

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF
PARENT ON BEHALF OF STUDENT

v.

GARVEY SCHOOL DISTRICT.
OAH CASE NUMBER 2019030004

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on February 28, 2019, naming Garvey School District. The Office of Administrative Hearings is referred to as OAH. Garvey School District is referred to as Garvey. OAH continued the matter for good cause on March 22, 2019.

Administrative Law Judge Cole Dalton heard this matter in Rosemead, California, on June 25, 26, and 27, 2019, and on July 9 and 10, 2019.

Attorneys Carol Jung, Qiongyue Hu, and David German represented Student. Student's Mother attended the hearing each day on behalf of Student. OAH provided a Cantonese language interpreter and translator. Student did not attend the hearing. Attorney Sharon Watt represented Garvey. Special Education Director Alma Ulloa attended the hearing each day on behalf of Garvey.

At the request of the parties, OAH granted a continuance to August 5, 2019 at 5:00 PM to file written closing briefs. The parties filed timely written closing briefs. On August 5, 2019, the record was closed and the matter was submitted for decision.

ISSUES

The issues have been redefined in accordance with *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443; *Ford v. Long Beach Unified School Dist.* (9th

Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No substantive changes have been made.

Before witnesses were sworn, Student withdrew his issue, previously identified as Issue One, regarding Garvey's January 2017 assessments in speech and language and psychoeducation, and his issue previously identified as Issue Four as to the request for an independent psychoeducational evaluation. The remaining issues have been renumbered accordingly.

1. Did Garvey deny Student a free appropriate public education, referred to as FAPE, by failing to timely conduct its March 5, 2018 assistive technology, alternative augmentative communication assessment, referred to as assistive technology?
2. Did Garvey deny Student a FAPE by failing to timely and appropriately conduct its February 28, 2018 functional behavior and March 5, 2018 occupational therapy assessments?
3. Did Garvey deny Student a FAPE by failing to timely or appropriately respond to Student's July 9, 2018 request for independent educational evaluations in the areas of speech and language, functional behavior, occupational therapy, and assistive technology?
4. Did Garvey deny Student a FAPE since February 29, 2017 by failing to offer appropriate goals, related services, supports, and placement to address needs in the areas of communication, occupational therapy, behavior, social skills, adaptive and daily living skills, academics, and health?
5. Did Garvey materially fail to implement assistive technology portions of Student's March 5, 2018 individualized education program, referred to as an IEP, resulting in a denial of FAPE?

SUMMARY OF DECISION

As to Student's first issue, Student did not have the necessary skills to use an assistive technology device or needed one to access his education prior to March 5, 2018, when Garvey conducted its assessment. Accordingly, Garvey's assistive technology assessment was timely.

Student prevailed, in part, on the second issue. Garvey failed to timely conduct its February 28, 2018 functional behavior assessment. Garvey was on notice that Student's behaviors impeded his learning since the 2015-2016 school year. Student's January 2017 annual IEP stated that behavior goals were required to address such behaviors, but Garvey offered none. Garvey's providers did not understand the function of Student's behaviors. As a result, they inadvertently reinforced tantrum behaviors and further impeded Student's access to his program. However, Student did not prove he required an occupational therapy assessment prior to March 5, 2018, as his fine motor and sensory needs were met through supports embedded within his classroom.

Student also prevailed on the third issue. Garvey failed to fund or file in response to requests for independent educational evaluations in speech and language, functional behavior, occupational therapy, and assistive technology. Garvey's failure resulted in a procedural violation which significantly impeded Parents' opportunity to participate in the decision-making process.

As to Student's fourth issue, Student did not prove Garvey failed to offer appropriate goals, related services, supports, and placement in the areas of communication, occupational therapy, behavior, social skills, adaptive and daily living skills, academics, and health. Throughout the relevant time frame, Student demonstrated slow progress, appropriate in light of his significant intellectual disability.

As to Student's fifth issue, after Mother consented to services, Garvey materially implemented assistive technology according to the March 5, 2018 IEP without undue

delay.

FACTUAL FINDINGS

Student, seven years old at the time of hearing, resided with his Parents within Garvey School District's attendance boundaries at all relevant times. Student received early intervention services through East Los Angeles Regional Center. During 2014 assessments, Student qualified for Regional Center services as a child with intellectual disability and autism.

During Garvey's February 2015 initial assessments, Student scored in the range of a six month old in communication, a one year old in cognition, a three month old in social emotional skills, a ten month old in adaptive behavior, and a one year-seven month old in physical ability. Student could not stack blocks, make lines or circles on paper, string beads, or use forms. He did not demonstrate skills in academics or self-help and was nonverbal. Mother carried him into the assessment room, where he wanted to be held and carried and drank using a baby bottle. He avoided eye contact, looking away when someone made eye contact with him. Student qualified for special education services due to intellectual disability and autism. In April 2015, Mother informed Garvey Student was allergic to peanuts. Garvey developed a health plan and trained staff to provide a response in the event of an allergic reaction.

2016-2017 SCHOOL YEAR

Student received in-home intensive behavior intervention through Regional Center funding beginning in March 2016. California Pediatric and Family Services provided applied behavior analysis to Student for 12 hours per week, board certified level supervision for four hours per month, and Parent training for two hours per month. Student's behavior and ability to communicate at home was consistent with that seen at school. Tantrum behaviors were similar but lasted longer, in the home environment.

Mother did not share information on Student's in-home behavior program with Garvey.

Student attended a preschool special day class for children with moderate to severe disabilities, at Eldridge Rice Elementary School. Credentialed special education teacher Jennifer Rogers taught Student while he attended Rice. Ms. Rogers held a bachelor of arts in psychology and a masters of arts in educational administration. At the time of hearing, she worked as a preschool teacher for 16 years. She had extensive training and experience teaching, conducting assessments, and developing and implementing IEPs.

Student attended class with approximately eight other children, taught by Ms. Rogers, two instructional aides, and two one-on-one aides provided to specific students. The one-on-one aides sometimes assisted with small-group instruction. Ms. Rogers ran an organized and engaging classroom. Students learned in whole class, small group, and individual settings, depending on the subject and their IEPs. In preparation for Student's transition to kindergarten, Garvey conducted assessments in psychoeducation and speech and language.

January 19, 2017 Individualized Education Program

Garvey held an early triennial IEP team meeting on January 19, 2017. All necessary team members attended. Though the January 2017 IEP was not at issue at hearing, the IEP provided a basis for determining Student's progress throughout the remainder of the 2016-2017 school year.

School psychologist Stephanie Ho reported results from her January 19, 2017 psychoeducational assessment. Ms. Ho held a bachelor of arts in psychology and a masters of arts in both counseling and educational psychology. She held pupil personnel credentials in school counseling and school psychology. She worked as a school psychologist for 16 years at the time of hearing.

Ms. Ho administered standardized tests. Student's results using the

Developmental Profile, Third Edition, were in the cognitively delayed range. Student's results using the Vineland Adaptive Behavior Scales, Second Edition were in the low range in communication, daily living skills, and socialization. Student continued to qualify for services due to intellectual disability and autism. Testing results were consistent with Regional Center's 2014 assessments.

Ms. Rogers reported on results of her administration of the Brigance Diagnostic Inventory of Early Development, regarding academic skills. Student demonstrated academic skills from the one year-six month range up to the four-year-old range, an improvement from 2015 testing.

In the area of speech and language, Student made spontaneous sounds but not words. He communicated using eye contact, signing "more," and grabbing an adult's hand to lead them to a desired item. He demonstrated speech skills in the below one year old range, showing improvement from 2015 testing.

Student demonstrated social emotional development between the three-month and two years-six-month range. He improved from 2015, when his skills reached a ceiling at three months. He began showing interest in peers during recess by running, making eye contact, and laughing. He showed little interest in peers while in class. He did not respond to his name being called.

Behaviorally, Student attended to preferred activities for up to 15 minutes and non-preferred activities for up to five minutes. He engaged in tantrum behaviors for attention out of frustration when having to wait, when his routine changed, because he could not communicate, was tired, and because of scratching to the point of sores due to his severe eczema. Tantrum behaviors included hitting himself, grabbing onto an adult, crying, screaming, and throwing himself on the ground. He soothed himself by holding preferred objects and watching calming music videos. He repeatedly opened and closed doors and sought out being held by an adult. Classroom staff often soothed

Student by rubbing lotion on his eczema and holding him.

Speech language pathologist Traci Flora reported results of her January 2017 speech and language assessment at the IEP meeting. Ms. Flora held a bachelor of arts in communicative disorders and a master of science in communication disorders and sciences. She was a licensed and certified speech language pathologist.

During Ms. Flora's assessment, Student demonstrated skills in the six to nine-month range in the areas of interaction-attachment, play, receptive language, and expressive language. Student demonstrated pragmatics and gestures within the nine to 12-month range.

Ms. Rogers developed new academic goals for Student. Student's goal for peer interaction required him to appropriately acknowledge, through a verbal or non-verbal response, an interaction initiated by others. Student's toilet training goal required him to be habit trained, taken to the restroom throughout the school day, and flush the toilet. His goal for responding to his name required him to recognize his name in print. A pre-writing goal required him to imitate vertical and horizontal lines. Student did not demonstrate needs requiring an occupational therapy assessment as he made progress engaging in fine motor activities in the classroom.

Ms. Flora developed two speech goals addressing expressive and receptive language. The first goal required Student to request objects or activities by selecting a picture from a field of two, signing, or verbally approximating a word. The second goal required him to imitate gross motor movements such as clapping hands, raising arms, or stomping feet following a verbal command like "do this" or "follow me."

Student's tantrum behavior impeded his learning. The January 2017 IEP identified behavior interventions, strategies, and supports including use of a visual schedule and IEP goals. However, the IEP did not contain behavior goals.

At hearing, Ms. Rogers described a number of behavior intervention tools used in

her class, including redirection and using first-this, then-that. She first opined that Student tantrumed because he could not communicate. Later in her testimony, she insisted tantrums were tied to Student's pain or discomfort due to eczema. Ms. Roger's confusion demonstrated that staff did not know the antecedent to Student's behaviors. This confusion resulted in staff inconsistently using behavior intervention techniques.

