FAPE offer dated March 13, 2018 made at the July 18, 2018 IEP team meeting, and reviewed at the August 27, 2018 IEP amendment team meeting was appropriate. Los Alamitos argues that the 2018 IEP was procedurally sound and any procedural violations that may have occurred did not amount to a denial of FAPE. Los Alamitos claims that because Parents refused to consent to the 2018 IEP, it was legally obligated to initiate a due process hearing.

6. Student contends that the IEP dated March 13, 2018, was not appropriate. Father contends, among other things, that the removal of Student's weekly individual occupational therapy services and replacing them with monthly consultation would likely result in regression. Father also contends that he never received the necessary clarification he sought during the August 27, 2018 IEP team meeting about the occupational therapy services before Los Alamitos filed for due process on August 29, 2018. Father also argues that Ms. Cerrillo's assessment was inappropriate because it

included input from Ms. Polcyn. Father claims the 2018 IEP did not include the necessary discussion or agreement on goals, including a goal to address Student's failure to raise his hand to sign, which the IEP team agreed to include, and that the behavior services were inadequate. Mother contends, among other things, that Student's overall plan was inappropriate because it was not based on parent input and was predetermined. Mother claims that the 2018 IEP was based on inappropriate assessments performed without her consent, and was developed without her presence at the July and August 2018 IEP team meetings. Mother also asserts, among other things, that the Del Sol placement was inappropriate and Student's after-school behavior services should remain at the local high school campus and school district office.

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

8. An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) An IEP must

include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. §300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

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

10. The IDEA requires that school districts establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE by such agencies. (20 U.S.C. § 1415(a).) A written explanation of all the procedural safeguards under the IDEA shall be included in the notice of a parent's or guardian's rights. (Ed. Code, § 56321, subd. (a).) A copy of the procedural safeguards must be given by a school district to a particular parent of a child with a disability a minimum of once a year. (20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a); Ed. Code, § 56301, subd. (d)(2).) Education Code section 56500.1, subdivision (b) requires that parents be informed about procedural safeguards at an IEP team meeting.

11. A procedural violation results in a denial of FAPE if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the parent's child, or

causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2). The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S. Ct. 1994].) "[T]he informed involvement of parents" is central to the IEP process. (*Ibid.*) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 ("*Amanda J.*").) Parents not only represent the best interests of their child in the IEP development process, but also "provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." (*Ibid.*) "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." (*Id.* at p. 892; see also, *W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1484 ("*Target Range*"), *superseded in part by statute on other grounds* [". . . procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].)

12. Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(b) & (c); Ed. Code, §§ 56304, 56341.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 ("*Fuhrmann*") [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].)

13. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or afforded the opportunity to participate, including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting a mutually agreed on time and place. (34 C.F.R. § 300.322(a).) In addition to other requirements, the notice must indicate the purpose, time and location of the meeting and who will be in attendance. (34 C.F.R. § 300.322(b).)

14. The fact that it may be difficult to schedule meetings or to work with a parent does not excuse a failure to include the parent in the IEP team meeting. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1045 (“*Doug C.*”).) When confronted with competing IDEA procedural requirements, the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of FAPE. (*Id.* at p. 1046.) In reviewing an agency’s actions in such a scenario, the agency will have reasonable latitude in making that determination. (*Ibid.*) A school district denies Student a FAPE where it holds an IEP team meeting to consider placement and services without parents even where parents had already decided the student would not be attending a district school. (*D.B. ex rel. Roberts v. Santa Monica-Malibu Unified School Dist.* (June 1, 2015, No. 13-55665) (9th Cir. 2015) 606 Fed. Appx. 359, 360 [nonpub. opn.]; see also, *Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1055 [“[T]he IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents’ preferences do not align with those of the educational agency.”].)

15. Unless excused by the parent in writing, the public agency must ensure that the IEP team for each child with a disability includes the parents of the child; a



regular education teacher if the child is, or may be, participating in the regular education environment; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a) & (c).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).)

16. A school district is required to conduct, not just an IEP team meeting, but a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) "Participation must be more than mere form; it must be meaningful." (*Deal v. Hamilton County Board of Educ.*, 392 F.3d 840, 858 [citations omitted] ("*Deal*").) A school cannot independently develop an IEP, without meaningful participation, and then present the IEP to the parent for ratification. (*Target Range, supra*, 960 F.2d at p. 1484.) A school district that predetermines the child's program, and does not consider parents' requests with an open mind, has denied the parents' right to participate in the IEP process. (*Deal, supra*, 392 F.3d at p. 858; *Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, *superseded on other grounds by statute*.)

17. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting and is unwilling to consider other alternatives. (*Deal, supra*, 392 F.3d at p. 857-858; *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56486) (9th Cir. 2007) 239 Fed. Appx. 342, 344-345 [nonpub. opn].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn.10.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to

bring to an IEP team meeting their questions, concerns, and recommendations as part of a full discussion of a child's needs and the services to be provided to meet those needs before the IEP is finalized. (*Assistance to States for the Education of Children Disabilities* (March 12, 1999) 64 Fed. Reg. 12478-12479.) School officials may permissibly form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, January 17, 2013, No. 1:11-CV-398) 2013 WL 209478, p. 7.)

18. When a judicial decree or order identifies a specific person or persons as having authority to make educational decisions on behalf of a student, that person is determined to be the parent for purposes of the IDEA. (34 C.F.R. § 300.30(b)(2).) When the parents of a student are divorced, the parental rights established by the IDEA apply to both parents, unless a court order or state law specifies otherwise. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46568 (August 14, 2006); see also *Letter to Biondi*, OSEP, October 7, 1997, *Letter to Best*, OSEP, January 8, 1998, and *Letter to Serwecki*, OSEP, February 28, 2005.)

19. "The question of which divorced parent should be allowed to perform parental functions under the IDEA . . . is a matter for State or local divorce courts. Just as these courts deal with matters of custody, they can appropriately deal with matters related to the responsibility for making educational decisions on behalf of the child." (*Pam Taylor v. Vermont Dept. of Educ. et al.* (2d Cir. 2002) 313 F.3d 768, 780; see also *Navin v. Park Ridge School Dist.* (7th Cir. 2001) 270 F.3d 1147, 1149 ["a divorced parent retains statutory rights [and] nothing in the IDEA overrides states' allocation of authority as part of a custody determination"].) Consistent with the above, the express language of a custody order has been used to determine which of two divorced parents has decision-making authority regarding education. (See *North Allegheny School District*

(Penn. SEA 1997), 26 IDELR 774; *Upper Darby School District* (Penn. SEA 2002), 36 IDELR 285; *L.T. ex rel. C.T. v. Denville Township Board of Education* (N.J. Adm. 2004), 2004 WL 2623606.)

20. In California, joint legal custody means that both parents share the right and the responsibility to make decisions relating the health, education, and welfare of a child. (Fam. Code, § 3003.) When a family court makes an order of joint legal custody, the court must specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. If the court does not state that the consent of both parents is required on an issue, either parent acting alone may exercise legal control of the child. (Fam. Code, § 3083.)

21. Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, §§ 56043(k), 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service needs or a parent request for reevaluation. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a).)

22. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) To assess or

reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321(a).) Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1); Ed. Code, § 56381, subd. (f).) The district has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session in excess of five schooldays, to complete the assessments and develop an IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a), 56381(a).) In making changes to a child's IEP, the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. (34 C.F.R. § 300.324(a)(4).)

23. The assessment must be conducted in a way that: (1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; (2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and (3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessments are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c); Ed. Code, §§ 56320, 56381, subd. (e); 34 C.F.R. § 300.304.) The determination of what tests are required is made

based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where the concern prompting the assessment was reading skills deficit].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

24. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent, and an IEP team meeting must be held to consider the assessment. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, §§ 56302.1, subd. (a), 56329 subd. (a).)

25. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will

result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) In other words, the IEP must be reasonably calculated to enable the child to achieve educational benefit appropriate in light of the child's circumstances. (*Andrew F., supra*, 580 U.S. \_\_\_, 137 S.Ct. at p. 1002.) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 ("*Adams*"), citing *Fuhrmann, supra*, 993 F.2d 1031, 1041.)

26. School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular 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).)

27. In determining the educational placement of a child with a disability, a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the least restrictive environment,

consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

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

29. If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction or instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

30. The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155

F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 83.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 208.)

31. Here, Los Alamitos failed to prove that the IEP dated March 13, 2018, developed at the IEP team meetings held between March 13, 2018, and August 27, 2018, offered Student a FAPE.

#### Procedural Compliance: Assessments

32. Los Alamitos was entitled to assess Student based upon Father's January 18, 2018, consent to the written assessment plan even in the absence of Mother's agreement. Since Los Alamitos was never provided with a copy of the divorce decree prior to hearing,<sup>6</sup> it was entitled to presume that Parents shared joint legal custody of Student and each held co-equal educational rights. Under that presumption, consent from only one Parent was necessary to trigger Los Alamitos's obligation to assess.

