

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

POWAY UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018060763

POWAY UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018080048

DECISION

Student filed a Due Process Hearing Request on June 18, 2018, with the Office of Administrative Hearings, State of California, naming Poway Unified School District. On August 1, 2018, Poway Unified School District filed a Due Process Hearing Request, naming Student. OAH ordered these matters consolidated on August 2, 2018. On November 30, 2018, Student filed an amended complaint; Poway filed its response on December 10, 2018.

Administrative Law Judge Clifford H. Woosley heard the consolidated matters in Poway, California, on January 24, 29, 30, 31, 2019, and telephonically on February 5,

2019.

Attorneys Paul Hefley and Roxanne M. De La Rocha represented Student. Mother and Father attended on behalf of Student. Attorney Sundee M. Johnson represented Poway Unified School District. Program Administrator, Matthew Adair, attended on behalf of Poway Unified School District.

At the parties' request, OAH granted a continuance to March 4, 2019, for the filing of written closing arguments. On March 4, 2019, the parties submitted their final written closing briefs, the record was closed, and the matter was submitted for decision.

STUDENT'S ISSUES¹

1. Did Poway deny Student a free appropriate public education because the December 2017 triennial IEP offer of nonpublic school placement was not Student's least restrictive environment?

2. Did Poway deny Student a FAPE from June 11, 2016 to the date the complaint was filed when Poway failed to develop Student's individualized education program to include appropriate accommodations, modifications, supports, and services?

3. Did Poway deny Student a FAPE by failing to initiate a due process hearing within a reasonable time after the IEP Team reached an impasse regarding his

¹ Student withdrew an issue regarding a behavior emergency report, without prejudice, on the first day of hearing. In his March 4, 2019 closing brief, Student withdrew three issues — whether a December 2016 functional behavior assessment was legally appropriate, whether an October 2017 psychoeducational assessment was legally appropriate, and whether Poway failed to convene an IEP meeting when Student showed lack of progress.

placement in 2017? ²

POWAY'S ISSUE

Did Poway's September 6, 2017 IEP offer of program, services, and placement, as amended on October 25, 2017, December 14, 2017, January 29, 2018, and May 3, 2018, provide Student with a FAPE in the least restrictive environment?

SUMMARY OF DECISION

In Issue 1, Student failed to prove by a preponderance of the evidence that Poway's December 2017 triennial IEP offer denied Student a FAPE because nonpublic school was not Student's least restrictive environment. Nonpublic school placement was appropriate because it provided a smaller effective environment to address Student's behaviors. Student's dysregulation, aggressions, defiance, sensory needs, and elopement could not be addressed in his current placement on a comprehensive public-school campus. Student's behaviors created safety risks for him, his fellow students, and the staff. Student was not meaningfully interacting with typical peers in mainstreaming activities and was not accessing and benefiting from his educational placement. Nonpublic school placement was Student's least restrictive environment where his behaviors could be addressed, in a safe and quieter venue.

In Issue 2, Student did not demonstrate by a preponderance of the evidence that Poway failed to develop IEP's that included appropriate accommodations, modifications, supports, and services, from June 2016. From June 2016 through May 2017, Poway convened 11 IEP team meetings and conducted seven assessments, including a full

² The order of issues has been altered for purposes of analysis, but the issues are unchanged.

triennial psychoeducational, a second functional behavior analysis, and two educationally related mental health services assessments. Poway used multiple sources to determine present levels of performance, drafted and revised goals, gathered behavior data, and fine-tuned the behavior intervention plan, while keeping Parents informed and involved. Student's IEP's were reasonably calculated and offered Student appropriate accommodations, modifications, supports, and services to enable Student to make progress appropriate in light of his circumstances.

In Issue 3, Student did not prove by a preponderance of evidence that Poway denied him a FAPE by failing to initiate a due process hearing within a reasonable time after the December 2017 IEP team reached an impasse regarding his placement. Poway's August 1, 2018 due process request was not unreasonably delayed. Both Student's and Poway's complaints addressed whether the triennial IEP offer, as amended in May 2018, was FAPE in the least restrictive environment. Poway's complaint was filed within three months. Additionally, Poway's filing and consolidation did not unreasonably delay the due process proceeding. The parties' desire to mediate a second time resulted in a joint request to set the hearing for December 12, 2018, and the hearing was continued to January 24, 2019 because Student file an amended complaint. Poway's August 1, 2018 due process filing complied with Education Code section 56346(f), in accordance with *I.R. ex rel. E.N. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164.

For Poway's Issue, Poway did not demonstrate that its December 2017 triennial IEP offer, as amended at the May 2018 IEP team meeting, offered Student a FAPE in the least restrictive environment. Though Poway convincingly demonstrated nonpublic school placement was appropriate and Student's least restrictive environment, Poway failed to provide Parents with adequate information about the nonpublic schools. This was a procedural violation because federal and state law required Poway to make a

FAPE offer that was sufficiently specific for Parents to evaluate. The parental component of the IEP team could not make an informed decision as to whether they believed Student's unique needs could be met at the nonpublic school. Poway's procedural violation significantly impeded Parents' opportunity to participate in the decision-making process and, therefore, amounted to a denial of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

FACTUAL FINDINGS

1. Student was nine and a half years old, attending a fourth-grade autism special day class at Poway's Westwood Elementary School, at the time of the hearing. He lived with Parents within Poway's geographical boundaries at all relevant times. Poway initially assessed Student in first grade and found in September 2015 that he qualified for special education placement and services under the eligibility of other health impairment.

2016-2017: SECOND GRADE

2. Student started the 2016-2017 school year in teacher Grace Mahelona's second-grade general education class at Chaparral Elementary.

September 8, 2016 Annual IEP Meeting

3. Poway convened Student's annual IEP meeting on September 8, 2016. All requisite team members attended, including Mother, Father, and their advocate Debra Burdman.

4. The IEP team found that Student demonstrated internalizing and externalizing behaviors since starting second grade, though not at the same level of autistic behaviors as in first grade. Student struggled with academics. He had appropriate pragmatic language skills, did not have a language disorder, but had an

articulation disorder.

5. Student wrestled with his writing assignments, though he followed the teacher's pre-writing activities, with handwriting deficiencies in spacing, letter formation, and alignment. Student performed at grade level in math, which was his strongest subject. He appropriately interacted with peers and, particularly, one-on-one with adults. He transitioned between activities with minimum adult prompting. He required one or no prompt to initiate and maintain attention on math tasks but needed one to two prompts to initiate writing tasks, and three to five prompts to complete those tasks. Student had difficulty following directions and displayed defiant behaviors when asked to perform a non-preferred task. Parents reported that Student exhibited anti-social behavior, aggression towards peers, and defiance.

6. Student met his annual goals for sight word reading, task initiation and completion, and transition between activities. He made partial progress on his goals for decoding, sentence copying, and fine and visual motor skills. The occupational therapist provided Parents with adaptive handwriting paper so Student could work on his handwriting at home. The team agreed upon accommodations to relieve the difficulty associated with Student's handwriting and the time taken to complete homework.

7. Student had medical diagnoses of autism spectrum disorder, attention deficit hyperactivity disorder, and anxiety mood disorder. He was taking Risperdal and Zoloft. The IEP team considered other eligibility categories, such as autism and speech and language impairment. Because Student did not demonstrate significant autistic characteristics during the first few weeks of second grade, the IEP team agreed that other health impairment should remain as Student's primary disability category. The IEP team agreed to reconvene at any time if Parents or school members had additional concerns, including increased autistic like characteristics.

8. The team reviewed three new reading goals (sight-work reading, decoding one-syllable words, and increasing reading to 75 correct words per minute), a fine motor goal (letter legibility, alignment, and spacing), and two articulation goals. The new behavior goal addressed Student's initiating and completing tasks in the general education class with minimal prompts. All seven goals were understandable and measurable.

9. Poway's offer of FAPE was for Student to remain in a general education classroom at Chaparral, with 60 minutes of specialized academic instruction delivered during pullout resource specialist sessions, four times a week, and 30 minutes a month of resource specialist consultation regarding Student's behavior goal. Group and individual occupational therapy was to be administered in 30-minute sessions, for 930 minutes annually, with 30 minutes a month of occupational therapy consultation in the regular classroom. Student would receive speech articulation services in 10-minute increments, totaling 580 minutes for the school year. Poway did not offer extended school year because it did not find that Student regressed during the summer but the IEP team agreed to reconsider if Student did not recoup skills as expected. Parents did not accept the FAPE offer, indicating a desire to further review the proposed goals.

October 17, 2016 Amendment IEP Meeting

10. Poway convened an amendment IEP team meeting at Parents' request on October 17, 2016. All requisite team members attended, including Father and Heather Carder, clinical supervisor with Autism Learning Partners, which provided Student with in-home applied behavior analysis therapy. Mother did not attend.

11. Father shared that Student's behavior was interfering with his education, that the school assessment and Poway did not properly consider Student's behaviors, and that Student's behaviors were now similar to those in kindergarten and first grade,

as documented by outside providers and reports. Parents contended that the behavior goal was ineffective in addressing Student's behaviors. Student's behaviors, including aggression and hitting, had resulted in multiple trips to the principal's office, which Father contended merely reinforced Student's negative behaviors. Principal Rhiannon Buhr said that Student did class work when he was in the Principal's office because of a behavior incident. Student would work for an incentive, but preferred incentives frequently changed.

12. Parents found that the home-based applied behavior analysis therapy improved Student's social interaction and behavior in the home setting. Student received 15 hours a week of applied behavior analysis therapy in three-hour sessions, five times a week, from Autism Learning Partners. Parents requested the development of a behavior intervention plan and the assignment of a one-to-one aide to support and implement the behavior plan at school. Parents also sought a one-to-one aide to assure Student's safety, as indicated by some reported behavior incidents.

13. The resource specialist teacher Linda Ford observed that Student started second grade with minimal aggressive and defiant behaviors, but Student's recent behaviors had become recurrent and problematic. Ms. Carder shared that Student's behavior was very complex, with constant revisions to his home behavior plan. Student was very intelligent and, despite her team's proactive adjustments, Student found "loopholes" that required reactive strategies. At times, Student became aggressive.

14. Poway had referred Student, before the IEP meeting, to its Behavior Support Team, which would support the development of a behavior intervention plan. The IEP team reviewed a draft behavior intervention plan, with input from Father and Ms. Carder. Those who worked with Student were ignoring negative behaviors and focusing on increasing positive reinforcement when Student made good choices. The IEP team suggested that Ms. Carder, with Parents' permission, observe Student in the

school setting; Father said the Parents would consider this request.

15. The Poway IEP team members recommended a functional behavior assessment. The team also agreed to proceed with a special circumstances independence assessment, in response to Parents' request for a one-to-one adult aide. Poway was to provide the assessment plan. The meeting adjourned.

16. The amendment IEP team reconvened on October 27, 2016. All requisite IEP team members attended, including Mother, Father, and Meghan Moore from Poway's behavior support team. Parents could not contact Ms. Carder by phone and Ms. Carder did not attend the meeting as expected.

17. Parents had previously received a copy of the draft behavior intervention plan, but Father refused to review the plan. Parents wanted the assessor from the behavior support team to write the intervention plan after the completion of the functional behavior assessment. Poway IEP team members provided Parents with a proposed Supplemental Assessment Plan that included academic assessments; Parents did not consent.

18. Student's general education classroom participation was inconsistent. Ms. Ford proposed increasing Student's specialized academic instruction pullout from one hour to one and a half hours a day, providing Student with a quieter environment and fewer distractions. To keep Student engaged in the classroom, the staff developed a special, quiet place in the classroom, where Student often chose to work. Father thought this was a type of isolation, but the site team shared that Student found the area less distracting. Parents agreed to the additional specialized academic instruction time in the resource room to work on Student's language arts goals. The school would arrange for Parents to observe Student in the classroom.

19. The team discussed revision of the home-school communication sheet. A draft revised communication sheet was to be sent home for Parents to consider. Also, if

Student failed to bring the sheet home on any particular day, the sheet would be sent to Parents electronically. The team also determined that Student met the criteria for extended school year services.