Student did not require a one-on-one aide due to the classroom size and student-teacher ratio. Staff were able to keep Student safe during tantrums. Neither Ms. Rogers nor Ms. Flora believed Student could benefit from an assistive technology device, during the 2016-2017 school year. Ms. Rogers credibly explained, at hearing, Student inconsistently matched real-life objects to pictures of them. Since assistive technology devices used pictures as icons, Student could not access such a device. Further, Student did not understand cause and effect and would not attribute pushing a button or icon, to accessing an actual item. Ms. Rogers persuasively demonstrated that Student could not functionally access an assistive technology device during the 2016-2017 school year.

Garvey offered Student continued placement in his moderate to severe special day class at Rice with transportation, 60 minutes per week of push-in speech and language, and extended school year services. Mother consented.

May 17, 2017 Individualized Education Program

On May 17, 2017, Garvey held a transition IEP meeting with all appropriate, unexcused Garvey team members. Mother, an interpreter, and Director of Special Education Alma Ulloa, also attended. Ms. Ulloa held a bachelor of arts in sociology and a master of arts in special education. She held special education specialist and administrative services credentials. She had 20 years of experience in education at the time of hearing beginning as a teacher and ending with her position as special education director for Garvey.

The team discussed program options. Garvey offered placement in a moderate to severe special day class at Sanchez Elementary School, with an increase in specialized academic instruction to match the longer school day. Garvey offered continued transportation, speech and language, and extended school year services. Mother expressed her familiarity with the program at Sanchez and agreed to the offer of FAPE.

Student demonstrated behaviors impeding his learning throughout the 2016-2017 school year. He engaged in tantrum behaviors on varying days for varying reasons. Garvey did not understand the cause of his behaviors, and did not address behaviors in a consistent, systematic fashion. Garvey did not develop behavior goals or a behavior intervention plan. Through the end of the school year, Student developed toileting habits of pulling his pants down and up independently and removing soiled pull-ups when wet. He ate some foods sent to school by Mother, but did not like to touch his food.

2017-2018 SCHOOL YEAR

January 12, 2018 Individualized Education Program

Garvey held Student's annual IEP team meeting on January 12, 2018, with all required team members. Mother attended the meeting, aided by a Cantonese translator. The team reviewed Student's strengths and weaknesses, present levels of performance, proposed new goals, and Garvey's offer of FAPE. Throughout the meeting, Mother participated by providing input and asking questions.

Mother reported that, at home, Student was toilet trained and good at asking permission for things he desired. She expressed concern over Student's speech, lack of eye contact, and inability to sit for long periods of time. Special education teacher Tiffany Gonzalez reported Student could sit in his chair for up to 20 minutes during a preferred activity. Ms. Gonzalez held a bachelor of arts in sociology with an emphasis in

social work. She held an education specialist credential. She worked as an instructional aide for three years and an elementary teacher for moderate to severe students for three years at the time of hearing.

Speech language pathologist Erika Noble, described Student's progress in speech, at the IEP meeting. Student could sit and attend during group speech therapy, a non-preferred activity, for up to 15 minutes. Student met one of two speech and language goals. In receptive and expressive language, he expressed wants or needs by choosing one picture from a field of two. He did not demonstrate a consistent understanding that the item he chose was an item he wanted. He often pushed the item away after receiving it. He made progress toward his goal to imitate gross motor movements, such as clapping hands, but did not do so independently. He learned signs for "more", "I want", "go", "in", and "all done". He demonstrated a new, repetitive, vocalization of E-I-E-I-E-I. Student often became upset when asked to sit with the group during speech sessions. He occasionally had tantrums during which he would cry, hit, kick, and or throw himself on the floor. Ms. Noble easily redirected him back to task. Group speech activities were an unpreferred task for Student.

Student met all four academic goals in the areas of toileting, interacting with others, responding to name in print, and pre-writing. Student began making circles and practiced the alphabet by tracing over stencils, with hand-over-hand support. During academics, he enjoyed peer interaction with one or two other students in a group.

Student communicated wants and needs by pulling on an adult's arm or crying. Tantrum behaviors or crying and throwing himself on the floor continued. Some antecedents to tantrums, included Student being tired, discomfort due to eczema, and seeing the door open when he could not go outside. He continued to seek attention from adults by hugging them. He engaged in repetitive behavior in the class bathroom by flushing the toilet repeatedly and opening and closing the bathroom door. However,

team members described a variety of strategies and preferred activities and items used to redirect Student to task. Mother told the IEP team that, at home, Student did not listen. She noticed that he listened to Ms. Gonzalez at school. Garvey team members explained to Mother that school and home structures differed, creating different responses from children.

Student continued to need help eating and drinking and was a very picky eater. He did not eat school food and inconsistently ate food sent from home. Staff noted Student's lunch consumption on the daily communication log provided to Mother. Staff applied cream and Vaseline to address his severe sensitive skin issues. There were no reported incidents regarding his peanut allergy.

Garvey determined Student required goals in communication, vocation, mathematics, and academics. The team reviewed proposed goals for each of these areas. In speech and language, Ms. Noble proposed a goal for Student to use the word more when given visual and verbal models, to address his need for hand-over-hand support to use the sign or symbol for more. A second goal for joint attention between a preferred item or activity and communication partner addressed his need for eye contact and social interaction. A third goal to communicate wants and needs required Student to choose a picture during playtime or mealtime using verbal or gestural cues.

In academics, Ms. Gonzalez presented a vocational goal for Student to participate in a classroom job such as being line leader, passing out papers, or cleaning tables. This goal addressed Mother's concern about Student leaving his work area, by providing a structured manner for Student to move around the class. A mathematics goal required Student to identify geometric shapes from a field of two. A goal to identify body parts required Student to point to body parts using verbal and physical prompts.

Garvey offered 30-minutes of speech and language in two-15 minute sessions. The length of sessions matched the length of Student's sustained attention in speech.

Ms. Noble explained the sessions would be a combination of push-in and pull-out to maximize generalization of skills across environments. Classroom staff would use the same strategies as Ms. Noble to support Student throughout his school day.

Garvey offered continued placement in a moderate to severe special day class using specialized academic instruction. Mother signed consent to an assessment plan, initially sent to her on January 10, 2018. The assessment plan responded to Mother's request for occupational therapy, assistive technology with alternative augmentative communication (referred to as assistive technology for ease of reading), and functional behavior assessments. Mother did not consent to the IEP.

On February 6, 2018, Mother sent a letter to Garvey consenting to implementation of the 2018 annual IEP. She disagreed with the removal of group speech and language services and requested stay-put as to the previously agreed upon 60-minute weekly group speech services. Although, the amount of time Student spent in regular class and extracurricular and non-academic activities changed solely due to the different structure in place at kindergarten, compared to his prior placement in pre-school, Mother disagreed with the decrease in mainstreaming. Mother also sought an increase in individual speech services, behavior goals, a behavior intervention plan, and a goal to train Student to eat and drink independently.

February 28, 2018 Functional Behavior Assessment

Board certified behavior analyst Mary Hum conducted a functional behavior assessment in January and February, resulting in a report dated February 28, 2018. Ms. Hum held a bachelor of arts in psychology, a master of arts in counseling, and a certificate in applied behavior analysis. She held pupil personnel services credentials in school counseling and school child welfare and attendance. She had extensive experience working as a behavior analyst and consultant in school and home programs. At the time of hearing, she worked as a behavior interventionist for Garvey. Ms. Hum

demonstrated extensive knowledge in the area of behavior analysis and intervention. Her testimony was forthcoming, even when unflattering to Garvey, she was credible.

As part of her assessment, Ms. Hum reviewed records, observed Student, collected behavioral data, and conducted direct and indirect assessments. Ms. Hum obtained input from Mother and Ms. Gonzalez through reviewing IEP comments on tantrum behaviors and intervention strategies. She also administered the functional analysis screening tool, a survey provided to Mother and Ms. Gonzalez, to obtain their input on the primary function of Student's tantrum behavior. Potential primary functions, based upon Ms. Hum's review of records, included attention or access to preferred items, escape, sensory stimulation, and pain attenuation. Mother's responses demonstrated attention or access to preferred items as the primary function. Ms. Gonzalez rated each of the four potential primary functions the same.

Ms. Hum identified tantrums as the target behavior. Her operational definition of tantrum was crying, whining, kicking, pulling other's hair, throwing himself backwards. At hearing, she explained that Student only pulled another's hair once.

Ms. Hum observed Student for approximately 17 hours, over nine days, during various school activities. Tantrums occurred 3.1 times per hour, on average. Some were only a few seconds long. Most lasted between one-and-a-half minutes and nine minutes. Tantrums occurred only in the classroom when Student became upset. Student was calmed by application of lotion and Vaseline in the morning, and access to the sensory space and bean bag at recess. Student used swings with adult assistance on the playground and transitioned back into class calmly.

Ms. Hum determined a lack of attention from staff caused Student's tantrum behavior. Examples included staff assisting others and children leaving class and Student not being allowed to follow. Less frequently, Student tantrumed when instructed to engage in a non-preferred activity, such as sitting in his chair to work. In her opinion,

engaging in tantrums and being off task served the same function, escape from a non-preferred task.

Consequences of Student's behavior included staff giving him attention to console him, lead him to the bean bag, hold his hand, apply lotion to his skin, redirect him to another area inside class, take him to the restroom, or block him from running out the door. Staff provided a safe space for Student when he threw himself backwards so that he would not hit his head on anything.

Ms. Hum opined as to the importance of obtaining data on a student's behavior. She stressed the point that treatment plans must be based on data. She obtained data on Student's behavior through observation and data collection and reviewed data taken throughout the day by teacher and aides and believed each collector took data on the same target behavior.

March 5, 2018 Assistive Technology Assessment

Speech language pathologist Jennifer Strom conducted an assistive technology assessment of Student on February 28, 2018, resulting in a report dated March 5, 2018. Ms. Strom held a bachelor of arts in English literature and a master of arts in education. She was licensed, credentialed, and certified to provide assistive technology assessments and services.