33. Los Alamitos failed to establish that the assessments upon which the 2018 IEP offer of special education and related services was based met all legal standards for assessments. (See 20 U.S.C. § 1414 (b) & (c); Ed. Code, §§ 56320, 56327, 56381, subd. (e); 34 C.F.R. § 300.304.) For example, Los Alamitos failed to prove that each of the triennial assessments it conducted used appropriate assessment tools and strategies to gather relevant information about Student, including information provided by Parent(s); was provided in a language and form most likely to yield accurate information on what

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<sup>6</sup> Since Los Alamitos was never provided a copy of Parents' divorce decree and was therefore unaware of its contents, this Decision does not address the specifics of Parents' divorce decree as it related to their respective educational rights.



Student knew and could do; were administered by trained and knowledgeable personnel in accordance with the instructions; and were used for purposes for which the assessments were valid and reliable.

#### 2018 PSYCHOEDUCATIONAL ASSESSMENT

34. The assessment plan required Los Alamitos to conduct an assessment of Student's cognitive functioning, academic achievement, social-emotional functioning/behavior, and adaptive behavior. Although the evidence proved school psychologist Marla Kennedy undertook to conduct these assessments and a written report was prepared, the evidence failed to establish that the assessments were properly conducted. Ms. Kennedy did not testify at hearing. There was no evidence presented that she was unable or unwilling to testify. Los Alamitos relied on Mr. Sellers to explain Ms. Kennedy's assessment and report, but that testimony fell short of establishing the procedural compliance Los Alamitos was required to prove.

35. Los Alamitos failed to prove that the assessment of Student's cognitive ability was appropriate. Ms. Kennedy's report stated that the Comprehensive Test of Non-Verbal Intelligence was administered to Student to assess cognitive abilities because he was nonverbal. Student was unable to respond to the standardized directions so the test was discontinued. The report referenced Student's prior assessments where Student's cognitive abilities were estimated to be within the significantly below average range. At hearing, Mr. Sellers explained that Student's inability to respond to the directions could have meant a number of different things, including that Student had difficulty with receptive and expressive language. Significantly, he also indicated that the assessor should have used other measures to assess Student's cognitive level. No other tests to determine Student's cognitive functioning were listed in the report under cognitive abilities. There was no evidence that Los Alamitos attempted any other tests to determine Student's cognitive levels.

Ms. Kennedy attempted one test and when Student could not perform that test, she decided to rely on Student's previous assessments instead of attempting to administer other nonverbal measures.

36. Los Alamitos's reliance on Student's prior assessments to determine his cognitive functioning as a substitute for current assessments was not credible. Ms. Kennedy's assessment reported that based on prior assessments, Student's cognitive level standard score in 2005 was a 64, and in 2008 was less than 50. According to Mr. Sellers, at below 50, Student performed so low he could not generate a score. In 2014, the assessor attempted the Universal Nonverbal Intelligence Test, but discontinued it due to Student's high level of non-responsiveness and apparently no other tests were attempted. Based on the 2005 and 2008 assessments, the 2014 assessor estimated Student's cognition to be in the significantly below average range. The evidence established that Ms. Kennedy relied on stale scores which were over 10 years old, when Student was six years old and younger. There was no evidence presented at the hearing indicating that these prior assessments were appropriately conducted by qualified personnel.

37. Los Alamitos offered no persuasive evidence to explain why other cognitive tests were not employed as part of the 2018 assessments. Mr. Sellers' testimony to the effect that cognitive levels do not change was not convincing. Mr. Sellers failed to explain the at least 15-point difference between Student's 2005 and 2008 scores, which appeared to undercut his testimony.

38. The evidence failed to prove Student was appropriately assessed in 2018 in the area of cognition or that he had ever been appropriately assessed in that area. Father was persuasive and credibly testified Student could understand much more than people thought he could. Throughout his testimony, Father was candid in his responses, in stark contrast to many of Los Alamitos's witnesses. Regardless of Student's actual

cognitive level, perceptions of Student's cognitive functioning and reliance on stale cognitive assessments were not a substitute for a complete and appropriate current cognitive assessment. Without a valid assessment of Student's current cognitive abilities, Parents were deprived of information necessary to their meaningful participation in the IEP process.

#### 2018 OCCUPATIONAL THERAPY ASSESSMENTS

39. Los Alamitos conducted two occupational therapy assessments, which Los Alamitos witnesses, including Ms. Polcyn, Ms. Cerrillo, and Ms. Bain, claimed was foundational for the 2018 offer of special education and related services. Both assessments and assessment reports were deficient. Because Los Alamitos failed to demonstrate procedural compliance for the occupational therapy assessments, it did not prove the 2018 IEP offered Student a FAPE.

40. The occupational therapy assessments conducted by Ms. Polcyn and Ms. Cerrillo each failed to include parental input. The law specifically required Ms. Polcyn and Ms. Cerrillo to use a variety of assessment tools and strategies to gather relevant information, including input from parents. (20 U.S.C. § 1414 (b)(2)(A).)