20. Ms. Kimble-Manalo said the special circumstance assessment was to be coordinated with the functional behavior assessment's completion. Parents' request to have a one-to-one aide assigned in the interim was declined; such support would be evaluated after the special circumstance assessment. The IEP notes were reviewed and revised to reflect further Parents' input. The IEP team adjourned the meeting.

December 15, 2016 Functional Behavior Assessment

21. Ms. Moore was a board-certified behavior analyst who conducted Student's functional behavior assessment and provided a report dated December 15, 2016. Analysis of Student's behavior was based upon interviews with Student, Parents, principal, general education teacher, special education resource teacher (case manager), occupational therapist, and speech and language pathologist. The report reviewed and summarized Student's health records and history (including his medical diagnoses), discipline reports, and academic records (including assessments and IEP's). Student had tried approximately a dozen medications and was currently taking Zoloft, Risperdal, and Focalin. Ms. Moore observed Student on multiple occasions in varied educational settings, acquiring behavior data that she analyzed and presented in her findings.³

22. Identified behaviors of concern included: yelling; screaming; repeating of words or phrases; refusing to follow staff repeated directions; walking, running, or crawling around the classroom during instruction; crawling under, laying upon, and

³ Ms. Kimble-Manalo used Ms. Moore's observations in preparing the special circumstances independence assessment.

banging on peers' desks; taking others' property; property destruction; aggression towards adults and peers (hitting, throwing objects); and eloping by leaving the classroom or assigned area without permission or by running into "off limit" areas (like a dirt hill in back of campus). The frequency and duration of Student's challenging behavior was 61 percent of his time in the general education classroom and about 15 percent when in the resource room (one-to-one or very small group).

23. Mother and Father reported that Student was very intelligent and adept at manipulating others. Student communicated in various ways, depending on the circumstances and audience, using grunting, talking like a baby, or talking like a mature kid. Parents used a reward system at home. They offered Student choices, shaped his behaviors with redirection, provided novel rewards, and used extinction⁴ in response to undesirable behaviors. Parents found that placing Student in a helper role was an effective method of getting him to follow directions.

24. The teachers and school staff reported that since the end of September 2016, Student had been displaying severely challenging behaviors of defiance, eloping, avoidance, disruption, aggression, negative self-talk, detachment, ripping assignments, threatening to harm others, and invading others' personal space. Student's behaviors mostly occurred in the general education classroom, throughout the day. Student's behaviors did not follow a pattern or cycle. The staff identified some behavior triggers as: entering a place in the presence of peers in a large group setting; transition from preferred to nonpreferred tasks, start of the school day, and lack of adult attention

⁴ The principle of extinction is that a target behavior will reduce in frequency when the behavior no longer elicits what the child wants, such as adult attention or avoidance of a nonpreferred task. The technique is to ignore the target behavior or to respond in a manner different from what the child seeks.

during whole group instruction.

25. Ms. Moore observed Student in his school setting on three occasions from late October to early December 2018, for a total of 5 hours and 55 minutes. Student required repeated prompting and adult support. He chose to primarily remain in his specially prepared private area in the general education classroom. In the first observation Student was escorted to the classroom by Principal Buhr, who also took him to the sensory room for greater regulation. When told it was time to do resource work, Student repeatedly screamed “no resource,” ripped up the worksheets, and knocked items off the table. On another occasion, Student eloped and Principal Buhr followed, repeatedly offering Student various reinforcing choices to dissuade him from running about the campus. Ms. Ford convinced Student to return to the resource room where he could work on Prodigy. She set a 10-minute timer, after which she told Student he could have more computer time after he completed two reading worksheets (a nonpreferred activity); he completed the sheets with prompting and returned to working on Prodigy. During the last observation, Student disrupted the general education classroom by defiantly shouting out while the teacher talked. He ran out of the classroom, where he took a basket from two other students and then returned to the classroom. He made loud noises and, when Ms. Mahelona asked for a nice response, Student responded “Poop butt!” He chased a fellow student into a corner, laughing and shouting, “I can see your underwear.” Student ran out of the classroom and ran into the library. Ms. Ford came to the library and escorted Student out but he turned and ran back into the library, making loud noises. Ms. Ford eventually coaxed Student into the resource room by calling him multiple times and telling him there was something new from Amazon she wanted him to see. The adults regularly used reinforcers and bargained with Student to redirect and regulate him, with varying success.

26. Staff utilized positive behavior reinforcements to reward Student’s good

choices and regulated behavior. Reinforcers included: peer attention; one-to-one time with the school principal; timed work periods with rewards; sensory room; helping the school custodian, time on iPad, Legos, toys, helping in another classroom, and play with a preferred friend. Staff used reinforcement inventories, or asked Student what he would like, to keep pace with the changing effectiveness of reinforcers for rewards. Current accommodations included: giving Student a choice of work environments, within the classroom and on campus; choice of academic activities; reward choices; sensory breaks; timers and reminders of when next reward was coming; special classroom desk to limit distractions; school-to-home communication chart; accommodated classwork; small group; and one-to-one attention. The reward system, movement breaks, small group, individual attention, noise cancelling headphones, and varying reinforcers proved the most effective in regulating Student's behaviors.

27. Ms. Moore concluded from her observations that Student had limited interaction with peers, would gravitate toward certain students, would often take items out of peers' hands and desks, and tease classmates. Student had the choice of what work to complete, environment within to work, and reward to receive.

28. Student shared in an interview with Ms. Moore, that his least favorite subject was reading and writing, which was the hardest part of his day. He saw math as a strength, along with building Legos and playing Minecraft. He acknowledged being bothered by his bad behavior and the home reports of being sent to the principal's office. Student wished that his in-home behavior provider would not come every day and that he did not have attention deficit hyperactivity disorder. He hesitated to directly discuss his challenging behaviors. He talked about how he would try to make large groups quiet and that he wished the teacher would say "you get to do this" more often than "don't do this." Ms. Moore also gave Student functional assessment and reinforcer sentence completion exercises.

29. Ms. Moore concluded that Student's behaviors impeded his and his peers' learning. The behaviors caused Student to miss instructional time and disrupted the learning environment of others. His escalated behaviors could be unsafe. Some of the intervention strategies worked, but progress in decreasing challenging behaviors was inconsistent. Ms. Moore recommended development and implementation of a behavior intervention plan with an organized approach in addressing the problem behaviors. Ms. Moore hypothesized that Student's challenging behaviors were primarily to escape and avoid work or the classroom environment and, secondarily, to gain attention from adults and peers. She determined that Student's need for behavior intervention was serious and that IEP goals to monitor behavior be drafted or amended.

30. Ms. Moore recommended structures and supports which could diminish Student's need to utilize problem behaviors: Daily schedule which incorporates Student's choices through the day; available alternate quiet work environment with few distractions; available break area; positive rapport building with staff; administration of correctives in a manner that demonstrated staff was on Student's side; staff to avoid power struggles; scheduled movement breaks; available sensory tools; positive reinforcement for general positive and on task behaviors; academic work geared to Student's level; visual supports for structured activities; and available alternate work activities. Many of the recommendations were already being implemented, but Ms. Moore listed them due to their importance. The functional behavior assessment properly evaluated Student's behaviors and proposed appropriate interventions strategies to address the behaviors in his educational environment.

December 15, 2016 Special Circumstances Independence Assessment

31. Ms. Kimble-Manalo completed a special circumstances independence assessment of Student's need for adult assistance in the school setting, producing a December 15, 2016 report. Parents sought the evaluation due to their concerns

regarding Student's safety, other children's safety, and Student's behavior interfering with his education. Student's behavior included yelling, screaming, refusing to follow staff directions, minor property damage, aggression towards others, eloping, and walking, running and crawling around the classroom during instruction. Ms. Kimble-Manalo reviewed all assessments and IEP's and Father, Ms. Mahelona, and Ms. Ford completed interviews.

32. Student's current IEP specified accommodations and supports in addition to his related services. These, and other interventions and strategies, included: preferential seating, prompts to stay on task, positive reinforcement (e.g., token economy), varied reinforcers, movement breaks, graphic organizers for writing, adapted writing paper, accommodated classwork, use of technology for classwork, daily home-school communication, a visual schedule, and sensory breaks, tools, and strategies. Student also received direct support from the school psychologist, the resource specialist, and the principal as needed during the day to assist with Student's behaviors and eloping.

33. Father reported that Student was dependent on adult supervision, requiring constant prompting to be safe and stay in a designated area during activities, such as mealtime, homework, play activities, crossing the street, and completing tasks. Student was most independent and required minimum support when playing Legos; he was least independent and required the most support during homework, his least preferred activity. Father saw Student as an unhappy boy, with no preferred activities. Student craved adult attention and would escalate behaviors to gain the sought-after attention. Student's rewards in the home setting were unpredictable and Parents were constantly reinventing rewards as reinforcers. For "normal" or regulated behavior at home, Student received reinforcers every 60 minutes. During nonpreferred tasks (e.g. homework), Student required reinforcers every 30 seconds to two minutes to get him to

physically remain present, even with parental supervision. Father referred to his comments at the prior IEP meetings regarding the Parents' other concerns regarding Student's behaviors.

34. Student was most independent during math time, requiring about two to three times more prompts than his peers. He required the most adult support to maintain appropriate behavior when entering the general education classroom and during transitions, language arts and writing time, independent work time, and physical education. Student needed adult support 70 to 90 percent of the time to access the curriculum and to interact with peers. Reinforcement and directions of Student included: direct adult attention and supervision, frequent varied positive reinforcers (for 20 to 25-minute work cycles), frequent movement breaks, and accommodated classwork. Student required adult prompting and support to participate in general education. Student did not appropriately interact with peers, often yelling out nonsense words at random, moving around the class, and attempting to touch peers and others' belongings. However, Student intermittently responded to working one-on-one with adults, with a behavior chart and frequent reinforcers.

35. Ms. Kimble-Manalo concluded that Student required a greater level of support for behavior and sensory needs than the general education classroom and resource environment. Adult one-to-one support in the general education environment would not be sufficient. Student required a structured classroom environment with clear expectations, a smaller adult to student ratio, consistent routines, a positive behavior system that would provide immediate and frequent feedback throughout the day, sensory strategies, visual supports and instruction to meet his academic, social, behavior, and emotional needs. Ms. Kimble-Manalo recommended that the IEP team consider a different placement that would provide the requisite environment and supports.

36. The special circumstances independence assessment was legally appropriate and properly evaluated the benefit of one-to-one adult assistance to Student in his educational environment.

December 15, 2016 Amendment IEP Meeting

37. Poway convened an amendment IEP team meeting on December 15, 2016. The team reviewed the functional behavior assessment and the special circumstances assessment. All requisite team members attended, including Father and Dr. Laura Mueller from Poway's behavior support team. Mother did not attend.

38. Ms. Moore discussed the identification of problem behaviors, Student's motivations, and the strategies that were and were not effective. Student's behaviors impeded the learning of Student and his peers and, therefore, a behavior intervention plan should be finalized and implemented. Father shared that Student's behaviors at home had improved over the prior few days and that he is holding Student accountable. Ms. Moore reviewed and revised the draft behavior intervention plan, with the IEP team's input and agreement. She proposed and the team reviewed a functionally equivalent replacement behavior goal.

39. Ms. Kimble-Manalo reviewed the special circumstances independence assessment, which demonstrated that adult assistant support in the general education environment would not be sufficient to address Student's behaviors. The team discussed a smaller, structured educational environment that would meet Student's identified needs. Poway recommended the autism spectrum disorder special day class. The intervention plan could be implemented, with Parents' consent, while Poway arranged for Parents to observe the special day class. If Parents accepted the placement, Dr. Mueller would train special day class staff on implementing Student's intervention plan.

40. Father preferred that Poway staff implement the behavior intervention plan in the general education environment. He did not believe that the plan could be

implemented without an adult assistant. The team therefore agreed to additional classroom adult support for Student during a 30-day trial period. The team agreed to meet after the trial period to review data and progress. Father wanted to review the proposal with Mother before providing consent. Parents formally agreed to the increase in resource services to 90 minutes a day and to the 30-day trial period for additional adult support for Student on January 9, 2017.