The appropriateness of Garvey's assistive technology assessment was not placed in issue at hearing. Ms. Strom conducted observations, interviews, reviewed records, and conducted an assessment task. The assessment task required Student to use two assistive technology applications, AAC Genie and Touch Trainer, to determine his ability to access devices and programs on them. Ms. Strom did not conduct formal assistive technology trials on various devices due to time constraints. At hearing, she explained that Student missed his final assessment appointment on March 2, 2018, due to illness. Trials could not be rescheduled as the team set a March 5, 2018 IEP meeting to review

assessments.

Ms. Strom interviewed Ms. Noble and Ms. Gonzalez as part of her assessment. Both found that Student had not demonstrated consistent preferences, which could be used as rewards to encourage his communication. Student engaged tantrum behaviors, which interfered with his progress in speech. Mother reported, during her interview, that a teacher working with Student after school attempted to use picture exchange communication cards with him, but found that using a lot of pictures was too advanced. Student currently used only one photograph to make request wants and needs during his in-home applied behavior analysis sessions. Mother reported that Student would bring her a photo of his device when he wanted to use it, and would use it for one hour.

Ms. Strom used information gathered through observations and interviews to determine Student's skill level and whether he could begin attempting to use a device. She considered devices matched to meet Student where he was at. Student had communicative intent, but he required support to communicate. Ms. Strom used AAC Genie and Touch Trainer to determine whether Student could activate icons, identify pictures and symbols, and the number, size, and other options of icons Student could access if provided with an assistive technology device at school. Student used a grabbing motion toward the activation icon on both devices. He could not activate the AAC Genie. The Touch Trainer had one picture in the middle of the screen. Student attempted to touch the picture after modeling and verbal prompting. He activated Touch Trainer on two of five attempts with light physical prompts. He could not access the device independently.

Ms. Strom determined that Student had basic skills, which showed potential for acquiring additional skills necessary to access a high-tech assistive technology device on a regular basis. Student demonstrated a high level of receptive vocabulary, ability to focus and attend to a device, and understood cause and effect. He was redirected

through verbal and gestural prompts. Student was in the early stages of acquiring skills needed to use an assistive technology device. For these reasons, Ms. Strom recommended a device with TouchChatHD, an application that allowed access to familiar photographs, presented in limited fields. The device and software provided verbal feedback to help communicate with unfamiliar listeners and provided access to Student's growing vocabulary.

Ms. Strom developed an implementation plan, as part of her report, which included the sequence of obtaining the device, training staff and student on use of the device, Parents signing a receipt form so the device could be sent home, and progress monitoring. She recommended three hours of training for student and staff, four hours of additional training for classroom implementation support for the speech language pathologist and device functioning, and monitoring over thirty academic days to determine what additional steps were required to successfully use the device at school. During the trial period, she recommended the team look at frequency and accuracy of use, number and type of prompts required for use, independence, behavior, and recommendations for next steps.

Ms. Strom conducted her assessment within 60 days of Mother signing the assessment plan. Though she reported feeling rushed due to time constraints, she did not say she would or should have considered any other devices or that Student's tablet device with TouchChatHD could not provide Student with educational benefit. She credibly opined she obtained an accurate view of Student's assistive technology needs.

March 5, 2018 Occupational Therapy Assessment

Occupational therapist Marina Toranian conducted an occupational therapy assessment of Student beginning in January 2018, resulting in a report dated March 5, 2018. Ms. Toranian held a bachelor and masters of science and worked as a licensed occupational therapist for 12 years by the time of hearing. She demonstrated

knowledge of Student's needs and testified in a direct and forthcoming manner, which underscored her credibility.

Ms. Toranian interviewed Mother and Ms. Gonzalez, observed Student at school, reviewed work samples, and conducted the sensory processing measure, to determine Student's need for occupational therapy services and supports. Mother reported concern over Student's lack of eye contact and speech. Ms. Gonzalez reported Student jumped a lot and had multiple tantrums.

Ms. Toranian observed what others reported regarding Student's behaviors in class. In a 30-minute time span, on one occasion, he opened and closed the bathroom door several times, walked around the classroom, jumped, gave the teacher hugs, became irritated easily, and enjoyed an aide rubbing Vaseline on his back. He independently ate crackers but needed hand-over-hand assistance to drink from a small cup. On another observation, he jumped up and down and repeated "eya, eya, eya" over and over again. He cried and did not listen to staff.

Ms. Toranian administered the sensory processing measure to determine overall sensory functioning and areas of need that may affect learning. Student scored in the definite dysfunction range in four of the seven areas assessed, specifically, social participation, visual processing, auditory processing, planning and ideas, and total sensory systems. Socially, Student never waited his turn or interacted with peers during pretend play. He appropriately participated in circle time. Visually, Student was frequently distracted by nearby objects, looked around the room, and had difficulty matching shapes and colors, and locating items by visually scanning. Auditorily, Student always made noises or hummed during quiet time, flushed the toilet several times in a row, had difficulty following verbal commands in the classroom when it was loud. In motor planning, ideas, and organization, Student frequently became stuck on one activity and played repetitively. He had difficulty with pretend play, and failed to

complete tasks with multiple steps.

Ms. Toranian informally assessed Student's fine motor skills through observation and review of work samples. Student performed fine motor skills within the two-to-three-year-old range. He used both hands to write but showed some right hand dominance. He made circles on a dry erase board, drew zig-zag lines, but did not yet trace. He could string four beads onto a string. He unzipped zippers and fastened buttons with minimal assistance. He independently used the bathroom, but required reminders to wash his hands. He required adult assistance for most school related tasks.

Ms. Toranian recommended occupational therapy support services to address Student's sensory processing and fine motor skills.

March 5, 2018 Individualized Education Program Meeting

On March 5, 2018, Garvey held an IEP meeting to review functional behavior, assistive technology, and occupational therapy assessments. All required team members attended. Mother attended, aided by a translator.

Ms. Toranian reviewed her occupational therapy assessment and made recommendations for services. During her assessment, Student demonstrated fine motor skills in the two-to-three-year age range. He was highly aroused in class, and sought sensory input and movement. Student could match some items, but only with significant prompting, not independently. She observed Student use an age appropriate grip for writing. He used both hands and had not expressed right or left hand dominance. He could make marks on a paper but was not imitating strokes. He did not use scissors appropriately.

Ms. Hum reviewed her functional behavior assessment. She reported that, in the few weeks since assessing Student, the function of his behavior changed to him wanting to go outside. She proposed a behavior intervention plan, which included the recently developed function of behavior. She identified Student putting his shirt in his mouth as

a first indicator of tantrum behavior. Mother reported that he put fingers in his mouth and plays with his teeth. She developed functionally equivalent replacement behavior for Student, or an appropriate means to communicate, appropriate ways to gain access to a desired item, or attention.

Ms. Strom reviewed her assistive technology assessment. She opined that Student had the potential to learn to use an assistive technology device, as he understood that a photograph can represent an object. Student was in the beginning stages of acquiring fine motor abilities to use such a device. She recommended the TouchChat application for a 30-day trial, with the IEP team reconvening to discuss results. The device would be set up for communication use only and would contain other applications or games. Garvey represented that it had a device available but needed to purchase the application and carrying case. Student would receive the device within one to two-weeks.

Ms. Toranian presented occupational therapy goals. The first goal required Student to improve sensory seeking behaviors by following an adult directed sensory diet with minimal prompting for 15 to 30-minutes, three times per day. The goal addressed Student's need for proprioceptive input and movement. Student's sensory diet included use of a sensory corner, trampoline, weighted vest, and tactile play. A second goal required Student to improve his grasp and trace shapes such as circles, squares, and triangles. The goal addressed Student's needs in handwriting. Ms. Toranian explained, at hearing, that tracing was a pre-writing skill. She described classroom activities, such as lacing, beading, use of a peg board, and coloring were examples of pre-writing activities and helped build hand dominance.

At Mother's request, the team drafted a feeding and drinking goal. The goal required Student to eat and drink independently. Teaching of these skills were embedded in Student's functional curriculum.

Ms. Hum did not draft behavior goals. She explained, at the meeting, that Student's behaviors were communication attempts and he already had communication goals that targeted building replacement behaviors. Ms. Hum made changes to Student's behavior intervention plan based upon the expectation that Student would use the new assistive technology device, even though Student did not have it yet.

Garvey and Mother agreed to revisit Mother's request for increased speech services at the 30-day meeting to review Student's progress with assistive technology. Garvey added occupational therapy for 60-minutes, monthly, which included consultation and push-in services for Student's sensory diet.

Trial of Assistive Technology Device

Mother consented to implementation of the March 5, 2018 IEP on March 13, 2018. Ms. Strom provided training to staff within two weeks of obtaining Student's assistive technology equipment. She believed the training felt rushed and she would have recommended more time. She attempted to schedule time for Mother's training, in April 2018. Staff monitored Student's progress on the device between May 5, 2018 and May 31, 2018, the trial period. Garvey set an IEP meeting for May 31, 2018, to review the trial and provide Mother with training on the device. Mother cancelled the meeting and the training the week of May 31, 2018. School ended within two weeks after the meeting was canceled and the meeting could not be rescheduled until the following school year. The delay between the March 13, 2018 and May 5, 2018 did not negatively impact Student's access to his education.

July 9, 2018 Request for Independent Educational Evaluations

On July 9, 2018, Ms. Hu, on behalf of Student, requested independent education evaluations in psychoeducation, speech and language, functional behavior, assistive technology, and occupational therapy. Garvey did not respond.

2018-2019 School Year

After the beginning of the 2018-2019 school year in August 2018, Garvey attempted to schedule a September IEP team meeting to review results of Student's assistive technology trial. Mother was not available.

Speech language pathologist Rebekah Taylor provided assistive technology support to staff and Student throughout the 2018-2019 school year. She worked for a nonpublic agency that contracted with Garvey. Ms. Taylor held a bachelor of fine art in medical illustration and a master of arts in communication disorders-speech language pathology. She held a clear speech language pathology services credential, a certificate of clinical competence, and was licensed to practice speech language pathology and audiology in California. She demonstrated extensive knowledge and experience in the field and working with Student and her testimony was found credible.