41. In conducting her assessment, Ms. Polcyn did not interview either Parent and admitted she obtained no input from Parents for her 2018 assessment because she did not feel it was necessary. Similarly, Ms. Cerrillo failed to obtain any input from Parents for her April/May 2018 assessment. The only people Ms. Cerrillo spoke to or obtained input from for her assessment were Mr. Rauscher, Student's Del Sol teacher, and Ms. Polcyn. Ms. Cerillo offered no justification at hearing for her failure to obtain parental input for her assessment.

42. The lack of parental input rendered both occupational therapy assessments fatally flawed. This consequence was corroborated by Student's program specialist and case manager, Mr. Sellers, who testified that parent input was a necessary

part of any assessment. The 2018 IEP offer of special education and related services included a significant reduction in Student's occupational therapy services, from individual pull-out services twice a week for 45 minutes per session, to 45 minutes per month of consultation services. This change in service was based upon the identical recommendations of Ms. Polcyn and Ms. Cerrillo. Their failure to obtain parental input, a critical piece of the assessment process, significantly impeded Parents' participation in the IEP formulation process. The law is clear that parents "provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." (*Amanda J.*, *supra*, 267 F.3d at p. 882.)

43. The fact that Ms. Polcyn had been a member of Student's IEP team, and that she and Ms. Cerrillo had provided services to Student at various points in the period prior to March 2018, was not a substitute for obtaining focused input from Parents regarding Student's current occupational therapy needs as part of their assessments. The lack of parental input in the assessments undermined the integrity of Ms. Polcyn and Ms. Cerrillo's opinions, and rendered their assessments invalid, and the offer of special education and related services inappropriate because it was based on those faulty assessments.

44. Ms. Polcyn's assessment was deficient in other ways that adversely affected Parents' participation in the IEP formulation process and demonstrated Los Alamitos's procedural noncompliance. Ms. Polcyn's report was required to include a discussion of whether Student needed special education and related services and the basis for making that determination. Ms. Polcyn's report did neither. The report is not comprehensive. The report's conclusions are cursory and did not state whether Student required occupational therapy. Although the report stated that the Benbow and the School Function Assessment indicated Student had adequate fine motor skills to access education, it did not explain that conclusion in relation to the assessment results, or

address other areas addressed by occupational therapy. At hearing, Ms. Polcyn described Student's scores on the School Function Assessment as "significantly low," but this information was missing from her report. Moreover, a "significantly low" score was not defined or explained in relation to the need for occupational therapy services. The report concluded Student scored significantly low on the Ordinal Scales, but again, there was no explanation as to how that impacted Student's need for occupational therapy services. At hearing, Ms. Polcyn testified she had recommended only consultative services, and she explained the basis for that recommendation, including, for example, her opinions that he was not generalizing the skills he learned to the classroom, that he was not meeting his goals and objectives for quite some time, and that he performed best in a setting where what he was taught had purpose and meaning.

45. Ms. Polcyn communicated her recommendation for monthly consultative services to certain Los Alamitos members of the IEP team, but it was never communicated to Parents until hearing. Although Ms. Polcyn claimed she presented her report at an IEP team meeting in 2018, she later contradicted that testimony and abundant evidence established that never occurred. Her recommendation and the explanation Ms. Polcyn offered at hearing as to the basis of her 2018 recommendation for exclusively consultative occupational therapy services once a month was completely absent from her report. The failure to include this critical information in the report rendered the report woefully inadequate to meet the minimum legal standards for assessment, and deprived Parents of important information necessary for their effective participation at the 2018 IEP team meetings.

46. Ms. Polcyn's occupational therapy assessment was procedurally inappropriate because it failed to include an appropriate assessment in the area of sensory processing. Ms. Polcyn testified that there were three target areas school-based occupational therapists focused on: fine motor skills, gross motor skills, and sensory

processing. The evidence established that sensory processing was an area of need for Student. Ms. Polcyn unsuccessfully attempted to justify her failure to appropriately assess Student in the area of sensory processing. Her testimony on this subject was not credible for several reasons, which undermined her overall credibility.

47. Ms. Polcyn was defensive in tone and demeanor during questioning by Mother about the lack of a sensory processing evaluation. Ms. Polcyn unconvincingly claimed there was only one test available to assess in that area, but she was unable to use it because she could not interview Student due to his communication limitations. She failed to explain why she did not use the tool used by Ms. Cerrillo to assess Student's sensory processing needs. In addition, there was no indication Ms. Polcyn ever attempted to interview Student or used other appropriate methods to obtain information from Student, although she admitted other methods were available. Ms. Polcyn falsely claimed she explored those options and that they were listed in her report. She pointed to a statement in her report that Student had exposure to daily skill development; however, it was clear she was merely contriving an answer because the statement she pointed to did not support her testimony. She also testified evasively and inconsistently as to whether she used Student's iPad in conducting her evaluation. Ms. Polcyn attempted to create the false impression that she had conducted a sensory processing evaluation through alternative measures. Although she conducted observations and interviews, the evidence failed to establish she conducted a specific sensory processing assessment.