February 1, 2017 Amendment IEP Meeting

41. Poway convened an amendment IEP team meeting at Parents' request on February 1, 2017. All requisite team members attended, including Mother. Father attended via telephone. Parents requested the IEP meeting before the running of the 30-day trial period because they felt Student could not make progress in his current placement. Parents wanted to accept the autism spectrum disorder special day class and to expedite the change in placement.

42. The team considered Student's multiple suspensions because of his defiant and aggressive behaviors, including being sent home the day of the IEP because of physical aggression towards his adult support. He had more than 10 discipline incidents resulting in suspension or loss of privileges since the beginning of the school year. Mother said Student viewed being sent home with a suspension as a reward. The team discussed and agreed the benefits of the special day class outweighed the impact of Student not attending his home school and diminished access to typical peers and the general education curriculum. Parents initially wanted the special day class placement to be a 30-day trial but, after discussion, agreed to Student's special day class placement to extend until the September 2017 annual IEP. The special day class placement would begin February 6, 2017. The IEP team agreed to meet on or before March 24, 2017, to review Student's progress with the new support team.

43. Poway's FAPE placement offer was specialized academic instruction, 300

minutes a day, five times a week, in the autism spectrum disorder special day class at Westwood Elementary School. Adult additional support across all school settings would be in place for 60 days to assist with the transition and implementation of the behavior intervention plan. Poway offered transportation and extended school year. Student would be in the special education environment 80 percent of his school day and in general education settings for 20 percent, which included lunch, recess, and other activities. His accommodations, supports, and related service of occupational therapy and speech and language for articulation remained as stated in the September 2016 annual IEP. Mother took the IEP home to review with Father and consented to the IEP.

March 21, 2017 Amendment IEP Meeting

44. Student's IEP team met on March 21, 2017 to discuss Student's progress in the new placement. Ms. Kimble-Manalo administered the meeting with Student's new support staff. All requisite team members attended, including Mother.

45. Dr. Mueller reported she trained the new team at Westwood regarding strategies outlined in Student's behavior intervention plan while autism specialist Dani Rodriguez demonstrated and reinforced the strategies and behavior expectations. Student's special education teacher Katie Romero shared that transition expectations were met and referred to data indicating improved behavior. The requirements for rewards were increased. Student was more frequently staying in the classroom to complete work while choosing to be in the alternative work room for reward time or as a place to regulate, for up to 30 minutes a day. Student could be somewhat stimulated coming off the bus, but he calmed by walking around the track for morning sensory activity. Speech pathologist Vandana Santhanam was pleased with Student's progress, noting that he was appropriately asking for breaks, would return to his speech work, and enjoyed earning stickers. General education teacher Cindy McClland reported Student's participation in her general education physical education and library classes had

improved, when provided clear expectations. He was more likely to engage with his fellow special day class students than general education peers. Occupational therapist Kathryn Hamm began Student's sessions with sensory activities and was then working on fine motor activities, like pencil grip. Student responded well to being able to choose the time of his occupational therapy sessions.

46. Mother reported the family was working with a new board-certified behavior analyst at home, focusing on increasing truth telling in the home. Student's trust and honesty was improving at school and Student was proud of his accomplishments. The team made no changes to the IEP.

Remainder of 2016-2017 - Second Grade

47. Student's deregulation and maladaptive behaviors steadily increased during the remainder of his second grade 2016-2017 school year. Student became progressively defiant, aggressive, and noncompliant. Each day began with sensory tools to diminish attention seeking behaviors. Student's reading improved somewhat, but he did not make appropriate academic progress. Math was still a strong point, but Student did not want to participate in class work and was disruptive of other students. Student had four formal disciplinary incidents, and was suspended four days, in May 2017.

48. The team reconvened on May 17, 2017 and revised the Student's behavior plan, adding "physical prompting" to guide Student to a quiet, separate environment where he could use sensory strategies in an attempt to deregulate. Student's one-to-one adult instructional aide support continued for the remainder of the school year and third grade. At a June 2, 2017 amendment IEP, the team added one-to-one counseling (20 minutes, 30 times a year) with the school psychologist.

2017-2018: THIRD GRADE

49. Student attended Ms. Romero's autism spectrum disorder special day class

at Westwood Elementary for third grade, 2017-2018 school year. Ms. Romero's class had nine to 11 students, with three assigned adults, Student's assigned aide, and another one-to-one aide for a different pupil. Ms. Romero testified at the hearing. She was in her fourth year working for Poway as a special education teacher. She had a bachelor's degree in human development and a master's degree in special education. She held multiple subjects K-8, education specialist mild-to-moderate, and education specialist moderate-to-severe teaching credentials, with an autism authorization. Ms. Romero completed all classes and supervision hours to be a board-certified behavior analyst; she was waiting to take the certification exam. She received crisis training, including emergency intervention (physical restraint).

50. Ms. Romero described Student as a fun, very smart boy with a strong personality. However, Student was unable to access and participate in the curriculum because of his increasingly dysregulated behaviors that also impaired the educational environment of his peers. Student's behaviors included: noncompliance (e.g., task avoidance, verbal refusal, redirect attention, climbing on furniture); aggression (grab or shaking peers, screaming into autistic students' ears, hitting peers and adults, threatening to injure others); disruption (yelling, screaming, taking others' materials); and elopement (exiting classroom, moving around campus, trying to leave the campus, and running through other special and general education classrooms).

51. The adult staff enjoyed Student when he was regulated. Charlotte D. Eazer was Student's one-to-one instructional assistant. She testified at the hearing. Ms. Eazer was a credentialed teacher, having worked for Poway since 1997, including 11 years as a substitute teacher. She was selected to work with Student because of his instructional needs. Poway trained Ms. Eazer in the implementation of behavior intervention plans and working with autistic children. Ms. Eazer tried every strategy listed in Student's intervention plan. She worked daily with Ms. Romero on modified classwork and

behavior intervention strategies for Student. She demonstrated an intimate knowledge of Student's academic performance and behaviors. When not regulated, Student was loud and aggressive with staff. Student had relationships with his classmates, when regulated. If not regulated, he was very disruptive. Student's behaviors had cycles of frequency, which constantly changed, but the behaviors would always return to the same level. Ms. Eazer believed that Student would rather elope whenever asked to do academic work. Student was regulated about 20 percent and dysregulated 80 percent of his time at school.

52. Student attended school activities (such as a general assembly) but refused to participate in general education opportunities, such as lunch, recess, and learning groups. He resisted and usually did not participate in physical education class, did not attend art class, and would occasionally join in library time. He participated in academic classroom activities rarely and nonacademic activities two to three times all year. Student did not participate in small group academic work, except for a few math fun exercises. Student was seldom able to receive whole group instruction from Ms. Romero. Student did class work with his aide or Ms. Romero; never with other students. He did poorly with long, direct instruction. Ms. Romero's one-on-one work taught Student step-by-step, with regular prompting and feedback. Student would not complete academic work at grade level, though he was capable. He accessed math better than reading and writing; his spelling was poor. The dissonance between Student's academic performance and grade level standards increased through the year.

September 6, 2017 Triennial IEP Meeting

53. Poway convened Student's triennial IEP team meeting on September 6, 2017. All requisite team members attended, including Father; Mother did not attend. The meeting focused on reviewing goal progress and possible new goals.

54. Student met the letter formation, but not the sentence legibility, portion of

his occupational therapy handwriting goal. For reading, Student met his sight words goal but not his fluency and decoding goals, though he made progress when he was regulated. He met his two articulation goals. Student did not meet his three behavior goals regarding task initiation and completion, leaving the classroom to avoid tasks, and using words to express needs when presented with nonpreferred tasks. The team reviewed a proposed new behavior goal that would correlate with Student's proposed counseling sessions. Father took the proposed goal home to review with Mother. The meeting concluded, to be reconvened to review the assessments.

October 2017 Triennial Psychoeducational Assessment

55. School psychologist Michelle Klock and Ms. Romero assessed and evaluated Student, issuing an October 25, 2017 psychoeducational triennial assessment report. Ms. Klock was a Poway school psychologist, worked at Westwood Elementary, attended all of Student's IEP's at Westwood through third grade, provided Student with counseling services, supported Ms. Romero and Ms. Easer in the classroom, and was otherwise regularly involved in Student's social, emotional, and behavioral needs at Westwood Elementary. She did not testify at hearing.⁵ Ms. Klock reviewed all available academic records, assessments, and IEP's.

Observations of Student.

56. Student was assessed in quiet rooms with minimal distractions for short segments over several days. He would do two to three visually listed activities and take a five-minute break, playing on his iPad. Student required frequent breaks, when he would sit in a beanbag. Student's behavior was inconsistent during testing, especially when he

⁵ At the time of hearing, Ms. Klock no longer worked at Poway and lived on the East Coast.

perceived a question or task as too difficult. He sometimes raised his voice, banged his hand on testing materials, or hit the glass on the door with a closed fist, when asked to do a nonpreferred task. Ms. Klock would calmly redirect Student, who appeared to put forth his best effort and demonstrated good levels of motivation during the assessment. Ms. Klock considered the assessment results to be a valid estimate of Student's then-current functioning.

57. Ms. Klock observed Student in the school environment on four occasions. The first observation began in the early morning, upon arrival of Student's bus, where Student remained – chanting loudly -- until Ms. Romero arrived. He walked regulated with Ms. Romero to the classroom, other than banging on a passing door. When Ms. Romero left the room with other pupils for a few minutes, Student went to an area of the room reserved for his use and played on his iPad while using headphones; he commonly took a break before starting the school day. Ms. Eazer was with Student and asked him about his work folder and then going to a school assembly. Student said he did not "do folder anymore" and said he did not go to assemblies. Student asked why Ms. Klock was there on a Tuesday, then screamed at her to leave. He darted to the other corner of the room and began to repeatedly kick a file cabinet, saying "Today is kick the cabinet day, not assembly day." He continuously kicked for six minutes until Ms. Romero returned, who talked to Student, and had him go back to break space.

58. Ms. Klock observed Student on another day, as Ms. Romero was bargaining with Student to be on good behavior at a school assembly for which they were about to leave. Overall, Student did well, sat on the floor as the multipurpose room filled with Westwood Elementary classes, appeared to listen to the firefighter speakers, and appropriately clapped. After listening to the next speaker from the burn institute, Student started loudly and continuously shouting until Ms. Romero prompted him to leave the room with her. Ms. Klock twice more observed Student in the classroom

because Student did not generally join his peers during recess. He interacted with peers when he was in his break space and playing on his iPad, his primary preferred activity. He pretended to sleep instead of transition to school work. Though he would answer personal questions, Student would ignore peers when they were talking to him. He also made mean comments to peers if they asked him obvious questions.

Parent and Teacher Interviews

59. Ms. Klock interviewed Mother. Mother reported that Student enjoyed swimming, playing Legos, and killing bugs in the yard. He got along okay with family members. Student did not really have any friends; he tended to clash and butt heads with boys his age. He did his house chores. Student was good in math, struggled with reading, and had awful writing. He required help with sentence formation and organizing his thoughts. Mother said Student seemed to be an unhappy boy and Parents were worried for his future. Parents were especially concerned about how his low frustration threshold and extreme behavior to avoid nonpreferred tasks impacted his learning.

60. Ms. Romero said Student enjoyed playing Legos, talking to familiar adults, assuming leadership roles, and playing Minecraft on his iPad. Student was very kind when regulated. He benefited from movement breaks throughout his day and opportunities to control the level of stimulation in this environment. Student became unregulated when asked to perform a nonpreferred activity, displaying disruptive, noncompliant, aggressive and elopement behaviors.

61. Student learned best with visual components. Math was his academic strength and not an area of need. He was reading at a 2.5 grade level but had reading recall at a 4.4 grade level, demonstrating Student comprehended what he was able to decode. He struggled with phonemic and phonological awareness. Student had a short endurance reading, which was a nonpreferred subject. Writing was a very nonpreferred

topic for Student, who was able to write one to two sentences at a time. His sentences were often incomplete, were missing key words, or simply did not make sense. He was highly resistant to proof reading. Student could dictate his ideas to adults, understood grade level vocabulary, knew nouns, verbs, and adjectives, but was weak in grade level spelling. Student continued to need support for motor integration and manual dexterity in his handwriting.