Ms. Taylor described Student's progress accepting and using his tablet device as slow. Typically, training students to use a device involved verbal instructions, showing them how to use the device, and having them practice. Since Student was nonverbal, she worked with him to see how he approached the device functionally. She then trained staff to work with him in that manner.

September 20, 2018 Psychological Assessment by Dr. B.J. Freeman

Dr. B.J. Freeman assessed Student in August and September 2018, resulting in a report dated September 20, 2018. Dr. Freeman held a bachelor of arts, master of arts, and doctorate degree in psychology and was a renowned expert in the field of autism spectrum disorders. Nonetheless, her testimony was given less weight than several of Student's providers because of her limited knowledge of Student.

Dr. Freeman assessed Student, briefly, and observed him at school for less than two hours on one day. She opined that Student showed signs of regression in Garvey's program. She based her opinion on her belief that Student stopped using utensils to

feed himself and occasionally urinated outside of the bathroom. Contrary to IEP reporting, she opined that Student had a history of not meeting his goals.

Dr. Freeman assessed Student's cognitive functioning using the Mullen Scales of Early Learning, an instrument determining relative strengths and abilities. She did not obtain an early learning composite, which would have provided Student's level of cognition. The Mullen was normed for children younger than Student at the time of administration. Dr. Freeman obtained some age equivalencies but did not complete the Mullen due to Student's inattention and behaviors. Her assessment shed no new light on Student's abilities.

Dr. Freeman administered the Vineland Adaptive Behavior Scales, third edition to assess communication, daily living skills, socialization, and motor skills. She opined that children with autism typically have a scattered score profile, rather than scoring consistently across domains. She offered no explanation for Student's scores, which were consistently low in all categories.

Dr. Freeman recommended a year-round 40-hour-per-week applied behavior analysis program in place of Student's special day class. Her recommendation lacked credibility as it was based on research related to a general population of children with autism, not children with Student's particular profile. She did not refer to research on children with significant cognitive delays co-existing with autistic like behaviors. She did not take into account Student's ability to attend to academic tasks, which was less than 30 minutes at the time, or how that would impact a forty-hour per week intensive program.

On Student's use of assistive technology, Dr. Freeman generally believed Student presented like a child who could learn to use a functional communication device. Her opinion did not support Student's theory that an assistive technology assessment should have been conducted sooner than March 2018.

Dr. Freeman made several additional recommendations for Student's educational program, including use of functional communication through verbal and alternate means, social skills instruction throughout the school day, teaching play skills, one-on-one instruction of basic skills, functional academics, and behavior intervention. Dr. Freeman's general recommendations mirrored the program already offered by Garvey.

October 22, 2018 Assistive Technology Progress Report

Ms. Taylor observed Student and consulted with staff regarding Student's progress using his assistive technology device. She developed a report dated October 22, 2018, on her findings.

Student received a tablet device with TouchChatHD software in May 2018. The device used photographs and symbols so Student could communicate wants and needs in categories of eating, drinking, and play. Student showed interest in the device. He developed skills for selecting icons to navigate to various pages. He independently activated icons for "I want" and "to play," but often activated an item button, then pushed away the item received. The team was unsure whether Student activated icons on the device to obtain voice output as sensory stimulation or exploring the vocabulary. Ms. Noble opined that Student made steady progress using the "more" icon, but believed he overgeneralized and used that icon when he really meant, "help" or "all done." She targeted teaching Student differences between "more," "help," and "all done" to facilitate functional use of the device.

Ms. Taylor recommended continued use of the device, focusing on motivating communication such as choice-making, requesting, and protesting. To facilitate generalization across environments, Student could take the device home, once Parents signed a responsibility contract and obtained training. She recommended three-hours of staff training, with additional time for consultation, or, a bank of 420-minutes yearly for

training and subsequent updates, adjustments, and consultation.

Ms. Taylor developed a formal implementation plan to support Student's consistent use of his assistive technology device across settings. She recommended staff continue to model spoken language while using icons to support Student's communication development. She provided specific examples for use of the device across settings. She instructed users to maintain the position of all icons, to build Student's motor memory in using the device. She identified prompt hierarchy examples to work towards Student's independent device use. She developed activity-based targets in the areas of bathroom, play, breaks, and meals to teach Student functional communication for wants, needs, and preferences.

October 24, 2018 Individualized Education Program Meeting

Student's IEP team met on October 24, 2018 to discuss trial results of his device. All required team members attended. Mother attended, aided by an interpreter.

Student's device trial began with four icons per page. Staff adjusted icons to two or three per page, based upon Student's limited progress. The team encouraged Mother to bring preferred foods for Student and staff would add icon pictures of the food, which they could use to encourage Student to use the device. Ms. Taylor explained the device and use to Mother. Mother was given responsibility paperwork to sign, so that Student could bring the device home. She did not sign the paperwork at that time.

Garvey's IEP team offered Student 420-minutes yearly for training of staff and parents and for device updates and adjustments. Mother consented to the IEP amendment at the meeting.

December 19, 2018 Individualized Education Program Meeting

On December 19, 2018, Student's IEP team met to review Dr. Freeman's psychoeducational assessment. All necessary team members attended. Mother attended

with the aid of an interpreter. Dr. Freeman attended telephonically.

Dr. Freeman shared results of her assessment. She opined that Student was prompt dependent and did not believe his test scores were a true indication of his ability. The IEP team discussed Student's inconsistent eating, not eating with utensils, and urinating outside the bathroom. Dr. Freeman believed Student's eating and toileting issues were behavioral and recommended a functional behavior assessment.

Ms. Toranian described consulting classroom staff on sensory issues. She used sand and putty, or tactile play, to address sensory needs. She agreed to trial the use of a chewy device to address oral input, though she had not observed sensory seeking of this type. Student engaged in throwing his head back and flailing to the ground when frustrated. Use of the sensory corner served to calm him down after such tantrums. Both Ms. Toranian and Ms. Noble observed that Student's behavior had not declined since the prior school year. Student spent 15 to 20 minutes at a time in the sensory corner engaging in tactile play and movement. He used the trampoline, bean bag, balance board, and balance ball. He often went to the sensory corner on his own. At times, it was a challenge to get him out of the sensory corner.

Student's special day class teacher Betty Szeto reported inconsistent class participation. Ms. Szeto did not testify at hearing. At the beginning of the school year, Student sat during circle time. By December, Student preferred to remain in the sensory area, did not respond to prompting to leave, and threw tantrums. He participated in circle time while in the sensory area, with prompting.

Dr. Freeman opined that Student required an intensive applied behavior analysis program to address his lack of adequate progress. She recommended the functional behavior assessment address Student's prompt dependence.

January 11, 2019 Individualized Education Program Meeting

On January 11, 2019, Garvey held Student's annual IEP meeting. All necessary

members attended. Mother participated with the aid of an interpreter.

The team discussed Student's strengths and weaknesses. Mother reported Student made progress in his home program. He put his shoes away and helped with chores. Ms. Szeto described Student as neat and organized with his desk. He also picked up toys on the floor and gave them to staff. He used the bathroom independently. Mother expressed concern over Student not communicating verbally, not being able to identify the alphabet, difficulty recognizing numbers and tantrums. He had begun to hit when upset.

The IEP team discussed Student's progress. Student sat and participated in preferred activities such as cutting and coloring. He required hand-over-hand assistance for non-preferred tasks, as he became distracted and walked away.

Student did not meet any of his four academic goals. He made limited progress performing class jobs because he required physical prompting to engage in them. The goal allowed for use of verbal and gestural prompts.

Student made little progress on his goal for geometric shapes. He was working on identifying a circle. Even with gestural prompting, he did not visually attend to objects.

He made no progress identifying body parts. He was working on naming his nose, mouth, ears, and eyes but required hand-over-hand prompting. Student made some progress on his eating and drinking goal. He demonstrated the ability to eat independently using hands and a spork, when staff cut his food into small pieces. At home, Student obtained water from a drinking dispenser. Mother reported he only drank water at home. He did not drink during the school day. The team agreed to have Student use the water dispenser in the office.

In speech and language, Student met his goal for using more, which he preferred to sign. He met his goal for joint attention, when a preferred item was held close to the

communication partner's face. He could look at an item, then at Ms. Noble, then back at the item. Student did not meet his goal for choosing pictures of preferred items. He sometimes chose an item but pushed it away once he received it. He did not visually attend to his device, meaning that he sometimes looked away from the device while trying to press the icons. He responded appropriately to the bathroom icon.

Student made progress toward his occupational therapy goal for use of a sensory diet to increase class participation. Though he used the sensory corner to calm himself, it did not result in increased attention to classwork. He made progress toward his goal for improving his grasp and tracing shapes. He used both hands, at the same time, to trace. He attempted making circles and crosses but did not trace shapes. He enjoyed drawing and cutting, fine motor skills. Ms. Toranian observed Student making circles on a dry erase board, randomly. He demonstrated this same skill during her assessment of him the previous year. He was able to engage in a preferred task for 30 minutes and non-preferred task for five minutes.

Ms. Taylor recommended decreasing the number of pages and icons on the device, until Student demonstrated mastery. Mother agreed. Mother signed Garvey's responsibility document, allowing Student's school device to be used at home. Garvey's team offered to provide assistive technology training to Mother and the two home teachers. Mother declined, stating the providers were busy and would not be able to attend. Ms. Taylor recommended reducing consultation services as staff training already occurred and less training time would be required for the coming school year. Student demonstrated the ability to touch icons on his own, at times. His ability to use the device decreased when behaviors escalated.

The IEP team discussed Student's behaviors. Ms. Hum reviewed the February 2018 functional behavior assessment and observed Student at school prior to the meeting. Mother expressed concern over Student hitting and kicking, which Ms. Hum

addressed in Student's behavior intervention plan. Ms. Hum opined the behaviors functioned to provide escape. She recommended collecting additional data to determine whether the increase in avoidance or escape behaviors related to the increase in task demands, compared to the previous school year. Mother agreed.

The team reviewed new proposed goals in academics, speech and language, and occupational therapy. Academic goals consisted of matching geometric shapes to address mathematics, following a visual schedule to address transition to non-preferred tasks, and taking turns and sharing to address social skills.