48. Ms. Cerrillo's report lacked procedural compliance. Ms. Cerrillo was required to include in her report specific information enumerated by statute. However, the list of items that is required to be in Ms. Cerillo's assessment report was not exhaustive. (Ed. Code, § 56327 ["The report shall include, but not be limited to, all of the following . . . ."].) Ms. Cerrillo knew Parents had requested a second assessment because

they were unhappy with Ms. Polcyn's assessment. As part of her assessment, Ms. Cerillo collaborated with Ms. Polcyn, discussed Student with Ms. Polcyn, including speaking to her about Student's functioning during his pull-out occupational therapy sessions, read Ms. Polcyn's report, and considered Ms. Polcyn's assessment findings in coming to her conclusions. Yet, Ms. Cerrillo failed to disclose any of this information in the written report she provided to the IEP team on May 10, 2018.

49. Although Ms. Cerrillo attempted to deny and minimize at hearing the extent of her assessment contacts with Ms. Polcyn, her testimony was inconsistent and evasive, which undermined the credibility of her denials. In addition, despite her claims to the contrary, the evidence established that Ms. Cerrillo was aware of Ms. Polcyn's service recommendation at the time Ms. Cerrillo conducted her assessment and adopted it without disclosing these facts to Parents. Father credibly testified that he was unaware of Ms. Polcyn's recommendation until she testified at hearing. There was no credible evidence that Ms. Polcyn's recommendation had ever been communicated to Parents prior to hearing. Parents never had the opportunity to speak to Ms. Polcyn about her assessment because she never attended any of the IEP team meetings in 2018, and they had no way of knowing that Ms. Cerrillo had relied on Ms. Polcyn's report and information obtained from Ms. Polcyn since that information was conspicuously absent from Ms. Cerrillo's report. Parents had the right to know what information Ms. Cerrillo relied upon and considered in reaching her conclusions, and the failure to fully disclose this information adversely affected Parents' participation in the formulation of the IEP.

50. Ms. Cerrillo's report was not legally sufficient. Besides neglecting to disclose her reliance on and discussions with Ms. Polcyn, Ms. Cerrillo's report also fails to include a clear statement as to whether Student required occupational therapy services and it does not mention Ms. Cerrillo's recommendation for consultative occupational

therapy service in lieu of individual services. Like Ms. Polcyn's report, the comprehensive explanation Ms. Cerrillo offered at hearing as to the basis of her 2018 recommendation for exclusively consultative occupational therapy services once a month was absent from her report. The report also inaccurately reported the results of the Beery assessment. In the report, Ms. Cerrillo inaccurately reported that Student "was observed imitating a vertical strike and circular strokes during the assessment," when it was only after the assessment he was able to imitate two items that had been on the assessment.

### The March 2018 IEP Team Meetings

51. The evidence established that Los Alamitos failed to comply with the procedural requirements of the IDEA and California law regarding the March 13 and 27, 2018 IEP team meetings. Los Alamitos failed to prove that all required IEP team members attended the March 2018 IEP team meetings. Ms. Polcyn's assessment was discussed at the March 2018 IEP team meetings, but there was no occupational therapist present to interpret the instructional implications of the assessment. There was no evidence Parents waived in writing the attendance of an occupational therapist at either of the March 2018 IEP team meetings.

52. As set forth above, Ms. Polcyn's report failed to comply with the minimum legal requirements for assessments. Among its many deficiencies, the report failed to state whether Student may need occupational therapy services or explain the basis for that determination. It did not adequately explain the significance of the assessment results as it related to Student's need for occupational therapy services. On its face, the cursory report required interpretation and explanation. There was no persuasive evidence that Ms. Polcyn's recommendation or the basis of that recommendation was ever communicated to Parents prior to hearing. Father credibly testified that he was unaware of Ms. Polcyn's recommendation until she testified. Los Alamitos failed to rebut that evidence. Unbeknownst to Parents, Ms. Cerrillo collaborated with Ms. Polcyn in



conducting her assessment and then Los Alamitos adopted Ms. Polcyn's recommendation as part of its 2018 offer of special education and related services. The failure to have an occupational therapist present at the March 13 or 27, 2018 IEP team meetings to interpret the instructional implications of Ms. Polcyn's occupational therapy assessment significantly impeded Parents' right to meaningfully participate in the IEP formulation process.