62. The speech and language pathologist Vandana Parasaram reported that Student's speech was up to 100 percent intelligible, despite his articulation struggles. Student's receptive, expressive and social communication core language scores were in the average range. Student demonstrated social communication skills when regulated.

Cognitive Assessment

63. For intellectual ability, Ms. Klock administered the Wechsler Intelligence Scale for Children, 5th Edition, which was a psychometrically sound, reliable and valid measure of cognitive abilities. Student's full scale intelligence quotient index was 111, but Student's composite results were significantly scattered, meaning the full scale score should be interpreted with caution. Wechsler general ability index provided an estimate of general intellectual ability with reduced emphasis on working memory and processing speed. Ms. Klock concluded the general ability index was a better measure of Student cognitive ability. Student's general ability index scores were between 114 and 125, indicating that Student was functioning in the very high range of general cognitive ability.

64. Student scored in the high average range on the Wechsler verbal comprehension index, demonstrating a well-developed verbal reasoning system with strong word knowledge acquisition, and good ability to reason and solve verbal problems. On the phonological awareness composite, Student scored in the poor range, demonstrating poor phonological processing skills as compared to same-aged children.

Yet, as tested by Ms. Parasaram, Student had age-appropriate oral language processing skills at that time.

65. Student fell into the low average range on the Wechsler working memory index, measured the capacity to retain information while simultaneously processing the same or other information for a short period. Ms. Klock used the Comprehensive Test of Phonological Processing, Second Edition, to evaluate Student's long-term recall. On the rapid symbolic naming index, Student demonstrated a poor ability in naming automaticity and verbal retrieval abilities. Student's poor working memory and poor long-term storage and retrieval strongly influenced all aspects of his academic learning.

66. Student scored in the age appropriate range for spatial reasoning and ability to analyze visual details. He demonstrated a strong ability to abstract conceptual information from visual details, as indicated in his very high score on the fluid reasoning index. Student's scores for the processing speed index showed an average ability to rapidly identify visual information and to make quick, accurate decisions.

67. Ms. Klock considered the Scales for Diagnosing Attention Deficit/Hyperactivity Disorder and the Behavior Assessment Scale for Children, Third Edition,⁶ in evaluating Student's attention processing and executive functioning. Student had difficulty maintaining necessary levels of attention at school and home, was easily distracted, had difficulty concentrating, and made careless mistakes. Both Ms. Romero and Parents rated Student extremely elevated for executive functioning, including his behavioral and emotional control. Student had extreme difficulty in maintaining self-control and regulating impulsive behaviors. He had outbursts, sudden

⁶ Ms. Klock used the Behavior Assessment Scale for Children, Third Edition, scores obtained by school psychologist Sandra Cumming, who was contemporaneously conducting an educationally related mental health assessment.

and frequent mood changes, and emotional instability. Concerns at home included problem solving and attentional control. He struggled with planning and was typically disorganized.

Academic Assessments

68. Ms. Romero administered the Woodcock-Johnson, Fourth Edition, Test of Achievement to measure Student's educational achievement in the areas of reading, mathematics, written language, academic skills, fluency, and applications. Student's subtest scores for the Woodcock's basic reading skills index were scattered and considered invalid. She, therefore, administered the Wechsler Individual Achievement Test, Third Edition, word reading index subtest, which demonstrated Student could read whole words but was below average in reading nonsense letter combinations, which was consistent with Student's phonological processing and long-term retrieval deficits.

69. Student's reading fluency, reading comprehension, and math calculation indexes were in the average range. Student was in the superior range on the Wechsler math problem solving subtest. He was in the average range for written expression, but had a weakness in spelling.

Social-Emotional Functioning, Autism, and Adaptive Functioning

70. Ms. Klock reviewed the results of Father's and Ms. Romero's responses to Scales for Diagnosing Attention Deficit/Hyperactivity Disorder and the Behavior Assessment Scale for Children regarding Student's behaviors. Areas of significant concern across all environments were hyperactivity, aggression, conduct, depression, withdrawal, inattention and impulsivity. Student had disruptive, impulsive, and uncontrolled behaviors. Student's aggressive and rule-breaking behaviors included arguing, defiance, threats, and lying. He was irritable, pessimistic, and easily upset, stressed, nervous, worried and tense. In the home setting, Student's atypical behavior

seemed odd, out of touch with reality, and he spoke nonsensically. Parent and teacher rated Student's behavior symptoms index to be in the clinical range.

71. Ms. Romero completed the Emotional Disturbance Decision Tree, which rated Student in the very high clinical range for inability to build or maintain relationships, inappropriate behaviors or feelings, pervasive mood or depression, and physical symptoms or fears. Overall, Student's emotional disturbance was rated to be highly severe and to highly impact his education. Student met all five federal criteria for emotional disturbance eligibility. Ms. Klock found Student's characteristics of emotional disturbance occurred over a long period of time, to a marked degree, and had adversely affected his educational progress.

72. Father and Ms. Romero completed the Social Responsiveness Scale, Second Editions, which measured Autism Spectrum Disorder, from mild to severe. Student had deficiencies in social cognition, social communication, social motivation, and restrictive interest, and repetitive behaviors. Ms. Romero rated Student to be at risk for autism, while Father's responses were elevated to the clinical degree. Student adaptability skills were developing. He had difficulty adapting to changing situations and took longer to recover from difficult situations than most same-aged peers.

Eligibility

73. Ms. Klock summarized the results and considered potential special education eligibilities. Student met the criteria for specific learning disability eligibility because Student's basic reading skills and math problem solving was below grade level, which was significantly discrepant from his high cognitive ability. Student continued to meet other health impaired eligibility criteria because of his Attention Deficit Hyperactivity Disorder. Student displayed behaviors and characteristics of a child on the autism spectrum, but also interacted appropriately with staff and, on several occasions, peers. Autism was not an appropriate eligibility if the child's educational performance

was adversely affected primarily because of emotional disturbance, for which Student met the eligibility criteria. Ms. Klock left the eligibility determination up to the IEP team. Ms. Klock made recommendations to support Student in the classroom, including engaging Student to discuss his behaviors when he was regulated.

October 2017 Educationally Related Mental Health Assessment

74. School psychologist Sandra Cummings conducted an Educationally Related Mental Health Assessment of Student and issued an October 24, 2017 report. She testified at the hearing. Ms. Cummings had a bachelor's degree in communication, a master's degree in psychology, and a pupil personnel services credential with school psychology specialization. She was in her sixth year as a school psychologist with Poway. Her duties included initial and triennial assessments, creating behavioral intervention plans and supports, and collaborating with IEP team members. Ms. Cummings was one of two case managers and school psychologists assigned to Poway students placed in nonpublic schools, scheduling and attending IEP's and doing supplemental assessments. Ms. Cummings also did Educationally Related Mental Health Assessments – about 250 in her career. Her education, credentials, and experience qualified her to conduct Student's mental health assessment, interpret the results, and prepare the report.

75. The purpose of the mental health assessment was to determine Student's current social-emotional functioning and if Student required therapeutic intervention in order to receive educational benefit. Student received individual counseling from the school psychologist as part of his IEP related services. Educationally related mental health counseling was more therapeutic and provided by outside professionals, such as a family therapist or a psychiatrist. The assessment also considered behavior interventions and goal revisions.

76. Ms. Cummings reviewed all available academic records, assessments, and IEP's, including those from Kaiser Permanente Department of Psychiatry (March 2016)

and Easter Seals Autism Services (May 2016). She interviewed Ms. Westwood's principal Jennie Mikels, Ms. Romero, Ms. Eazer, Ms. Klock, Ms. Hamm, Ms. Santhanam, Ms. Rodrigues, Parents, and Easter Seals' behavior program manager Brenda Armas. She was unsuccessful in contacting Student's private therapist.

77. The interviews confirmed that Student's behaviors of defiance, aggression, avoidance, isolation, and elopement were becoming more frequent and escalating. He would regularly leave the classroom and climb a tree, roam about the school, enter other classrooms, and try to leave campus. Student was not accessing general education peers and environment. His high levels of impulsivity and dysregulation prevented the use of sustainable and successful interventions. Identifying and strategically responding to behavioral triggers proved elusive and ineffective because of Student's unpredictability and explosive reactions. Any strategy that improved behavior was only temporarily effective. Student's behaviors kept him from benefiting educationally and jeopardized his safety and the safety of other students on campus, requiring adult support throughout his day.

78. Ms. Cummings administered and reviewed the results of Ms. Romero's and Father's scale responses to the Behavior Assessment System for Children, Third Edition, which indicated Student was in need of intensive support. She twice observed Student at school with behaviors like those observed and reported by Ms. Romero in the psychoeducational assessment report.

79. Student told Ms. Cummings in his interview that everything was difficult and appeared self-aware. He knew he had some skill deficits and, when under pressure, he became insecure and anxious. He believed that peers judged him and thought him stupid. Student tried to avoid activity or tasks that caused him anxiety. Ms. Cummings opined that Student was not eligible to receive educationally related mental health services because she thought that Ms. Klock could administer cognitive behavior

therapy to help Student be more self-aware regarding his anxiety and negative behavior triggers.⁷ Ms. Cummings prepared a folder regarding initial stages of cognitive behavior therapy to be used by Ms. Klock with Student. Ms. Cummings proposed a social emotional goal and social pragmatic goal. She made a number of recommendations, many of which had already been included in Student's IEP, was part of the behavior intervention plan, or had been attempted by Student's support team. She recommended that Student's access to iPad and electronic games be diminished as a reinforcement because the gaming and electronic devices overstimulated Student, making transition to school work more likely to escalate behaviors. She never referred to Minecraft as violent or that violence was otherwise negatively affecting Student. Ms. Cummings acknowledged that if her recommendations did not benefit Student, the IEP team needed to look at a more restrictive environment.

October 2017 Occupational Therapy Evaluation

80. Ms. Hamm conducted an Occupational Therapy Evaluation and issued an October 16, 2017 report. She testified at the hearing. Ms. Hamm had a bachelor's degree in human development, a master's degree in occupational therapy, and a license with the California Board of Occupational Therapy. She was an occupational therapist with Poway since 2016, providing assessments and implementation of related services at Westwood and Monterey Elementary Schools. Ms. Hamm provided Student with 30-minute individual occupational therapy sessions about once a week (30 times a year) since his spring 2017 arrival at Westwood. Her education, credentials, and experience qualified her to conduct Student's occupational therapy evaluation, interpret the results,

⁷ Cognitive behavioral therapy is a short-term form of therapy that focuses on changing how a person thinks about and reacts to specific situations.

and prepare the report.

81. Ms. Hamm reviewed Student's records and interviewed Parents and Ms. Romero. She formally observed Student in class, where he chose to remain in his quiet space for a reading assignment and iPad break. She had Ms. Romero complete the Sensory Profile 2 School Companion rating scales to measure Student's sensory processing abilities and their effect on his functional performance. Student sought movement, avoided auditory and visual stimuli, and had a high threshold for tactile input.

82. Ms. Hamm administered the fine motor and visual motor subtests of the Bruininks-Oseretsky Test of Motor Proficiency to evaluate Student's fine motor integration and manual dexterity. Student's scores confirmed his struggles with motor integration, motor coordination, and fine motor movement. Student's need for reminders to follow instructions did not impact the standardized test results' accuracy and reliability.

83. Ms. Hamm found that Student was easily frustrated when handwriting, struggling with spacing and certain letters. She evaluated Student's motor planning, finding he was able to sequence multistep tasks, follow verbal commands, and appropriately use classroom tools, when Student was regulated. She concluded that Student's frustration with nonpreferred tasks like handwriting and his sensory needs negatively affected his attention, tolerance, and availability to learn within the learning environment. Student benefitted from movement breaks throughout his day and opportunities to control the level of stimulation he received in his environment.

October 25, 2017 Triennial IEP Meeting – Part Two

84. The second meeting of Student's triennial IEP convened on October 25, 2017. All requisite team members attended, including Father, Mother and Ms. Cummings. The team reviewed the triennial assessments, which were previously

provided to Parents.⁸ Ms. Klock presented the psychoeducational assessment report, including her conclusion that Student met the criteria for specific learning disability, other health impaired, and emotional disturbance eligibilities.