Speech goals included responding to greetings and good byes and communicating wants and needs using his communication device, visuals, gestures, or verbal speech. Ms. Noble did not develop a social skills goal for several reasons. Student had not demonstrated the ability to attend group speech sessions because of his inability to share and to wait to take a turn. He demonstrated the ability to interact with peers already, during recess. Further, social skills, such as playing with peers, were embedded in the curriculum and worked on with staff during the school day.

Occupational therapy goals included using sensory items such as a pressure vest, chewy, kinetic sand, to increase length of participation in non-preferred activities, cutting shapes using scissors with correct grasp and tracing lines to address fine motor skills.

Mother agreed to all goals. She asked about someone to work with Student on behaviors in class. The team discussed that Ms. Hum trained staff on implementation of Student's behavior intervention plan and remained available for support. Staff demonstrated success working with Student in class. Ms. Hum opined the behavior intervention plan had been effective. The March 2018 plan became part of Garvey's offer of FAPE. However, Student urinated five times in the classroom and once outside of class. This was an emerging behavior not identified in the behavior intervention plan.

Functionally equivalent replacement behavior, the main way to implement replacement behavior, remained the same and had been effective.

Mother asked for a daily communication log, similar to the one used by Ms. Rogers during the previous school year. Ms. Szeto agreed to follow up with Mother on a communication log. Mother stated that a one-on-one assistant would help Student learn more. Garvey team members believed an aide would create more dependence. Student demonstrated the ability to perform tasks set forth in goals, but with more scaffolding and support than allowed to meet the goals. The classroom ratio of five students and four adults provided sufficient support for Student.

Garvey offered Student continued placement in the moderate to severe special day class for specialized academic instruction, with 30 minutes of weekly individual speech and language services, 90 minutes of monthly occupational therapy push-in or pull-out services, and 380 minutes of annual assistive technology services for training, updating, and adjustments. Garvey also offered transportation and extended school year services.

On February 11, 2019, Mother provided Garvey with a Parent Statement agreeing to implement the January 11, 2019 IEP, while denying it offered a FAPE. Mother requested Student receive thirty additional minutes each of group occupational therapy and individual and group speech and language services. She requested a full time, one-on-one behavior aide, eight hours per week of behavior supervision by a board certified behavior analyst, and a daily communication log regarding Student's behavior and progress.

At hearing, Ms. Toranian explained Student's progress between January and February 2019. Occupational therapy activities in class included lacing, beading, using tongues and tweezers. These activities helped with grasp. During such activities, he was given objects at his midline, meaning directly in front of him. He would have to reach

out with one hand or the other to grab the item. He more often reached out with his right hand, showing development of right hand dominance. These were pre-writing skills.

Ms. Toranian observed Student's attention improved over time. In 2018, Student could not tolerate two hours of occupational therapy service. In spring of 2019, Student could tolerate one-on-one instruction for up to 30 minutes. She discontinued the use of the chewy device for oral input as Student did not use it. She did not observe Student's behavior worsen from the prior school year.

Student's fine motor skills improved over time. During the 2017-2018 school year, Student needed help stringing beads. In January 2019, he was able to string four to five beads independently. He progressed from needing hand-over-hand assistance with buttons and zippers to needing minimal assistance. Use of the pressure vest in 2019 allowed him to become calmer and tolerate non-preferred classroom tasks for up to 15 minutes.

February 28, 2019 Prior Written Notice

On February 28, 2019, Ms. Ulloa sent prior written notice to Parents, responding to their request for additional services and disagreement with Garvey's January 11, 2019 offer of FAPE. Garvey declined changes to Student's 2019 annual IEP, based upon Student's 2019 annual IEP and assessments conducted in 2017 and 2018, including Dr. Freeman's assessment. Garvey agreed to implement a daily communication system regarding behaviors and academic progress.

March 22, 2019 Functional Behavior Assessment Update

Ms. Hum conducted a functional behavior assessment update, resulting in a report dated March 22, 2019. She observed Student and collected behavior data over nearly 23 hours. She obtained behavior survey results from Ms. Szeto and Mother,

interviewed Ms. Szeto, analyzed antecedent-consequence-behavior data, and completed a trial-based functional analysis of tantrum behavior.

Expressively, Student communicated wants and needs with staff using pictures, gestures, sign language, and his device. He learned to sign "juice" and "all done." Receptively, Student followed two-to-three word instructions. For example, at the end of recess, he would run back to class independently when told, "all done." Student independently filled his cup with water from the office drinking fountain. However, he poured the water out instead of drinking it. Ms. Szeto observed Student climb on tables and jump onto a chair. He complied with staff direction to get down from the furniture.

Ms. Hum conducted a preference assessment to determine motivating items or activities. He preferred cutting paper with scissors, playing with kinetic sand, and art activities such as gluing paper. He engaged in tantrum behaviors more when presented with a task demand, such as working on IEP goals, English language arts, or mathematics, and daily living skills, like brushing his teeth. Ms. Hum defined tantrums as crying, whining, kicking others, dropping to the floor, throwing himself backwards on the floor, hitting self and others, head butting, stomping feet, biting shirt, and laying on the floor.

Student engaged in tantrum behaviors 19 of 33 days. Tantrums ranged in length from less than four minutes to ten minutes and occurred approximately two times a day, when Student had tantrums. Based upon Ms. Hum's analysis of surveys, observations, and data collection, she determined the function of Student's tantrum behavior. Primarily, Student sought escape from presented tasks. Secondly, Student sought access to tangible items. Student appeared very focused when presented with preferred tasks such as cutting paper with scissors or art activities.

At hearing, Ms. Hum noted Student's improvement over time. He participated in class more, learned to select a break on his device, loved cutting paper and held scissors

correctly, and used the classroom token exchange chart. He knew that when he stayed on task he could take a token from the stack and place it on his chart and that when he reached five tokens, he could play with sand or other preferred activities. During circle time, he participated and attended more. On the playground, she observed Student looking at peers and smiling, and playing chase with general and special education students.

Remainder of School Year

Ms. Taylor trained Mother to use Student's assistive technology device in November 2018, January 2019, and May 2019. Ms. Taylor observed Student's progress using the device. He learned to associate a picture of sand with his preferred item, kinetic sand. He selected that icon, the device provided verbal output, and he was given the sand. Toward the end of the school year, Student used three icons, more consistently selected the "I want" icon and asked for an item he actually wanted. He demonstrated the ability to touch icons for things he wanted, on his own. Ms. Toranian observed Student asking for a sensory break on his device during the summer school session.

STUDENT'S EXPERT ELIZABETH SCHWANDT

Elizabeth Schwandt testified on behalf of Student. Ms. Schwandt held a masters in education for special education curriculum design and was a doctoral student in clinical child psychology at the time of hearing. She obtained an autism spectrum disorders graduate program specialty credential in high-functioning autism and Asperger's syndrome. She had 12 years of experience as a board certified behavior analyst. She had extensive experience in applied behavior analysis, development of behavior plans, and working with children with autism.

Ms. Schwandt reviewed Student's records. She never met Student. She had

neither assessed nor observed Student. She had not spoken to any home or school staff or providers working with Student. Her opinions regarding Student, in particular, carried less weight than her testimony regarding application of behavior intervention principles, in general.

Ms. Schwandt persuasively opined that a behavior intervention plan must be based on data to determine what interventions stopped tantrums, made them less likely to recur, and provided appropriate replacement behaviors. She agreed with Garvey's approach to emergency safety precautions, which did not follow the same behavior intervention protocols, but were necessary to keep Student safe when having tantrums.

Ms. Schwandt explained interventions that reinforced negative behaviors. For example, placing Student in the sensory corner when he had tantrums taught him that he could access preferred items by engaging in maladaptive behavior. This opinion was consistent with Garvey's interventions, used during the 2016-2017 school year, before developing Student's behavior intervention plan.

Ms. Schwandt credibly explained that Student's urinating in the classroom was not evidence of regression in behaviors or previously learned skills. She opined there may be an underlying medical reason, which should be ruled out first. Student's other behaviors were consistent throughout the school year, and did not show regression.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The legal citations in the introduction apply to analysis of each issue. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) All references to the Code of Federal Regulations in this Decision are to the 2006

version.

The Individuals with Disabilities Education Act is referred to as the "IDEA." The main purposes of the IDEA are:

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

A FAPE, which is an acronym for "fair appropriate public education" 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 IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an individualized education program, or "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. This statement describes the child's needs, academic and functional goals related to those needs. It also provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§

56032, 56345, subd. (a).)

In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

In *Andrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Andrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “[E]very child should have a chance to meet challenging objectives.” (*Ibid.*) *Andrew F.* explained that “[t]his standard is markedly more demanding than the ‘merely more than de minimis’ test [¶] . . .

The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at pp. 1000-1001.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was "[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case." (*Id.* at p. 1001.) The Court noted that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Id.* at p. 999 [italics in original].) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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, assessment, 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.) Generally, a party is limited to filing a request for due process two years from the date the person knew or should have known of the facts which form the basis for the request for a due process hearing. (20 U.S.C. § 1415(f)(3)(C), (D).)

The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); 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 requested the hearing in this matter, and therefore Student has the burden of proof on

the issues.

ISSUES 1 AND 2: TIMELY AND APPROPRIATE ASSESSMENTS

Student contends Garvey failed to timely conduct its February 28, 2018 alternative augmentative communication assessment. Student further contends Garvey's February 28, 2018 functional behavior and March 5, 2018 occupational therapy assessments were neither timely nor conducted appropriately. Garvey argues its assessments were timely and appropriately conducted.

A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) Assessments must be conducted by individuals who are both knowledgeable of a student's disability and competent to perform the assessment, as determined by the local educational agency. (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).)

California law requires that a district assessment be completed, and an IEP team meeting held to discuss it, within 60 days of the district's receipt of a signed assessment plan. (Ed. Code, § 56344, subd. (a).)

Failure to conduct a timely or appropriate assessment constitutes a procedural violation. A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a 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); see Ed. Code, § 56505, subd. (f)(2); See *W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1484, (*Target Range*) superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 939.)