#### Parental Participation at July 2018 IEP Team Meeting

53. Los Alamitos significantly impeded Parents' right to participate in the IEP process when it held the July 18, 2018 IEP team meeting in Parents' absence. Los Alamitos asserts that it was justified in proceeding with the July 2018 meeting in Parents' absence because it needed to complete Student's triennial review and Parents refused to participate in the triennial IEP process. The evidence did not support Los Alamitos's position.

54. The Ninth Circuit has emphasized the parental participation safeguards are among the most important safeguards in the IDEA, and procedural violations that interfere with parental participation in the IEP formulation process "undermine the very essence of the IDEA." (*Amanda J.*, *supra*, 267 F.3d at p. 892.) It has supplied some guidance to school districts faced with balancing competing commands of federal law. In *Doug C.*, *supra*, 720 F.3d 1038, a district had scheduled an annual IEP team meeting just in time to meet the IDEA's requirement that a meeting be held at least annually to consider the student's progress on his goals and make revisions if appropriate. (See 20 U.S.C. § 1414 (d)(4)(A)(i); 34 C.F.R. § 300.324 (b)(1).) The parent could not attend because of illness and sought postponement to a later date and the district refused, citing its obligation to hold the meeting within a year of the previous meeting. The court held the district to a reasonableness standard and determined that the district denied the student a FAPE because it deprived the parents of adequate participation in the IEP

process.

55. Los Alamitos's conduct in proceeding with the July 18, 2018 IEP without Parents was unreasonable. Los Alamitos failed to prove it gave appropriate notice of the meeting or that Parents refused to participate in the IEP process. Los Alamitos did not offer any evidence as to the contents of the meeting notices. Parents had demonstrated they were active participants in the IEP process. Father credibly testified that he attended virtually all of Student's IEP team meetings over the many years Student received special education. Parents attended the March 13, March 27, and May 10, 2018 IEP team meetings. At the conclusion of the May 2018 IEP team meeting, the parties agreed to reconvene on June 7, 2018. Mother notified Los Alamitos she could not attend the June 7, 2018 IEP team meeting and when Los Alamitos called Father on June 7, 2018, Father told Los Alamitos he thought the meeting had been cancelled. In a June 26, 2018 letter, Los Alamitos notified Parents that the IEP team needed to complete Student triennial review, offering the following dates: July 10, 17, or 18, 2018. Although there was no persuasive evidence that Parents had refused to participate, Los Alamitos warned Parents that if they "continue to refuse to participate" in Student's triennial IEP and/or did not provide their availability for an IEP meeting, Los Alamitos would proceed with the IEP team meeting on July 18, 2018, without Parents' attendance. Significantly, it was in that same letter that Los Alamitos also notified Parents that it was agreeable to the assistive technology assessment by Goodwill. Father told Los Alamitos he was unable to attend on the three proposed dates, but did not offer alternative dates. On July 5, 2018, Mother notified Los Alamitos that she was on vacation and agreeable to an IEP team meeting in the fall after the assistive technology assessment was completed. Father credibly testified that he thought the July 18, 2018 IEP team meeting had been cancelled after speaking to Mother. Los Alamitos never responded to Mother's July 5, 2018 email or attempted to contact Father. Instead, it proceeded with the July 18, 2018

IEP team meeting in Parents' absence, where Los Alamitos discussed Student's services and developed goals, and "finalized" Student's IEP.

56. At the very least, Los Alamitos had an obligation to communicate with Parents after Mother advised Los Alamitos that she was on vacation and requested to postpone the IEP team meeting to the fall semester. Los Alamitos offered no persuasive evidence why the IEP team meeting could not be rescheduled to a later date or a date in the fall semester. School was scheduled to begin at the public high school on August 8, 2018 and on August 15, 2018 at Del Sol. It was not unreasonable for Mother to want the assistive technology assessment to be completed before meeting, particularly given that Student's augmentative and alternative communication device was one of his modes of communication. Los Alamitos had only communicated its agreement to assessment by Goodwill on June 26, 2018, and as of July 17, 2018, Los Alamitos had been advised by Goodwill it was just waiting on some paperwork to be returned before scheduling the assessment in the fall. Los Alamitos did not even have all required members of the IEP team present at the July 18, 2018 IEP team meeting, specifically an occupational therapist. The fact that Father attended the August 27, 2018 IEP team meeting provided further corroboration that had he been properly advised that Los Alamitos intended to proceed with the July 18, 2018 meeting even if Mother could not attend, he might have rearranged his schedule so he could attend or proposed another date. There was no credible evidence presented by Los Alamitos that Father ever refused to participate or attend an IEP meeting. Los Alamitos's claim that Father failed to offer alternative dates to the three proposed July dates was insufficient to meet its obligations under the law. (See, 34 C.F.R. § 300.322(c) & (d) ["If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls..." and must "...keep a record of its attempts to arrange a mutually agreed on time and place..."].)