85. The team reviewed Ms. Hamm's occupational therapy assessment. Parents asked about Student's sensitivity to noise. Student had access to noise canceling headphones and Ms. Romero noted he was accessing them. Ms. Cummings presented the educationally related mental health assessment report. Parents commented that Student manipulated his environment to get what he wants. Ms. Cummings shared information about cognitive behavior therapy and thought-record activities to diminish Student's escape and task avoidance behaviors by improving his self-awareness with more internal control. Parents, Ms. Klock, Ms. Romero, and Ms. Cummings discussed concerns and strategies regarding Student's behaviors in the home and school settings. The duration and intensity of Student's dysregulation and negative behaviors at school were increasing. Parents said antecedents to Student's behaviors were difficult to determine in the home environment. Ms. Cummings presented her two proposed social emotional goals, which Father believed Student could meet. The team further reviewed Ms. Cummings recommendations, including that Student not receive educationally related mental health services other than school counseling with Ms. Klock.

86. Since Student's present levels of performance were outlined in the

⁸ The parties stipulated in writing at hearing that the September 2017 triennial IEP's speech and language goals and services met Student's unique needs in the area of speech and language and that Student met his two previous speech and language goals and received educational benefit in the area of speech and language for the 2016-2017 school year. Therefore, speech and language assessments and services are not addressed in the decision.

assessment reports, Ms. Romero proceeded to review proposed reading and spelling goals. She was going to obtain a baseline of Student's skills in spelling phonetically-based words to see if a goal should be added in this area; the team agreed. The team discussed behavior and social emotional goals. Parents discussed Student's possible participation in an anxiety group through Kaiser. Ms. Klock discussed mindfulness strategies for self-regulation to be tried in individual counseling. The team revised a proposed behavior goal and adjusted the baseline on a social emotional goal. The team reviewed Ms. Hamm's proposed handwriting goal and two communication goals. The goals were understandable and measurable.

87. The IEP team did not discuss placement. Parents wanted to review the final versions of the goals at home before agreeing to implementation. The meeting was adjourned.

December 14, 2017 Triennial IEP Meeting – Part Three

88. The third meeting of Student's triennial IEP convened on December 14, 2017. All requisite team members attended, including Mother. Father did not attend. Ms. Kimble-Manalo guided Student's IEP triennial team meetings for the 2017-2018 school year, taking the meeting notes. She had the IEP team follow an agenda of matters that needed to be considered at a triennial meeting. After introductions and providing procedural safeguards, the team would review assessment results, reports, Student's progress on goals, and present levels of performance, discuss eligibility, consider Parents' concerns, review proposed goals and the frequency of progress measures, look at accommodations for statewide assessments and any special factors like technology, review and revise the behavior intervention plan, determine the types and levels of related services, decide the appropriateness of extended school year and transportation, and evaluate Student's educational setting and placement. Part Three of the Student triennial started where Part Two concluded, eligibility.

89. Ms. Klock reintroduced the question of which eligibility would be designated Student's qualifying disability in his IEP -- specific learning disability, other health impairment, or emotional disturbance. Ms. Klock and the other school team members indicated that emotional disturbance should be the primary eligibility with other health impairment as secondary. Mother believed an emotional disturbance eligibility designation would affect Student's self-esteem. Ms. Romero shared recently obtained data demonstrating measurable increases in duration and frequency of Student' noncompliance, elopement and aggression. The patterns of behavior were not decreasing despite the many interventions, supports, and strategies. Student's aggressive behavior created risk of harm to himself and others, necessitating repeated adult attention. Student did not participate in general education opportunities except for 15 minutes on occasion. Mother wanted to consider the eligibilities later with Father.

90. At hearing, Ms. Romero further testified to the nature, frequency, and consequences of Student's behaviors during the 2017-2018 school year, of which Parents were fully informed and aware because of constant communication with her or the principal. Student's elopement behavior particularly created disruption and safety concerns. The elopement was primarily associated with Student's desire to gain attention while avoiding nonpreferred activities. When Student eloped, Ms. Romero, Ms. Eazer, Ms. Mikels, and/or Ms. Klock would follow Student, calmly encouraging him to return. Everyone noticed Student's behavior as he roamed about campus, providing the attention Student sought.

91. Staff attempted to reduce the elopement by ignoring Student, such as when he would exit and climb on a low limb of a tree just outside the door, in sight of Ms. Romero or Ms. Eazer. Student could not be ignored when he wandered about campus, running through classrooms, threatening to enter restricted areas, or trying to go offsite. Student yelled, hit desks, and was aggressive. Other teachers were trained to

maintain neutral expressions and encourage their pupils to try to ignore Student, but he was insistently disruptive.

92. The IEP team reviewed the goals and objectives. Ms. Romero discussed the baseline for spelling phonetically-based words and that a separate goal was not necessary to track the skill, which was integrated in and could be monitored by the Student's writing goal. Ms. Romero also offered revised reading and writing goals as Parents requested at the last meeting. The triennial IEP had 13 goals with objectives: three reading, two writing, three social-emotional, behavior, fine motor, articulation, and two social language. All goals and objectives were understandable and measurable and, with the behavior intervention plan, addressed Student's areas of need. Mother agreed to the goals.

93. The team reviewed Student's behavior intervention plan, which was updated to reflect the current behavior frequencies. The plan identified the problem behaviors as noncompliance, aggression, and elopement, and listed specific associated behaviors, such as yelling, crawling on a desk, hitting, and running in other classrooms. The team identified six antecedents to problem behaviors and listed 14 environmental structures and supports to reduce the behaviors, including a daily schedule, available alternative work environment, scheduled movement breaks, available sensory tools, and available alternate work activities.

94. The plan enumerated 13 strategies and necessary materials to teach Student replacement behaviors with reinforcement procedures for establishing, maintaining, and generalizing. Current reinforcements included iPad, Legos, Minecraft game, preferred snacks, mazes, being a helper, and selecting from the reward box. The plan then identified specific behaviors with comprehensive corresponding strategic responses and post-incident approaches. Multiple sources – service providers, assessments, staff, teachers, psychologists, behavior intervention support, autism

specialist, and Parents – contributed to the creation of a thoughtful and detailed intervention plan. Mother had no questions or concerns about the plan.

95. Ms. Kimble-Manalo testified at the hearing. She obtained a master’s degree in special education in 1980, and held a multiple subject credential, and a resource specialist certificate. She was a special education program specialist with Poway since 2013, having previously held similar positions at San Diego Unified School District, where she worked in special education for 17 years. Her duties at Poway included leading IEP team meetings, monitoring IEP implementations, collaborating with service providers, teachers, and parents, maintaining records and data of students’ progress, and evaluating least restrictive environment placement. She first met Student at Chaparral Elementary, where she assessed his need for adult assistance.

96. Ms. Kimble-Manalo started the team’s discussion of placement by reviewing the many and various resources, supports, and interventions that had been utilized to address Student’s behaviors and safety. The spectrum of program options flowed from the least restrictive to the most restrictive placement, beginning with full inclusion in general education, then general education with related services (e.g., speech therapy, occupational therapy), to general education with push-in or pullout resource specialist services, to a special day class (the type depended on a pupil’s needs), followed by nonpublic school, and concluded with residential treatment center.⁹ She drew a graphic of program placement options on a whiteboard, discussing Poway’s provision of Student’s placement, supports, and services at each level. The team discussed whether other special day classes were appropriate.

⁹ The team did not discuss in detail residential treatment center placement or Poway’s special day classes (e.g., severely handicapped) because those placement options were clearly not suitable for Student.

97. Student was not educationally and socially benefiting in his present placement, despite the school team's implementation of many and varied resources, supports, interventions, and strategies. Student's behaviors and safety concerns severely limited his exposure to typical peers. The school IEP team did not believe Poway's other special day class placement options would benefit Student or that the revised behavior intervention plan was sufficient to address Student's behaviors, which would continue to occur on a comprehensive school campus.

98. Poway had a behavioral and social emotional support program, commonly called BASES, but Poway did not offer or discuss the program because it was not suitable. Ms. Cummings said the program would have been a disservice to Student because it lacked the high level of visual structure and sensory support needed by Student and which the autism special day class was better able to provide. Poway's behavioral and social emotional support program was also on comprehensive public-school campuses. The program was not a viable alternative placement option. However, Ms. Kimble-Manalo acknowledged that Parents should have been told about and had an opportunity to discuss the program at the IEP team meeting.

99. Poway IEP team members therefore recommended placement in a nonpublic school to meet Student's need for a more supportive environment to address his behaviors. Ms. Kimble-Manalo told Mother nonpublic school was considered only after Poway's resources were unable to provide Student with educational benefit.

100. Poway recommended two public schools, Springall Academy and San Diego Center for Children. Ms. Klock and Ms. Romero provided general information regarding nonpublic schools. The team discussed the nonpublic school placement process, which included Parents signing a release so Poway could share Student's information with a recommended nonpublic school. Without the release, the nonpublic school would not have the information needed to determine if its program could meet

Student's needs. Transportation would be provided. Mother took the release, saying she and Father would contact Ms. Kimble-Manalo with their decision.

101. Poway made a FAPE offer. Proposed services included speech and language direct therapy, 30 minutes, 31 times a year; individual counseling, once a week for 20 minutes, in a flexible location due to Student's behaviors; direct occupational therapy, 20 minutes, 30 times a year, and special academic instruction of 1500 minutes a week. Poway's offer of placement was in Ms. Romero's special day class until the next IEP team meeting, which would be scheduled after Parents informed Poway of their decision. Mother agreed that the services and goals could be implemented immediately.

102. Parents testified that they were shocked at the nonpublic school placement offer because the placement was not mentioned in the first two triennial meetings. They thought that Ms. Cummings mental health assessment recommendations provided guidance on how Poway could alter its approach to address Student's needs at Westwood. They felt Poway did not adequately explain the basis for the nonpublic placement offer, noting that Ms. Hamm and Ms. Parasaram did not express an opinion in the meeting. Ms. Hamm testified she fully supported the nonpublic school offer, persuasively stating why Student's behaviors could not be adequately addressed on a comprehensive campus.

103. Poway's special education director Jodi Payne testified at the hearing. She reviewed the nonpublic school placement process as outlined in Poway's Special Education Procedure Manual. A nonpublic school placement was considered after all programs within Poway had been considered and exhausted. If a program specialist believed a student needed a nonpublic school, conversations regarding student's placement probably would have taken place with other Poway IEP team members. Conversations would have included exhausting least restrictive environment options before nonpublic school placement. Such placement was not an administrative decision

and was ultimately decided by the IEP team. The procedure manual stated there should be at least two IEP meetings to discuss nonpublic school placement. After an IEP team agreed upon a nonpublic school placement, the program specialist would formally commence the nonpublic school referral by completing the Alternate Placement Referral form, with the assistance of the case manager.

104. Parents felt that Poway IEP team members made up their mind regarding nonpublic school placement before coming to the meeting. Ms. Kimble-Manalo said she did not consider such placement until shortly before the meeting. Ms. Mikels had no input into the nonpublic school offer, learning of the offer after the IEP meeting; however, she agreed with the offer. Ms. Romero agreed with the offer and, at the IEP, explained to Mother why a nonpublic school could better meet Student's needs, as opposed to Westwood's comprehensive public-school campus. Poway team members' responsibilities included making placement recommendations, which meant they would have been considering Student's placement before the December 2017 meeting, where placement was scheduled for discussion.

105. Parents were frustrated by the lack of information and guidance they received regarding the proposed nonpublic schools. Poway did not provide specifics at the IEP meeting, like program details, class size, student-adult ration, or venue of the offered nonpublic schools. Poway did not invite anyone from Springall or San Diego Center to attend the meeting and discuss the program. Ms. Kimble-Manalo gave Mother printouts of internet descriptions of the schools and the release form. Mother did not ask any questions regarding either of the nonpublic schools.

106. Ms. Cummings was assigned Springall as part of her case manager and school psychologist nonpublic school duties. She was well informed of Springall's program and knowledgeably testified at hearing about Springall's class sizes, physical venue, counseling services, and program. She was not asked to attend any of Student's

IEP meetings or to otherwise communicate with Parents to discuss Springall or nonpublic school placement, even though she was assigned to Poway students placed in nonpublic schools.