Mother signed an assessment plan for assistive technology, functional behavior, and occupational therapy on January 12, 2018. Garvey conducted each assessment and, on March 5, 2018, held an IEP team meeting to review them. Garvey's assessments were conducted within the 60-day timeframe required by state and federal law.

Student argues the assessments should have been conducted sooner because Garvey had knowledge of Student's unique needs in the areas of assistive technology, functional behavior and occupational therapy.

Assistive Technology Assessment

Student argues Garvey knew of his communication needs long before the March 5, 2018 assistive technology assessment and should have assessed sooner. Garvey argues Student lacked sufficient cognitive growth, acquisition of symbolic reasoning, and communicative intent through at least January 2018.

Student could not use a device independently at the time of the March assessment. Ms. Strom's recommendation of an assistive technology trial for Student provided the benefit of the doubt that Student could learn to use such a device.

Contrary to Garvey's assertions, Student did demonstrate communicative intent before March 5, 2018. Nonetheless, he did not associate pictures of items with actual items. He did not demonstrate that he had the capacity to operate assistive technology devices with icons or buttons to request wants and needs at any time prior to March 5, 2018. He lacked the underlying skills that would trigger the need for an assistive technology device during the relevant time frame. For these reasons, an assistive technology assessment conducted before March 5, 2018 would not have provided relevant information to assist his IEP team in determining his educational needs.

Student did not prove that Garvey's duty to assess in assistive technology was triggered prior to March 5, 2018.

Functional Behavior Assessment

Student argues that Garvey failed to conduct a functional behavior assessment when warranted. Student further argues that, once conducted, the assessment was not conducted appropriately. Garvey argues Student's functional behavior assessment was timely conducted as Student's behaviors were appropriately addressed through his IEP and classroom strategies. Garvey further argues the functional behavior assessment was appropriately conducted.

Student proved a functional behavior assessment should have been conducted before March 2018. Tantrum behaviors occurred during Student's first year of attendance at Garvey. By the time of his January 19, 2017 annual IEP, Student tantrumed by hitting himself, grabbing onto an adult, crying, screaming, and throwing himself on the ground. Garvey had sufficient time, between the beginning of the statutory period on February 28, 2017 and the May 17, 2017 IEP, to conduct a functional behavior assessment and develop a behavior intervention plan. Even though Student would transition to a different school for the 2017-2018 school year, his placement remained similar. Over both school years, Student was placed in a moderate to severe special day class with fewer than ten students, one special education teacher, two classroom aides, and individual student aides. He continued receiving functional curriculum directed towards his ability level. Garvey should have offered Parent an Assessment Plan for a functional behavior assessment before Mother requested one in January 2018.

The frequency and duration of Student's tantrum behaviors prevented Student from engaging socially and communicating wants and needs. Both Ms. Schwandt and Ms. Hum testified that Student required a data driven approach to determine what interventions could prevent behaviors from progressing into tantrums, made tantrums less likely to recur, and provided appropriate replacement behaviors. Both were board certified behavior analysts with significant training and experience conducting functional

behavior assessments. Board certified behavior analysts are particularly qualified to conduct behavior assessments. (Ed. Code, § 56525, subd. (a).)

Research and experience demonstrate that education of children with disabilities can be made more effective by providing incentives for positive behavioral interventions and supports to address the learning and behavioral needs of those children. (Ed. Code, § 56520, subd. (a)(3).) During the 2016-2017 school year, staff sought more to calm and soothe Student than to implement positive behavioral interventions to address his learning and behavioral needs. The evidence demonstrated that calming and soothing resulted in reinforcement of tantrum behaviors, as Student learned that he could obtain what he wanted through tantrums.

The following school year, Ms. Gonzalez did not understand the function of Student's behavior resulting in continued reinforcement of negative behavior. Primarily, Student's behavior functioned to obtain attention, which he obtained when he tantrumed. Such behaviors denied him access to educational opportunities and resulted in a denial of a FAPE.

Although Student proved Garvey should have assessed Student earlier, Student did not prove Ms. Hum failed to conduct an appropriate functional behavior assessment. Ms. Hum was qualified and knowledgeable about Student's disability. (See, Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) Ms. Hum used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student. (See, 20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) She obtained input from Mother and Ms. Gonzalez, collected and analyzed behavior data, determined the function of Student's behavior and made recommendations for a behavior intervention plan. (See, 34 C.F.R. § 300.304(c)(7).)

Student proved that Garvey had notice of the behaviors that impeded his learning, that behavior goals had not been offered, and that IEP strategies were not

effective in diminishing such behaviors, and that Garvey should have conducted a functional behavior assessment by the end of the 2016-2017 school year. Student is entitled to a remedy for Garvey's failure to conduct a timely behavior assessment in regards to this portion of Issue Two.

Occupational Therapy Assessment

Student contends, but offered no evidence, that Garvey's occupational therapy assessment was untimely. Student argues that the assessment was not appropriately conducted for two reasons. First, Ms. Toranian only administered sensory processing rating scales to Ms. Gonzalez and not Mother. Second, Ms. Toranian did not utilize a standardized fine motor instrument. Garvey argues its occupational therapy assessment was timely, given that Student did not qualify for services after a 2015 assessment and Student's progress during the statutory time frame leading up to the March 2018 assessment did not give notice that an assessment was necessary. Garvey further argues that Student did not prove that its occupational therapy assessment was deficient.

Student did not present evidence that the assessment was untimely during the hearing and apparently abandoned his argument, by not addressing it in his closing brief.

There was no evidence Ms. Toranian was required to administer the sensory processing measure to both teacher and parent to be considered a valid determination of Student's needs or that Ms. Toranian failed to obtain valid and reliable information or identify needs relating to his disability. Likewise, Student presented no evidence demonstrating that Ms. Toranian's informal assessment of fine motor skills was legally deficient or resulted in inaccurate findings.

Student did not prove the occupational therapy assessment was untimely or insufficient in any way.

ISSUE 3: INDEPENDENT EDUCATIONAL EVALUATIONS

Student contends he is entitled to independent educational evaluations because Garvey failed to timely and appropriately respond to his July 9, 2018 request for such assessments in the areas of speech and language, psychoeducation, functional behavior, occupational therapy, and assistive technology.

Under certain conditions, a parent is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent educational evaluation at public expense as set forth in Ed. Code, § 56329].) To obtain an independent educational evaluation, the parent must disagree with an evaluation obtained by the public agency and request an independent educational evaluation at public expense. (34 C.F.R. § 300.502(b)(1).)

The obligation for a school district to fund the independent educational evaluation is not automatic. When a parent requests an independent educational evaluation, a school district must either fund the independent educational evaluation at public expense or file, without unnecessary delay, for a due process hearing to show that its assessments were appropriate. (Ed. Code, § 56329, subd. (c).) This requirement is described as a school district's "fund or file" obligation.

While a school district may select either option, it is not permitted to do neither. If it fails to do either, the school district may waive its right to contest student's request for an independent educational evaluation whether the school district's assessment was appropriate or not. (*J.P. v. Ripon Unified School Dist.* (E.D. Cal. April 14, 2009, No 2:07-cv-03084) 2009 WL 1034993 (*Ripon*); *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal Dec. 15, 2006, C-06-0380) 2006 WL 3734289.)

In *Pajaro Valley*, the school district delayed filing a complaint to defend its initial

eligibility assessment for three months. The court found that the school district's "unexplained and unnecessary delay" waived its right to contest student's requests for independent evaluations by showing its assessment was appropriate. The court analyzed the importance of a school district's compliance with procedural safeguards, noting that violations of the safeguards, which seriously infringe a parent's opportunity to participate in the development of their child's IEP, may warrant relief under the IDEA. The court then analyzed the appropriateness of district's initial assessment and found it lacking. The court determined district's "unexplained and unnecessary delay" alone waived the right to contest student's request for an independent educational evaluation. The *Pajaro Valley* court limited its findings to the facts of that case.

Here, as in *Pajaro Valley*, Garvey's failure to respond to Student's request for independent educational evaluations resulted in "unexplained and unnecessary delay." Student sent a written request for independent educational evaluations on July 9, 2018. In response, Garvey neither funded the assessments nor filed a complaint to demonstrate the adequacy of contested assessments. Garvey did not offer evidence or argument explaining the failure to fund or file. Accordingly, Garvey waived its right to contest Student's request for independent educational evaluations.

But that finding alone does not relieve Student of the burden of proving that Garvey's procedural violation resulted in a denial of FAPE. A per se violation is not the same thing as a per se remedy. Not all procedural violations result in a denial of FAPE. Once a procedural violation is identified, the inquiry turns to whether the error impeded student's right to a FAPE, significantly impeded parent's opportunity to participate in the decision-making process, or caused deprivation of educational benefits. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910; *Target Range, supra*, 960 F.2d 1479, 1484.)

Here, Student sought but failed to prove the inappropriateness of Garvey's March

2018 functional behavior and occupational therapy assessments. Student did not contest the appropriateness of the March 2018 assistive technology assessment. Student withdrew his claim on the appropriateness of the January 2017 speech and language assessment, as it fell outside the two-year statute of limitations.

Likewise, the evidence demonstrated that Student made progress, over time, commensurate with his abilities in each area of requested assessment. During 2016-2017 school year, Student had difficulty responding to a one-word request. By the end of the 2018-2019 school year, Student followed two-to-three word instructions, like running back to class when told "all done." Student initially had difficulty choosing between two pictures to express wants and needs. In March 2018, he could not access an assistive technology device in any meaningful way. By the end of the 2018-2019 school year, Student communicated using pictures, gestures, sign language, and his device.

Behaviorally, Student engaged in fewer tantrums. He used his device to seek access to the sensory area and to meet other wants and needs. He learned to access and benefit from use of the classroom token economy system. He attended to task longer and demonstrated joint attention.

Garvey provided progress reports to monitor Student's abilities in the areas of occupational therapy and assistive technology, spent several hours collecting additional behavior data and developed an updated behavior intervention plan during the 2018-2019 school year. In short, Student did not connect Garvey's failure to respond to his request for independent educational evaluations to a deprivation of educational benefits or show that it impeded his right to a FAPE.