57. Applying the *Doug C.* standard, the only reasonable course of action was to reschedule the July 18, 2018 IEP team meeting to a later date. Had Los Alamitos rescheduled the meeting to a later date with at least one Parent in attendance, it would have had important input from a Parent and afforded a full discussion of Parent's questions and concerns, as well as Los Alamitos's recommendations, in the development of Student's IEP. Instead, by proceeding on July 18, 2018, Los Alamitos failed to obtain the required input and participation from Parents or the occupational therapist in developing Student's offer of special education and related services. Significantly, Dr. Olshan admitted at hearing that she lacked clarity regarding the occupational therapy services. Yet, the team finalized the IEP at the July 18, 2018 IEP, including the occupational therapy services without an occupational therapist present. Proceeding without Parents denied Parents the opportunity to discuss the proposed IEP and prevented Parents from asking questions or otherwise participating in the development of an appropriate program for Student. At the time of the July 2018 IEP team meeting, Student already had an IEP in place and Los Alamitos failed to prove that postponing the meeting would do more harm to Student's interest than proceeding without the presence of at least one Parent. Clearly, postponing the IEP team meeting to the fall semester would have promoted the purposes of the IDEA and was less likely to result in a denial of FAPE. Los Alamitos's decision to meet on July 18, 2018, without Parents, significantly impeded Parents' opportunity to meaningfully participate in the decisionmaking process and denied Student a FAPE.

#### The August 27, 2018 IEP Team Meeting

58. The evidence established that Los Alamitos failed to comply with the procedural requirements of the IDEA and California law regarding the August 27, 2018 IEP team meeting.

#### LACK OF NOTICE

59. On August 27, 2018, the IEP team met to review the March 13, 2018 IEP, which Los Alamitos had finalized at the July 18, 2018 IEP team meeting.

60. Los Alamitos failed to prove that it gave written notice for the August 27, 2018 IEP team meeting. On July 24, 2018, Los Alamitos sent a letter to Parents advising them that the IEP team met on July 18, 2018, and finalized the 2018 IEP. In an effort to give Parents the opportunity to review the IEP, Los Alamitos proposed three meeting dates, August 20, 21, or 22, 2018. Instead of holding the IEP team meeting on one of the proposed dates, Los Alamitos held the meeting on August 27, 2018. Although Father attended the August 27, 2018 IEP team meeting, there was no evidence presented that Mother had received written notice of the meeting or that she waived her attendance at the meeting.

61. In the circumstances of this case, Los Alamitos was required to give notice to both Parents for the August 27, 2018 IEP team meeting so they both would have the opportunity to participate. (See, 34 C.F.R. § 300.321(a) [a public agency must ensure that the IEP team includes "the parents of the child"]; *Letter to Serwecki*, OSEP, February 28, 2005 [both divorced parents have the right to attend their child's IEP meeting].) Los Alamitos was aware Parents were divorced, had joint custody, and lived in different cities. Los Alamitos knew both Parents were active participants in the formulation of Student's 2018 educational program, and had a years-long practice of attending Student's IEP team meetings. Los Alamitos provided notice to both Parents for the August 20, 21, or 22, 2018 IEP team meetings, and cited no authority relieving it of the requirement for providing both Parents written notice for the August 27, 2018 IEP team meeting.

62. By failing to give Mother notice of the August 27, 2018 IEP team, Los Alamitos denied Mother the opportunity to participate in Student's IEP. The failure to

give proper notice to Mother for the August 27, 2018 IEP team meeting significantly impeded Mother's opportunity to meaningfully participate in the decisionmaking process and denied Student a FAPE.

#### ABSENCE OF AN OCCUPATIONAL THERAPIST

63. Los Alamitos failed to prove it had all required IEP team members at the August 27, 2018 IEP team meeting. Los Alamitos was required to, but did not, have an occupational therapist or someone who could answer Father's questions regarding the reduced occupational therapy services offered in the IEP.

64. Prior to attending the August 27, 2018 IEP team meeting, Father did not understand that Los Alamitos's offer of special education and related services did not include the weekly individual occupational therapy services Student had been receiving since 2015. Neither Ms. Polcyn's report nor Ms. Cerrillo's report included any specific recommendation regarding Student's services, and there was no persuasive evidence Parents were ever properly or adequately advised about the occupational therapists' recommendations at any of the earlier 2018 IEP team meetings Parents attended. At the August 2018 IEP team meeting, Father expressed concern about the reduction in services because, based on what he had been told by Los Alamitos members of the IEP team over the years, Student still required those services to make progress. Father asked the IEP team to explain what the proposed services would look like and why the services were being reduced.