107. Parents did not sign the release form because they did not want the nonpublic schools to have access to the private information unless Parents first knew about the school and its program. Parents visited Springall Academy and spoke with a representative, because Poway did not arrange a tour. Parents viewed a classroom they believed Student would be in and observed an unlocked door that exited to a parking lot. Parents were told that Springall Academy had a program similar to Poway's behavioral and social emotional support program. Parents concluded that Poway could adequately deliver the program that Springall Academy would provide Student, perhaps in another special day class. They chose not to agree to a nonpublic school placement.

108. Parents did not provide Springall Academy with copies of any of Student's IEP's or assessments before touring Springall. Therefore, since they did not sign the release, the Springall representative only had Parents' description of Student for purposes of the tour. Parents never asked Poway to arrange a tour. Father acknowledged that a significant contributing reason for not agreeing to a nonpublic school was that Student would not be home in time to participate in home behavior services.

January 29, 2018 Triennial IEP Meeting – Continuation

109. Student's IEP team met again on January 29, 2018. The meeting was a continuation of the triennial review. All requisite team members attended, including Mother and Father. Parents announced they wanted to move forward with the triennial review, but they would not agree to a change of placement to a nonpublic school or emotional disturbance as Student's primary disability. Poway IEP team members again reviewed the interventions that had not been able to adequately address Student's

behaviors so he could receive educational benefit. Ms. Romero suggested a Diagnostic Center Evaluation; Parents stated they were not interested in more assessments at that time.¹⁰

110. Ms. Klock shared that she had attempted to implement the cognitive behavior strategies in counseling, but Student shut down and would not participate. The strategy elevated his behaviors. She opined that Student required a higher level of counseling. Parents believed that individual school counseling was a trigger; they would rather have Student regulated at school than dysregulated by counseling sessions. Ms. Klock said that if Student was not progressing with individual school counseling, then another level of therapy needed to be considered. The school IEP team recommended another educationally related mental health reassessment, which would be of minimal impact upon Student. Parents agreed to consider the recommendation.

111. The team again discussed Student's primary eligibility. The school team members believed anxiety and mood were the drivers of Student behaviors and, therefore, emotional disturbance was the appropriate primary eligibility. If impulsivity and attention were the drivers of his behaviors, the other health impairment eligibility would be appropriate. Parents strongly opposed the emotional disturbance eligibility. The team agreed to list other health impairment as the primary eligibility.

112. Father asked about Student's behavior in the social group. Student would participate for 10 minutes when the group was in class. He would shut down when the discussions concerned behaviors. The social group was not a Student preferred activity.

¹⁰ The California Department of Education's Diagnostic Centers provide individualized assessment and educational planning services for difficult to serve special education students, upon a special education director's referral from the local educational agency.

113. Parents felt that Poway could have had nonpublic school representatives at the January 2018 IEP. Without a signed release, Poway could not invite outside educators to the IEP meeting where Student's confidential information was discussed. Parents did not ask Poway to have representatives at the IEP meetings and did not make further inquiries regarding the IEP's.

114. Poway IEP team members said that the nonpublic school placement was necessary for Student to access his curriculum and make educational progress. They questioned whether Student could be kept safe on the Westwood campus. Therefore, Poway's offer of FAPE in the least restrictive environment remained the same, including nonpublic school placement. Poway would provide Parents with an assessment plan for the mental health assessment and the meeting concluded. Parents later agreed and returned the signed assessment plan.

April 2018 Educationally Related Mental Health Assessment

115. School psychologist Laura Valencia conducted an Educationally Related Mental Health Assessment of Student and issued an April 16, 2018 report. She testified at the hearing. Ms. Valencia was a school psychologist with Poway since 2001, had a master's degree in human behavior, and held a pupil personnel services credential. She was one of two Poway school psychologists who conducted mental health assessments and was also assigned to an elementary school site to provide services. She conducted more than 100 educationally related mental health assessments. She did not know Student before the assessment. Her education, credentials, and experience qualified her to conduct Student's mental health assessment, interpret the results, and prepare the report.

116. Ms. Valencia reviewed all available academic records, assessments, and IEP's, including Ms. Cumming's mental health assessment. She interviewed Student, Father, Mother, Ms. Romero, Ms. Hamm, Ms. Parasaram, Ms. Mikels, Ms. Klock, and

Student's home behavior services manager Rudy Mendoza. The interviews garnered consistent views of Student's behaviors, across all settings; concern for Student's safety was a consistent theme. She reviewed, analyzed, and reported the results of Father's and Ms. Romero's scale responses in the Behavior Assessment System for Children, Third Edition, which Ms. Cummings conducted for her October 2017 assessment. The behavior assessment results were consistent with the behaviors reported in the interviews.

117. Ms. Valencia summarized seven discipline incidents, occurring between October 20, 2016 and February 9, 2018. Each incident concerned Student causing, attempting, or threatening injury to another, including assaulting another student, kicking adults in the leg, hitting a student with a book, threatening his teacher and the principal, and attempting to stab another student with plastic knives. Student also had eight "bus referrals" while at Westwood, with infractions for failing to obey the bus driver, not staying seated, and failing to behave in an orderly manner.¹¹ She twice observed Student in the school setting, one of which included an elopement.

118. Ms. Valencia had sufficient information for an informed determination of Student's mental health services needs to make recommendations. She found that Student's social-emotional functioning was a factor that prevented access to educational benefit because of negative behaviors in response to demands; he did not have the skills to behaviorally deal with demands. Student was also reactive to sensory input of noise and overstimulation, but his reactions were inconsistent. She opined that Student did not have the foundational skills to interact to enable him to benefit from

¹¹ Though some of these incidents were referred to in Student's Poway discipline profile, Ms. Valencia used the discipline incident summaries to assess Student's entitlement to mental health services and separately confirmed the nature of Student's conduct.

cognitive behavioral therapy. Student had not benefitted from school counseling and outside therapy and his behaviors continued to escalate.

119. Ms. Valencia recommended that Student receive educationally related mental health services on a trial basis, until November 2018, to determine if the services would impact his behaviors. She recommended a trial because Student had not accessed school counseling and she was not sure Student could sit through and benefit from the mental health services. Student was also struggling with emotional stability. For example, Student's behaviors would escalate when Ms. Klock asked him about his behaviors; he steadfastly avoided discussing his behaviors. Ms. Valencia made a number of suggestions regarding Student's behaviors, but she acknowledged that Poway's team had already tried them.

May 3, 2018 Amendment IEP Meeting – Assessment Review

120. Student's IEP team met on May 3, 2018 to review Ms. Valencia's assessment. All requisite team members attended, including Mother, Father, and Ryan Brewer from Poway's transportation services.

121. Mr. Brewer had safety concerns because Student was not remaining in his seat while on the bus. He proposed the use of a safety vest, which he showed Parents. Mother thought the safety vest might escalate Student's behaviors and he would not be able to stay in school. Parents said they have not recently seen this behavior and declined the vest usage but would reconsider if the problem reoccurred.

122. Ms. Valencia presented her report, findings, and recommendation for a trial of educationally related mental health services. Parents did not ask any questions, saying they would think about the offer of services. Poway's offer of FAPE was revised by discontinuing individual school counseling and adding educationally related mental health services direct therapy, once a week for 30 minutes until November 9, 2018. Poway's FAPE offer otherwise remained the same, including the nonpublic school

placement. Ms. Kimble-Manalo again provided Parents with releases, authorizing Poway to share Student's records with a potential nonpublic school so it could evaluate if its program met Student's needs. Signed releases were never returned.

Remainder of 2017-2018 - Third Grade

123. Ms. Mikels testified at the hearing. She worked for Poway as Westwood Elementary's principal for three years, having been a principal or assistant principal for Riverside Unified School District the previous eight years. She had Tier II Administrative Services, Preliminary Administrative, and Multiple Subject Teaching credentials, with a master's degree in educational administration. The first Student's IEP meeting she attended was on May 3, 2018. However, she consistently worked with Student, staff, and the IEP team members since Student's arrival in Spring 2017.

124. Ms. Mikels frequently and regularly interacted with Parents regarding Student's behaviors and disciplinary incidents. She estimated interacting with Student 400 to 600 times, from simply saying "hi" to the more formal discipline process. For the 2017-2018 school year, Student had about 23 formal discipline incidents with consequences ranging from loss of privileges to school suspension. Poway held a manifestation determination meeting on May 2, 2018 because Student had been suspended more than 10 days for the year, finding Student's behavior was a consequence of his disability. Student had four more discipline reports thereafter in May 2018, two resulting in suspensions.

125. Ms. Romero and Ms. Mikels testified that the school campus would go on lockdown when Student eloped and could not be redirected to return to class or a safe location, was threatening to other students, or otherwise created an unsafe condition. Campus wide lockdown disrupted the entire school of about 800 students, who were trained in lockdown protocols. Children became nervous or upset, even though the nature of the lockdown was announced. Teachers and students remained where they

were, unable to go to the next class or move about campus. Student's behaviors caused a school-wide lockdown more than 25 times. One lockdown was during mandated statewide testing, which threatened invalidating results and required the retaking of some tests.

126. Student's severe dysregulated behaviors and aggression posed a danger that caused evacuation of his classroom more than 30 times since coming to Westwood. Ms. Romero, Ms. Eazer, Ms. Mikels, Ms. Klock, and/or other adult staff would remain with Student while his classmates were taken elsewhere. Student managed to leave the school campus on two occasions, going through the front office's door. He remained in the parking lot around the corner of the building on one occasion. On the second occasion, he crossed the street and was retrieved by Ms. Romero.¹² Ms. Mikels would call Parents with each suspension or if Student's dysregulation created a danger. Parents came to retrieve Student and would find Student loud and emotional, sometimes causing his Parent to physically carry Student off campus. Student's increasingly frequent severe dysregulation episodes put Student and others at risk throughout the 2017-2018 school year. Parents gave permission for Poway adult staff to grab the back of Student's shirt to prevent him from eloping; though sometimes helpful, Student continued to evade restriction and elope.

2018-2019: FOURTH GRADE

127. Student remained at Westwood in an autism spectrum disorder special day class for fourth grade, the 2018-2019 school year. Student's new class had the same number of pupils and adult support as Ms. Romero's class, which was next door.

¹² Poway was legally prohibited from locking all doors and exits because of safety concerns.

128. Father asserted at hearing that Student's behaviors greatly improved in fourth grade, referring to "smiley face" log sheets as evidence of Student's improvement. Father said these were behavior communication logs that Parents had been receiving since Student's December 2016 IEP. Each log sheet was divided into two days and each day was divided into three time periods -- morning, after recess, and after lunch. Each section had blank smiley faces, one for each 10 minutes of the time period. Student's adult assistant tracked Student's behaviors every 10 minutes by filling in a smiley face if Student met expectations for keeping hands to self, following directions, staying safe, staying in the classroom unless he asked to leave or take a break. Otherwise, the smiley face was left blank. Log sheets from August 22, 2018 to January 18, 2019 were admitted into evidence.

129. Because the log sheets had so many smiley faces, Father said Student's behaviors had greatly improved in fourth grade. This was consistent with improved behaviors at home, where Student no longer was allowed to use the iPad or play electronic device. Parents also used extinction in response to Student's unwanted behaviors, like elopement. Father believed that reacting to Student's bad behavior was actually rewarding Student with attention.

130. Father's testimony that Student's negative behaviors dramatically improved in fourth grade was not persuasive. Many of the log sheets' narrative entries referred to Student's dysregulation and some negative behaviors, such as eloping. The log sheets smiley faces were not the same as data collected for behavior analysis. Father never formally observed Student in his classroom setting at Westwood. He was in Student's classroom twice, when asked to retrieve Student early. Also, the use of extinction in the school setting in response to Student's elopement or aggressive behaviors was not a realistic option because assuring Student's and others' safety was primary.

131. Poway staff did not observe a dramatic change in Student's behaviors in fourth grade and continued to recommend nonpublic school as Student's appropriate placement. Ms. Eazer convincingly stated that any behavior improvements were short-lived. Ms. Romero regularly observed Student during Fourth Grade and continued to believe that Student's behaviors posed a safety risk and that Student needed a nonpublic school's quieter and more contained environment to access his education. Ms. Hamm, who worked with Student in fourth grade, similarly believed that Student's sensory needs and dysregulation could be addressed in a nonpublic school but not at a comprehensive public-school campus like Westwood.