Turning to parental participation, publicly funded independent educational evaluations provide students with access to experts who can evaluate all of the information already available to school districts and provide an independent opinion.

The Supreme Court underscored the importance of this right, reasoning that it allows parents to overcome the natural advantage held by school districts when there is a dispute over a student's educational program. (See, *Schaffer, supra*, 546 U.S. 49, 60-61.) School districts already have access to expert opinions through their own specially trained staff of occupational therapists, school psychologists, and the like. Independent assessments allow parents to challenge district assessments, determine whether all unique needs have been identified, and ensure the appropriateness of district programs being offered.

Here, Garvey failed to respond at all to Parents' request for independent educational evaluations in light of a duty to do so. Allowing such procedural noncompliance without remedy to Student renders the IDEA's procedural safeguards ineffective. Garvey's inaction left Parents to wonder whether Garvey intended to file a request for due process to defend its assessments, how long they should wait before filing their own request, and whether the costs of filing or obtaining assessments on their own would shed new light on Student's needs or educational program. Garvey's failure to respond effectively prevented Parents from any meaningful exchange on whether to proceed with independent assessments and thereby significantly impeded meaningful participation in the IEP development process.

Student met his burden of proof on Issue Three and is entitled to a remedy.

ISSUE 4: GARVEY'S FAPE OFFERS

Student contends Garvey failed to offer appropriate goals, related services, supports, and placement to address needs in communication, occupational therapy, behavior, social skills, adaptive and daily living skills, academics, and health since February 28, 2019. Garvey contends it offered an appropriate program at all relevant times.

The IEP shall show a direct relationship between the present levels of

performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code. Regs., tit. 5, § 3040(b).) In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

Related services include speech and language services, occupational therapy services, physical therapy services, and other services as may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527.) Related services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities and make progress towards achieving the goals of his IEP. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.)

Curriculum includes recess time, lunchtime, and a wealth of other activities that occur at school that are not specific to pure academic learning. Using the restroom and eating with one's peers are aspects of a child's school curriculum. For example, training a student to toilet properly has been determined to be part of her education at school. (See, *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 883.)

In determining the educational placement of a child with a disability a school district must ensure that:

1. The placement decision is made by a group of persons, including the parents,

- and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
2. Placement is determined annually, is based on the child's IEP and is as close as possible to the child's home;
 3. Unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
 4. In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
 5. A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

Communication

Student argues that Garvey never offered a functional communication system to him as part of his IEPs, throughout the statutory time frame. Garvey argues that it provided Student with appropriate speech and language goals and services and Student made progress. Garvey further argues it conducted a timely assistive technology assessment, which provided additional, appropriate communication support to Student.

Student did not demonstrate that Garvey failed to offer appropriate communication supports and services throughout the statutory timeframe. Student, in his closing brief, makes several arguments regarding the appropriateness of his communication program during the 2016-2017 and 2017-2018 school year. Student's January 19, 2017 annual IEP was not at issue at hearing because it was developed outside of the statutory timeframe for hearing. Student did not argue a failure to implement the annual IEP, only that Garvey failed to offer an appropriate

communication program during the statutory period.

By the time of Student's next annual IEP in January 2018, he demonstrated progress in communication, commensurate with his abilities. He had significant intellectual disability, which presented, in part, in a slow and sometimes inconsistent learning pattern. He learned additional signs for "I want" and "all done." He demonstrated he could choose one item from a field of two pictures in order to meet his wants or needs. At times, he pushed the item away, once received. But that fact does not negate progress made over the prior year. At the time of the January 2017 annual IEP, Student could not choose an item from a field of two. Instead, he made wants and needs known by grabbing the arm of an adult and leading them to a desired item.

Student could sit and attend during speech and language sessions for up to fifteen minutes by the time of the January 2018 IEP. Ms. Noble tailored her offer of speech services to Student's ability to attend. She recommended, and Garvey offered Student, two-15-minute speech and language sessions per week. Ms. Noble consulted with classroom staff on communication strategies to use throughout Student's school day and offered push-in and pull-out speech in order to help Student generalize communication skills.

Student argued he should have received an additional 30 minutes of individual and 60 minutes of group speech and language services at the time of the January 2018 IEP. The weight of the evidence demonstrated that Student did not have foundational skills necessary to participate in group speech at that time. Ms. Noble persuasively testified that Student could not wait his turn or share during group sessions. Student presented no evidence to the contrary.

Student continued to progress in speech and language throughout the 2017-2018 and 2018-2019 school years. By his January 2019 annual IEP, Student met two of three speech goals and made progress on the third. He signed the word "more"

and demonstrated joint attention. His difficulty choosing pictures of preferred items to meet wants and needs continued. Student's teachers provided language rich environments wherein staff used oral language, gestures, and signs. Student learned to sign "juice" and "all done."

Ms. Schwandt testified, on behalf of Student, that Garvey did not offer enough functional communication goals and that Student overgeneralized the sign for "more," which meant he no longer attached meaning to the word. Ms. Schwandt's testimony carried little weight on this for several reasons. Ms. Schwandt is a behaviorist, not a speech language pathologist. She did not assess Student, never observed Student at school, and never met him. Finally, Ms. Schwandt did not provide any specific recommendations as to what goals Student should have been provided, how much therapy would have been appropriate, and how Student's intellectual disability impacted his ability to communicate. Ms. Noble's expertise as a speech language pathologist who assessed and worked with Student gave her testimony on this issue significantly more weight.

Student argues that Garvey should have provided him with a nonverbal communication system during the relevant time frame. For the reasons stated above, this argument fails. Moreover, during the course of the IEP meetings at issue, Mother voiced concern over Student's lack of verbal speech. Staff taught Student using total communication, which encouraged verbal speech in addition to use of gestures and signs. Student demonstrated the ability make vocalizations. At hearing Student offered no evidence showing that use of an assistive technology device could help Student communicate verbally. Moreover, Student did not present any evidence to support his contention that his placement had any impact on his ability to make progress in the area of communication.

Student did not persuasively demonstrate that Garvey failed to offer appropriate

speech and language supports and services such that it denied Student a FAPE during the relevant time frame.

Occupational Therapy

Student did not meet his burden of proving that he required more or different occupational therapy services during the statutory time frame. Student argues that he should prevail on this issue during the time frame of February 2017 through March 2018, simply because he was not offered any services.

Ms. Toranian, the only occupational therapist that testified at hearing, did not opine that Student required services prior to her March 2018 assessment. Moreover, the evidence demonstrated Student made progress appropriate in light of his circumstances. In initial 2015 testing, Student could not stack blocks, make lines or circles on paper, string beads, or use forms. By the time of his January 2017 annual IEP, he stacked up to five blocks, used forms, stringed up to four beads, could fasten and unfasten clothing, and made lines and circles on paper.

Student's progress continued through the January 2018 annual IEP. Student could hold a pencil or marker while working. He liked to write, by making lines or circles, independently on paper or a white board. In class, he worked on learning the alphabet by tracing letters using a stencil. He required hand-over-hand assistance. He met his academic pre-writing goal for imitating vertical and horizontal lines. The evidence did not demonstrate the need for occupational therapy, as Student acquired fine motor skills as part of his daily classroom curriculum.

After Mother requested an occupational therapy assessment, Garvey timely assessed and offered goals and services in March 2018. Ms. Toranian developed a goal for grasp and tracing, activities also worked on during Student's regular curriculum. Ms. Toranian attributed Student's jumping, crawling, and requesting hugs as need for proprioceptive input. She developed a goal for sensory seeking behaviors using a

sensory diet to increase attention to task. Classroom staff already provided Student with access to the sensory corner for calming, which led to increased attentiveness. Ms. Toranian provided additional structure and further means of measuring Student's progress in fine motor and sensory processing.

Garvey provided Student with appropriate occupational therapy goals and services from March 2018 through the 2018-2019 school year. While Student argues that he met no goals during this period, the evidence demonstrated he continued to make progress commensurate with his ability. Student became overwhelmed easily and required frequent sensory breaks. He accessed the sensory corner throughout the day, which provided regulation or calming, using a variety of proprioceptive and tactile input. He enjoyed cutting "theraputty" and made progress in safe use of scissors. Use of the pressure vest allowed him to attend to a non-preferred task for up to fifteen minutes or longer. Attention to preferred and non-preferred tasks increased consistently over the statutory period.

Student offered no evidence supporting his theory that he required more or different occupational therapy services throughout the statutory period. The weight of the evidence demonstrated that Garvey addressed his fine motor and sensory needs appropriately, that he obtained educational benefit and was offered a FAPE at all relevant times. Student did not prevail on this issue.

Behavior

Student argues that Garvey did not meet his behavior needs during the entire statutory period, even after development of a behavior intervention plan. Garvey contends that staff appropriately addressed behaviors throughout the relevant time period.

The same analysis regarding Garvey's failure to conduct a timely functional behavior assessment applies here. Student engaged in tantrum behaviors from the time

he began attending Garvey. His IEPs reflect that his behaviors impeded learning and he required behavior goals, which were not offered. Behavior techniques, such as redirection and using first-this, then-that were not consistently applied. Because staff did not understand the cause of Student's behaviors they often sought to comfort him more than teach him to wait, be calm, and communicate his needs. In this way, Student's negative behaviors were inadvertently reinforced. Student persuasively demonstrated that Garvey failed to appropriately address his behavior needs from February 28, 2017 until March 2018.

Ms. Hum conducted an appropriate functional behavior analysis, resulting in a behavior intervention plan, which Garvey implemented after the March 5, 2018 IEP. Ms. Hum described the most important moving part of the plan as the functionally equivalent replacement behavior, which is meant to replace maladaptive behavior. Because Student would begin using his device at school, Ms. Hum modified the behavior intervention plan to include use of the device for functional communication. To appropriate obtain attention from an adult, Student would select an icon and show a nearby adult. To request access to a preferred item or activity, Student would point to or select a picture of it on the device. He could also sign "more" for additional time on a preferred activity or for more of a snack item.

Throughout the end of the 2017-2018 school year and during the 2018-2019 school year, Student's teachers, aides, and providers continued to use total communication in addition to teaching Student to use the device. Student communicated wants and needs using pictures, gestures, sign language, and the device.