65. At hearing, Dr. Olshan admitted Father's questions could not be answered because there was no occupational therapist in attendance at the August 2018 IEP team meeting. It was evident from her testimony that based on what Father shared during the IEP team meeting, she was not entirely certain that there had not been a mistake in Los Alamitos's offer. Dr. Olshan admitted she required specific clarifying information from Ms. Cerrillo, including verification of her recommendation and an explanation as to the

basis for reducing Student's services to only consultation, once a month. The IEP team agreed to follow up with the occupational therapist to obtain that clarification, and to convene another IEP team meeting. Los Alamitos filed its due process complaint two days later, without ever providing the clarifying information and without ever reconvening the IEP team meeting.

66. The failure to have the occupational therapy assessor present at the August 27, 2018 IEP team meeting significantly impeded Father's opportunity to meaningfully participate in the IEP process. Los Alamitos was required to conduct a meaningful meeting with the appropriate people present. Because the assessor was not at the meeting to explain her recommendation, Father did not have the required information to consider and was left struggling to understand the offer and the basis for that offer. Los Alamitos's failure to later convene an IEP meeting with the occupational therapist in attendance meant Father's questions were never answered.

67. Los Alamitos's attempt to defend its actions by claiming that it was not required to hold any IEP team meetings after the IEP had been finalized is without merit. The scope of Los Alamitos's issue in this case specifically includes the August 27, 2018 IEP team meeting. The purpose of the August 27, 2018 amendment IEP team meeting was to review the entirety of the offer of special education and related services dated March 13, 2018, finalized at the July 18, 2018 IEP team meeting in order to obtain Parents' consent to implement that IEP. As an IEP team meeting to obtain consent to the offer of special education and related services, Los Alamitos was required to comply with all of the procedural requirements that pertain to such meetings and offers, including the laws pertaining to pre-determination and parental participation. A school cannot independently develop an IEP, without meaningful participation, and then present the IEP to the parent for ratification. (*Target Range, supra*, 960 F.2d at p. 1484; *Doug C., supra*, 720 F.3d at p. 1047 ["[a]fter-the-fact parental involvement is not

enough...".) Public agencies must ensure that, if agency personnel bring drafts of some or all of the IEP content to the IEP meeting, there is a full discussion with the child's parents, before the child's IEP is finalized, regarding drafted content and the child's needs and the services to be provided to meet those needs. (*Assistance to States for the Education of Children Disabilities, supra*, 64 Fed. Reg. 12478-12479.)

68. Father was entitled to a full discussion of his questions, concerns, and recommendations, before the IEP was finalized. That did not occur. Despite Dr. Olshan's admitted confusion about the occupational therapy services and the looming questions Father had about the propriety of the occupational therapy services offer as of the August 27, 2018 IEP team meeting, Los Alamitos proceeded with filing this action on August 29, 2018. This conduct together with Dr. Olshan's admission at hearing that the offer for special education and related services finalized at the July 2018 IEP team meeting was not going to change, demonstrated Los Alamitos had decided on its offer prior to the meeting and was unwilling to consider other alternatives. Los Alamitos predetermined its offer of placement and services, which significantly impeded Parents' participation rights and denied Student a FAPE.

#### Substantive Compliance

69. The evidence established that Los Alamitos engaged in multiple procedural violations, which resulted in the denial of FAPE because the violations undermined the very essence of the IEP, parental participation in the IEP formulation process. Among other things, and as discussed above, in developing the IEP dated March 13, 2018, Los Alamitos's assessments upon which its 2018 offer of special education and related services was based did not comply with the law and Los Alamitos held IEP team meetings without required members present. These violations significantly impeded Parents' participation rights, and as such, denied Student a FAPE. Regardless of all the other procedural and substantive aspects of FAPE the parties



attempted to litigate in this case, Los Alamitos did not meet its burden of demonstrating that the 2018 IEP offered Student a FAPE because of these significant procedural violations. Since the violations addressed in this Decision undermined the very essence of the 2018 IEP, it is not necessary to address the other procedural or substantive aspects of the offer. Without proper assessments and parental participation in the IEP process, there can be no appropriate substantive offer. District may not implement the IEP dated March 13, 2018 without parental consent.

## ORDER

Los Alamitos may not implement the IEP dated March 13, 2018, without parental consent.

## PREVAILING PARTY

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

## 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

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*/s/*

LAURIE GORSLINE

Administrative Law Judge

Office of Administrative Hearings