132. Ms. Mikels observed that Student's periods of severe dysregulation continued in his fourth-grade year, putting himself and others at risk. The discipline event policy changed in 2018-2019, so a pupil was not suspended as often. For fourth grade, Student engaged in behaviors, 15 to 25 times, that would have warranted suspension the prior year. She also believed that a nonpublic school placement would better assure Student's safety, better control his behaviors, and enable him to benefit from his education

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹³

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

¹³ 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)¹⁴ 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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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 California, related services are also called designated instruction and services].) 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.

¹⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school Bellflower 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 United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the '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.*)) The Supreme Court in *Endrew F.* stated that 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. (l).)

5. 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].) Here, Student carried the burden of proof on Student's issues and Poway had the burden of proof on Poway's issue.

STUDENT'S ISSUE 1 — DENIAL OF FAPE BECAUSE NONPUBLIC SCHOOL WAS NOT STUDENT'S LEAST RESTRICTIVE ENVIRONMENT

6. Student contends that Poway denied Student a FAPE because nonpublic school was not Student's least restrictive environment. Poway asserts it had exhausted its available supports, interventions, and placements on a comprehensive public-school campus, and therefore nonpublic school placement was needed to address Student's behaviors, which were preventing him from benefiting from his education while threatening the safety of Student and others.

7. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56342.)

8. A school district must ensure that a continuum of alternative placements is

available to meet disabled children’s needs for special education and related services. (35 C.F.R. § 300.115.). The continuum of program options must include, but not necessarily be limited to, all of the following or any combination of the following: Regular education programs; resource specialist programs, designated instruction and services; special classes; nonpublic, nonsectarian school services; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, and instruction in the home, in hospitals, and in other institutions. (Ed. Code § 56361.)

9. Student failed to meet his burden of proof that the nonpublic school offer was not Student’s least restrictive environment. The evidence established that Student’s behaviors could not be adequately addressed by behavior interventions and supports on a comprehensive public-school campus, so that Student could access and benefit from his education.

10. Student contended that the more restrictive nonpublic school was not appropriate, using the four-factor test of *Sacramento City Unified School District v. Rachel H.*, (9th Cir. 1994), 14 F.3d 1398.¹⁵ The first factor was educational benefit. Student asserted that he progressed academically, citing Ms. Romero’s testimony. However, Ms. Romero stated Student’s progress was *di minimus*, which the Supreme Court recently emphasized in *Andrew F.* was a FAPE deficient test of educational benefit. In fact, Ms. Romero stated Student was not benefitting from his academics because of his dysregulation and behaviors. The evidence confirmed that the primary energies of staff were invested in keeping Student regulated, which substantively compromised his

¹⁵ The *Rachel H.* court addressed whether a child should remain fully included in a general education classroom, but the four-factor analysis is often used to evaluate placement to a more restrictive environment.

educational benefit. Student was not educationally benefiting in his special day class placement.

11. Student argued that Poway could not properly determine if he was educationally benefiting because Poway had not exhausted its resources. Student referred to Poway's behavioral and social emotional support program. The support program was designed for students with behavioral and social-emotional needs. Poway did not offer the placement nor even discuss the program with Parents. Therefore, Student claimed that Poway did not exhaust its resources before proposing nonpublic school placement.

12. Here, Poway's behavioral and social emotional support program was an unsuitable placement for Student. Ms. Cummings testified the program would have been a disservice to Student because it lacked the high level of visual structure and sensory support needed by Student. All of the behavioral programs were on Poway comprehensive public-school campuses. Ms. Romero and Ms. Kimble-Manalo agreed with Ms. Cummings. Exhausting district resources did not mean Poway was obligated to offer an inappropriate placement.

13. Student further claimed Poway should have provided direct behavioral support team services before offering nonpublic school. Student argued the services had been intermittent, thus preventing Student from benefitting educationally. Father asserted that direct services began in June 2018 and they were effective in decreasing Student's behaviors. The evidence did not support Student's contention. Student's October 17, 2016 IEP team agreed to a functional behavior assessment in response to Student's increasingly difficult behaviors while he was in Chaparral's general education second grade. The team met on October 27, 2016, to review a behavior intervention plan draft; behavior support team member Ms. Moore attended. Ms. Moore conducted the functional behavior assessment, which she presented at the December 16, 2016 IEP.

Her assessment thoroughly examined Student's behaviors and her report provided recommendations for goals and the behavior intervention plan. Poway IEP team members revised the intervention plan and recommended a special day class placement. Ms. Moore and Dr. Mueller supported the February 2017 transition and trained the new staff on Student's behavior intervention plan. Ms. Romero and Ms. Eazer reported regular consultation and services from the intervention team throughout the 2017-2018 third grade year. The behavior support team consistently provided support, assessment, guidance, and training since October 2016.

14. Student's assertion that the direct behavior support team services improved Student's behaviors was also unsupported by persuasive evidence. As discussed above, Father's testimony that Student's negative behaviors had dramatically improved following third grade was not persuasive. Ms. Eazer, Ms. Hamm, and Ms. Romero all testified that Student's behavior did not improve, continued to pose a safety risk to Student and others, and needed a nonpublic school to address Student's sensory needs and dysregulation away from a comprehensive public-school campus. Student's periods of severe dysregulation continued in his fourth-grade year, putting himself and others at risk. The evidence did not support the assertion that further or direct behavior support team services should have been provided before a nonpublic school offer.

15. Student also argued that Poway was obligated to implement its triennial IEP, maximizing Student's mainstreaming with typical peers, before offering the more restrictive environment of nonpublic school. Student claimed that Poway should have first proved why it could not implement Student's updated triennial IEP in a public-school placement. For example, Student asserted that at least eight weeks were needed to measure progress on goals, arguing that Poway should therefore not have made a nonpublic school placement offer until it had tried to implement the goals for eight weeks.

16. Student's contention that Poway never clearly established why Student's revised triennial should be implemented in a nonpublic school was contrary to the evidence. Parents did not give permission to implement goals and services until the December 14, 2017 IEP. Ms. Klock therefore started to implement the cognitive behavior strategies, outlined by Ms. Cummings. She reported at the January 2018 IEP that Student would simply shut down, not discuss his behavior, and become dysregulated. Student asserted that Ms. Klock was not properly trained, demonstrating Poway's disinterest in implementing Student's IEP. Yet, Ms. Klock was a credentialed school psychologist, who worked and had a relationship with Student since coming to Westwood and who collaborated with school psychologist Ms. Cummings in developing and implementing the narrative beginnings of cognitive therapy. The evidence supported Poway staff's professional conclusion that Student would not discuss his behaviors without becoming loud, aggressive, or threatening, that he required a more contained therapeutic environment, and that his revised goals and services needed to be implemented in a nonpublic school.

17. Poway effectively established why Student's revised triennial should be implemented in a nonpublic school. Ms. Hamm, Ms. Romero, Ms. Klock, Ms. Mikels, Ms. Kimble-Manalo all stated their professional opinion that Student's sensory needs and severe dysregulation cannot be adequately addressed on a comprehensive public-school campus. Student's behaviors created safety risks for him, his fellow students, and the staff. Their opinions were supported by assessments, behavior data, observations, and their frequent personal intervention involvement with Student.

18. Poway's triennial IEP obligation was to make a FAPE offer, which included placement. Poway appropriately waited to make a placement offer until the IEP team discussed all the assessments, levels of performance, intervention plan, related services, goals and objectives, and supports. The offer of FAPE included the nonpublic school

placement, which was based on what Poway knew at the time. Considering the first *Rachel H.* factor, Student was not educationally benefiting in his current placement.

19. The second *Rachel H.* factor was the nonacademic benefit of the present placement. Student contended he progressed socially, citing his participation in library and physical education with typical peers. The weight of the evidence was that Student consistently refused most of his mainstreaming opportunities and, when he did, it was typically for about 10 minutes. The psychoeducational and functional behavior assessments also found Student was not benefiting from mainstreaming and increasingly isolated himself. The third *Rachel H.* factor was what effects Student's presence had on the teacher and other pupils. Here, the evidence plainly demonstrated that Student's dysfunctional behavior regularly disrupted his class, which was evacuated from the classroom more than 30 times, and the entire school, which was forced into lockdowns more than 25 times. The fourth factor was the cost associated with maintaining Student in his present placement. To Poway's credit, cost was never an issue in providing Student with placement and services.

20. Student required a more restrictive placement. Multiple indicators confirmed that Student's behaviors were preventing him from benefiting educationally, such as the increasing distance between his cognitive capabilities and academic performance. His elopement, aggression, and dysregulation rendered his special day class placement on a public-school comprehensive campus of 800 students unsuitable, jeopardizing his and others' safety. Student failed to meet his burden of proof that nonpublic school was not his least restrictive environment. Poway prevailed on Student's Issue 1.

STUDENT'S ISSUE 2 — FAPE DENIAL BECAUSE OF FAILURE TO DEVELOP
APPROPRIATE SERVICES, ACCOMMODATIONS, MODIFICATIONS, AND SUPPORTS,

FROM JUNE 2016.

21. Student contends that Poway failed to develop IEP's that included appropriate accommodations, modifications, supports, and services, from two years before his complaint's filing. Poway asserted that it had regularly assessed and evaluated Student's educational and behavioral needs, frequently held IEP team meetings to address Poway and Parents' concerns, revised Student's accommodations, modifications, supports, and behavior intervention plan, and consistently implemented Student's IEP. Thus, Poway argues it provided Student a FAPE since June 2016.

22. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) 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 concern prompting assessment was deficit in reading skills].) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

23. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) 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)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

24. The personnel who assess the student shall prepare a written report that shall include 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 effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

25. A school district's failure to conduct appropriate assessment or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

26. An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: (i) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); (ii) a statement of the special education and related services and

supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); (iii) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and (iv) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

27. 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. (See *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 student to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement 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.*)

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

29. Student failed to meet his burden to prove by a preponderance of the evidence that Poway failed to develop IEP's that included appropriate accommodations,

modifications, supports, and services, from two years before his complaint's filing. Instead, the record reflected consistent and frequent evaluation of Student's academic and behavioral needs, with earnest and thoughtful adjustment to Student's IEP and behavior intervention plan.

30. From September 2016 to May 2017, Poway conducted seven assessments, including a full triennial psychoeducational, a second functional behavior analysis, and two educationally related mental health services. Poway convened 11 IEP team meetings. Parents participated in each meeting, making suggestions, asking for additional or revised goals, reporting their view of Student's then current behaviors, and expressing concerns regarding Student's academic growth. Student was assessed in all areas of suspected disability. Student did not challenge the assessments.

31. The testimony and IEP team meeting notes indicated that Poway representatives engaged in regular evaluation and assessment of Student's performance, behavior, and educational and emotional needs. Poway used multiple sources to determine present levels of performance, drafted and revised goals, reviewed and updated accommodations and modifications, gathered behavior data, and fine-tuned the behavior intervention plan. Poway informed and involved the Parents, awaiting their approval to implement a goal or service.

32. Student asserted that Poway refused to implement assessment recommendations. Student's primary argument was that Poway used a violent video game – Minecraft – as the reinforcer for Student's appropriate behavior, ignoring its own school psychologist. Student claimed that Ms. Cummings stated access to the violent game made it more difficult to control Student's behaviors and that the iPad should be removed. Student's characterization of the iPad game and Ms. Cummings recommendations were not accurate.

33. Ms. Cummings recommended in her mental health services report that

Student's access to iPad and electronic games be diminished as a reinforcement because the gaming and electronic devices overstimulated Student, making transition to school work more likely to escalate behaviors. She did not say that Minecraft was violent or that violence was connected with Student's behaviors or desire to use his iPad. Further, Student provided no persuasive evidence that the game was bloody or violent. Therefore, the continuing reference to Minecraft as a violent video game in argument was unpersuasive.

34. Ms. Cummings did not say that Student's iPad activity be eliminated. She recommended trying a hierarchy of reinforcers and not going to the iPad and gaming so often. She specifically stated that Student retain contingent access to the iPad. Student's claim that Poway used Minecraft as the only reinforcer was not correct. The December 2017 behavior intervention plan included multiple reinforcement strategies that did not include the iPad, such as choice in work environment, asking for breaks, token economy, hot chocolate, extra recess time, and being a helper to a preferred adult. The success of each strategy varied. Student's assertion that Poway ignored its own psychologist's recommendations was unsupported by the evidence.

35. Student did not demonstrate by a preponderance of the evidence that Poway failed to develop IEP's to include appropriate accommodations, modifications, supports, and services, from two years before his complaint's filing. Instead, Student's IEP's were based upon comprehensive appropriate assessments, were reasonably calculated to provide educational benefit to Student and offered Student appropriate accommodations, modifications, supports, and services to enable Student to make progress appropriate in light of his circumstances. Poway prevailed on Student's Issue 2.

STUDENT'S ISSUE 3 — DENIAL OF FAPE BECAUSE POWAY FAILED TO INITIATE A DUE PROCESS HEARING WITHIN A REASONABLE TIME.

36. Student claimed that Poway unreasonably delayed in filing a due process

complaint and thus denied Student a FAPE. Student asserted that Poway and Parents reached an impasse regarding nonpublic school placement in January 2018. Student argues Poway continued to offer nonpublic school placement after the impasse and improperly delayed six months before filing a due process request to have its offer declared FAPE in the least restrictive environment. Poway responded that its August 2018 filing was reasonably prompt.

37. California Education Code, section 56346(f) states that if a school district determines that the proposed special education program component to which a parent does not consent is necessary to provide a free appropriate public education to the child, the school district shall initiate a due process hearing. Section 56346(f) does not contain a timeline within which a school district must initiate a due process proceeding. In 2015, the Ninth Circuit provided guidance in *I.R. ex rel. E.N. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164, stating that the district must act with reasonable promptness to correct the problem by adjudicating the differences with the parents. (*Id.*, at p. 1170.). The student in *I.R.* filed a due process a year and a half after the parent refused a special day class placement, which the district contended Student required to receive a FAPE. The district said it was continuing to try and work with the parent. The court ruled the delay of a year and half was unreasonable noting also that the district failed to initiate a due process at any time.

38. Here, Student argued Parents informed Poway that they rejected the nonpublic school placement offer at the January 29, 2018 IEP and, therefore, Poway's statutory obligation to file a due process complaint was triggered. Since Poway continued to contend its nonpublic school placement was necessary for Student to receive FAPE, Student asserted a delay of six months in filing violated its duty under section 56346(f) and was not reasonable.

39. Parents informed Poway at the January 29, 2018 IEP that they did not

intend to accept nonpublic school placement. In the same IEP, though, Poway reported that Student was not responding to the cognitive therapy but, instead, would become reactive or shut down. Poway team members recommended another educationally related mental health services assessment because they believed Student needed more therapeutic support. Parents said they would think about the recommendation. Poway again provided Parents with the releases, allowing Poway to provide the nonpublic schools with Student's IEP information. Parents eventually agreed to the mental health services assessment, which was presented at the May 3, 2018 IEP. Poway then amended its IEP offer to include mental health services, instead of school counseling, with the nonpublic school placement and other services.

40. Poway's August 1, 2018 due process request was not unreasonably delayed. Both Student's and Poway's complaints addressed whether the triennial IEP offer, as amended on May 2018, was FAPE in the least restrictive environment. Poway's complaint was filed within three months of the amended offer and Student's complaint. Poway's conduct did not unreasonably delay the due process proceeding. Poway's filing and consolidation delayed the hearing just two weeks from August 14 to August 28, 2018. The parties' desire to mediate the consolidated matter resulted in a joint request to set the hearing for December 12, 2018. The hearing was then delayed to January 24, 2019 because Student filed an amended complaint.

41. Student did not prove by a preponderance of the evidence that Poway's August 1, 2018 request for due process denied Student a FAPE. The filing was reasonably prompt. Poway prevailed on Student's Issue 3.

POWAY'S ISSUE — DID POWAY'S SEPTEMBER 6, 2017 TRIENNIAL IEP OFFER, AS AMENDED MAY 3, 2018, PROVIDE STUDENT WITH A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

42. Poway asserted that its September 6, 2017 triennial IEP offer, as amended

on October 25, 2017, December 14, 2017, January 29, 2018, and May 3, 2018, provided Student with a FAPE in the least restrictive environment. For reasons discussed below, Poway failed to meet its burden of proof.

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

44. A procedural violation results in liability for denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*). One of the procedural prerequisites determined to be of paramount importance by the Ninth Circuit is that an offer of FAPE to a student be specific and be made in writing. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; 20 U.S.C. § 1415(b)(3).)

45. Poway convened the first meeting of Student's triennial IEP on September 6, 2017. The team reviewed goal progress and a possible new goal. The IEP reconvened on October 25, 2018 to review the triennial assessments. Poway's assessments complied with all legal requirements: assessed Student in all areas of suspect disability, used multiple sources and instruments, administered tests by qualified personnel in accordance with the publisher's protocols, and were not discriminatory on racial or cultural basis. The assessment reports provided informed interpretation and analysis, explaining the basis for each determination, observing and examining the relationship of

Student's behaviors to his academic and social functioning, and providing recommendations for Student's IEP team. Student did not challenge the legal appropriateness of Poway's assessments.

46. Ms. Klock presented her triennial psychoeducational assessment. Student's cognitive capabilities were quite high while Student's academic abilities were low, except in math. Ms. Klock reviewed Student's behaviors, concluding that Student's dysregulation, defiance, and aggression interfered with his receiving educational benefit. She found Student met the criteria for specific learning disability, other health impairment, and emotional disturbance eligibilities. Ms. Hamm reviewed her occupational therapy assessment, concluding that Student's frustration with nonpreferred tasks like handwriting and his sensory needs negatively affected his attention, tolerance, and availability to learn within the learning environment. Ms. Cummings reviewed her educationally related mental health assessment report, suggesting some cognitive behavior therapy strategies and thought-record activities.

47. The team discussed the increasing frequency and duration of Student's dysregulation and negative behaviors. Using the assessments, the IEP team examined reading, spelling, behavior, handwriting, communication, and social emotional goals. They revised a proposed behavior goal and adjusted the baseline on a social emotional goal. The assessors, Poway team members, and Parents demonstrably participated in reviewing the goals. The team discussed eligibility, with Poway members recommending emotional disturbance as the primary disability. Parents disagreed and sought other health impairment as primary. The meeting concluded. Placement had not yet been discussed or considered.

48. Student's IEP team reconvened on December 14, 2017. Ms. Klock and other Poway team members believed that emotional disturbance should be the primary eligibility. After some discussion, Mother wanted to consider the eligibilities later with

Father, who could not attend. Ms. Romero presented behavior data demonstrating measurable increases in duration and frequency of Student' noncompliance, elopement and aggression.

49. The team finalized the goals and objectives and updated Student's behavior intervention plan to reflect current behavior frequencies. The plan enumerated 13 strategies and necessary materials to teach Student replacement behaviors with reinforcement procedures for establishing, maintaining, and generalizing. Current reinforcements included iPad, Legos, Minecraft game, preferred snacks, mazes, being a helper, and selecting from the reward box. The plan identified specific behaviors with comprehensive corresponding strategic responses and post-incident approaches. Multiple sources – service providers, assessments, staff, teachers, psychologists, behavior intervention support, autism specialist, and Parents – contributed to the creation of a thoughtful and detailed intervention plan. Mother had no questions or concerns about the plan.

50. Ms. Kimble-Manalo reviewed the many and various resources, supports, and interventions that had been utilized to address Student's behaviors and safety, which continued to interfere with Student's educational benefit. She went through the spectrum of program options, from the least to the most restrictive, drawing a graphic on the whiteboard, noting Poway's placement, supports, and services at each level. The team discussed whether another special day class was appropriate.

51. Poway's triennial assessments indicated that Student was not educationally and socially benefiting in his present placement, despite Poway's implementation of many and varied resources, supports, interventions and strategies. Student's behaviors and safety concerns severely limited his exposure to typical peers. The school IEP team did not believe Poway's other special day class placement options would benefit Student or that the revised behavior intervention plan was sufficient to address

Student's behaviors, which would continue to occur on a comprehensive school campus. Poway IEP team members recommended placement in a nonpublic school to meet Student's need for a more supportive environment to address his behaviors because Poway's resources were unable to provide Student with education benefit on a comprehensive public-school campus.

52. As found in Student's Issue 1, Poway's offer of nonpublic school placement was appropriate because it provided a smaller and more therapeutic environment for Student's behaviors. Student's dysregulation, aggressions, defiance, sensory needs, and elopement could not be addressed on a comprehensive public-school campus. Student's behaviors created safety risks for him, his fellow students, and the staff. Student was not meaningfully interacting with typical peers in mainstreaming activities. He was not accessing and benefiting from his educational placement. Nonpublic school placement was Student's least restrictive environment where his behaviors could be therapeutically addressed, in a safe and quieter small venue.

53. Poway did not, however, prove by a preponderance of evidence that the nonpublic school offer was procedurally sufficient. Poway was obligated to provide Parents with specific information about the two nonpublic schools that Poway offered; otherwise, the offer of placement was unclear. The procedural violation denied Student a FAPE because Parents could not make an informed decision as to whether they believed Student's unique needs could be met at the nonpublic schools.

54. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in

the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

55. As stated in California Code of Regulations, title 5, section 3001, subdivision (t), and section 3042, a special education placement is a unique combination of facilities, personnel, location or equipment necessary to provide instructional services to a Student with exceptional needs. Here, in offering two nonpublic schools in December 2017, Poway did not provide specific information regarding the classroom in which Student would be placed, the teacher or type of curriculum that he would have, or the contents of his program at either of the two schools. No representative from any nonpublic school was present at the IEP meeting to provide such information to Mother or to answer any questions or concerns she might have. Poway staff who had additional knowledge of the recommended nonpublic schools' programs were not present at the IEP meeting. Poway team members spoke in generalities as to what the nonpublic schools provided.

56. Poway gave Mother the nonpublic school names, printouts from the schools' websites, and releases for Parents to sign. Poway did not offer to arrange for nonpublic school tours. Poway did not have its own educational professionals, like Ms. Cummings, whose other duties included serving Poway's nonpublic school placed students, including at Springall, at the IEP meeting. The evidence also indicated that Poway did not thereafter provide more meaningful or comprehensive information to Parents after the initial December 2017 nonpublic school offer, including at the two subsequent IEP team meetings. Parents refusal to sign a release did not relieve Poway of its duty to make a clear placement offer. Poway simply did not provide sufficient nonpublic school program information that would have enabled Parents to make an

informed decision regarding the appropriateness the placement offer.

57. Poway's December 2017 nonpublic school offer, and its reiteration at subsequent IEP's, violated the requirement of *Union* of a "formal, specific offer from a school district," and improperly asked Parents to substitute their judgment for that of an educational professional. (*Union v. Smith, supra*, 15 F.3d at p. 1526.). Giving Parents multiple choices of schools, without any specifics regarding the proposed placements, was contrary to the underlying IDEA rationale that a specific offer of placement be made.

58. Poway convincingly demonstrated a nonpublic school placement was appropriate and the least restrictive environment where Student could make progress appropriate in light of his circumstances. However, by failing to provide precise information about the schools to Student's Parents, Poway substantively failed to offer Student a FAPE pursuant to the standards set forth in *Rowley* and federal and state law. Without specific details about the placement, the parental component of the IEP team could not make an informed decision as to whether they believed Student's unique needs could be met at the nonpublic school. (*Rowley, supra*, 485 U.S. at 188.) Parents' opportunity to participate in the decision-making process was significantly impeded. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) Poway's procedural violation therefore amounted to a denial of FAPE and Poway did not meet its burden of proof on Poway's Issue.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Poway's Issue; District prevailed on Student's Issue 1, Student's Issue 2, and Student's Issue 3.

RIGHT TO APPEAL THIS DECISION

This was a final administrative Decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: March 18, 2019

/s/

CLIFFORD H. WOOSLEY

Administrative Law Judge

Office of Administrative Hearings