The weight of the evidence demonstrated that Student made progress in his behavior program after March 5, 2018, for several reasons. Most importantly, staff no longer inadvertently reinforced tantrum behaviors. Student gradually learned to use his device for functional communication. He demonstrated progress using the classroom

token economy. After remaining on task appropriately, he would take a token from the stack and place it on his chart to obtain preferred activities as part of his break. He was more easily redirected back to work.

By the time of Ms. Hum's updated behavior assessment of March 22, 2019, Student could sit and attend in class longer to both preferred and non-preferred tasks. He responded to two-to three word instructions by complying. He could run back to class after recess when given told "all done." He could draw circles on paper independently, cut paper with scissors using a correct grip. Student began to demonstrate functional use of his communication device at the end of the school year. Being able to request wants and needs decreased tantrum behaviors.

The weight of the evidence demonstrated that Student made slow progress, commensurate with his abilities, in the area of behavior, once the target of his behaviors was identified and appropriately addressed in March 2018. Student met his burden of proof on this issue as to the time period of February 28, 2017 through March 5, 2018. Student did not meet his burden of proof on this issue as to the remaining statutory period.

Social Skills

Student did not demonstrate that his social skills declined during the relevant time frame. Student only generally argues that he lost social functioning between 2015 and 2018. He bases his argument on Dr. Freeman's interpretation of Vineland Adaptive Behavior Scale results. Student's standard score was low in socialization, across assessments conducted by Garvey in 2015 and 2017 and were low in Dr. Freeman's testing. Dr. Freeman administered a newer version of the Vineland in 2018. She did not explain the differences between the testing instruments or norming populations. Moreover, she administered the Vineland only to Mother, who assessed Student's socialization at home and in the community. As a result, the information provided no

insight into Student's adaptive functioning at school. The testing instrument did not show that Student's school based social emotional functioning declined.

The weight of the evidence demonstrated that Student developed social emotional skills between Garvey's 2015 and 2017 administration of the Brigance Diagnostic Inventory of Early Development. Social emotional skills were undeveloped in 2015. By 2017, Student demonstrated skills between the ages of one and two in relationships with adults, three months in play and relationships with peers, and two years-six months in pro-social skills and behaviors.

Throughout the 2017-2018 and 2018-2019 school years, Student developed eye contact and modeled play. Ms. Rogers observed Student ride a tricycle after observing peers riding during unstructured time. He ran around the playground after seeing others do so. Eventually, he began to play chase with peers during recess and lunch. Classroom staff provided Student with opportunities to interact with typically developing peers during unstructured times, which he did. He joined in their circle time and lined up for recess. In Ms. Gonzalez' class, Student played with toys and kinetic sand, and learned to take turns with peers.

Student did not demonstrate that his social skills declined or that Garvey failed to offer an appropriate program to meet his needs in this area throughout the relevant time frame.

Adaptive and Daily Living Skills

Student did not demonstrate that he required specific goals in the areas of toileting or feeding. Such daily living skills were embedded in the functional curriculum of Student's moderate to severe special day class.

Student argues that he regressed in adaptive or daily living skills in the areas of toileting and feeding. Student relies on scores from the Vineland in support of his argument. Student's standard scores were low in Garvey's 2015 and 2017 assessments.

Similarly, Student scored low using Mother as the sole reporter in Dr. Freeman's 2018 assessment. Again, Dr. Freeman did not explain differences between the Vineland she used in 2018 and earlier instruments used by Garvey. Moreover, Mother's responses did not provide a picture of how Student functioned at school.

Using the Brigance, Garvey demonstrated progress between testing results in 2015 and 2017 in the area of daily living skills. Student did not demonstrate toileting or feeding skills in 2015 assessments. He scored in the one year to three year range in 2017 testing. During the last semester of the 2016-2017 school year, Student developed toileting habits of pulling his pants down and up independently. He removed soiled pull-ups when wet. He ate some foods sent to school but did not like to touch his food.

By January 2018, Student toileted independently but needed to be reminded to wash his hands. He continued to require help eating and drinking. Garvey developed a goal for independent eating and drinking. By January 2019, Student was able to eat independently using his hands and a spork, as long as his food was cut into small pieces. Student did not drink independently at school.

Student also argued that he began urinating in class and on the playground during the 2018-2019 school year and this showed regression. Dr. Freeman opined that urination was a form of behavior or protest. Ms. Schwandt did not agree that the behavior showed regression. Rather, she recommended a medical evaluation to rule out an underlying physical issue. Overall, Student's behaviors were consistent throughout the school year, which tended to show he had not regressed. The weight of the evidence demonstrated that Student continued to use the bathroom independently in spite of the classroom urination issue.

Student progressed appropriately in light of his circumstances. He did not meet his burden of proving that Garvey failed to offer appropriate goals, supports, services, or placement to address his daily living skills needs.

Academics and Placement

Student argues that, since he met none of his academic goals at the time of the January 2019 annual IEP, Garvey failed to offer him a FAPE. Further, Student argues that he lacked learning readiness skills and regressed, as evidenced by Dr. Freeman's assessment and testimony. For these reasons, Student argued that he required placement in a one-on-one environment learning through applied behavior analysis for 40 hours per week, for one year.

The evidence demonstrates that Student made consistently slow progress toward his goals throughout the statutory time frame. His progress was commensurate with the nature of his disability. When Student first came to Garvey, he had no academic skills. Over time, he developed right hand dominance, increased his attention to preferred and non-preferred tasks, toileted independently, ate independently, developed eye contact, and began demonstrating joint attention.

At the time of the January 2019 annual IEP, Student met his goal for joint attention, a newly emerging skill. How Student met the goal underscores the degree of Student's cognitive delay and slow development. During Garvey's 2015 initial assessment of Student, he avoided eye contact and looked away when someone made eye contact with him. During his 2017 triennial assessment, Ms. Ho observed Student using eye contact as a means to communicate. He ran along with peers during recess, making eye contact, and laughing. Two years later, in 2019, Student began demonstrating joint attention under specific conditions. During speech sessions with Ms. Noble, Student made eye contact when presented with a highly preferred item, which Ms. Noble held close to her face. He then demonstrated the ability to look at the object, Ms. Noble and back at the object.

Dr. Freeman assessed Student in 2018. She had not worked with Student, reassessed Student, or observed him in his classroom since. She testified, and her report

confirms, that she had difficulty developing a rapport with Student. Because of Student's failure to engage in many of the tasks demanded during assessment, she was unable to obtain a clear picture of Student's abilities. On the other hand, staff working with Student developed a greater understanding of his needs and observed his development over time.

Dr. Freeman opined that Student did not have learning readiness skills and required an intensive one-on-one 40-hour per week applied behavior analysis program. She did not trial Student's ability to attend to such a program. She did not explain how Student's ability to attend for 30 minutes on a preferred task would translate into attending during a full time one-on-one program. She did not render any opinions on Student's ability to develop learning skills during such an intense program, given his developmental delays. Nor did she describe any research supporting the appropriateness of such a program for a child as cognitively impaired as Student. For all of these reasons, Dr. Freeman's opinions carried little weight and did not support Student's arguments.

The weight of the evidence demonstrated that Student made slow, steady progress, over time and that Garvey appropriately addressed his academic needs. Student did not meet his burden of proof on the issue of academics.

Student did not argue, or present evidence, that his placement in a moderate to severe special day class throughout the statutory period was overly restrictive. Instead, he argues that he requires a more restrictive environment in order to make progress. The only evidence Student presented on placement was Dr. Freeman's opinion regarding a one-on-one applied behavior analysis program. At hearing, the evidence was presented in the form of remedy for past deprivations of a FAPE, rather than as proof of what Student should have been receiving throughout the relevant time frame. The weight of the evidence demonstrated that Student made progress appropriate in

light of his circumstances from February 28, 2017 through February 28, 2019. He made progress toward and met goals in an environment where he developed skills to take turns, share, and play with peers. Student did not prove that he required a more restrictive environment in which to learn. Neither did he prove that he should have been offered any other placement or that Garvey's placement failed to offer him a FAPE during the relevant time period. Student did not meet his burden of proof on the issue of placement.

Health

Student argues that Garvey failed to provide appropriate health services due to a single peanut allergy incident and a lack of eczema medication. Student's arguments lack both an evidentiary and legal basis.

During the relevant time frame, Garvey was aware of Student's peanut allergy, developed a health plan, and provided staff training to address the allergy. A single incident involving peanuts occurred during the 2017-2018 school year, when an aide brought popcorn into class during a break. The popcorn had apparently been manufactured near or around peanuts. Ms. Gonzalez had the aide immediately remove the popcorn. Student did not come into contact with the popcorn. Student had no allergic reaction. The school nurse recommended administering Benadryl out of an abundance of caution and Parents were notified. Student argues that, simply because the incident happened, Garvey must have failed to properly train staff. The argument is unsupported by the evidence, which showed the school nurse had trained staff regarding Student's health care needs and medication use. Student presented no evidence tending to disprove these facts.

Next, Student vaguely references a lack of eczema medication in his classroom during spring 2017. Again, the evidence does not support Student's argument. Ms. Rogers testified she called Mother about Student's discomfort caused by his skin

problems around the time she filled out assessment rating scales in December 2016. She explained that staff could only administer medication if provided through the school nurse pursuant to a health plan. A health plan for eczema was not in place at that time. Moreover, December 2016 was outside the statutory time frame.

Student presented no evidence that Garvey failed to offer appropriate health services during the relevant time period.

ISSUE 5: FAILURE TO IMPLEMENT

Student argues that Garvey failed to implement the assistive technology component of his March 5, 2018 IEP because he had difficulty understanding and using the device and the team did not discuss the problems until October 24, 2018. Garvey argues that it implemented use of the device in a timely manner, beginning in May 2018.

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

progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn, supra*, 502 F.3d at p. 822.)

Garvey offered Student trial use of a device with TouchChatHD software to address functional communication needs during the IEP meeting held on March 5, 2018. Mother signed consent to implement the IEP on March 13, 2018. Subsequently, Garvey set about obtaining the device, a holder, and the software.

Student's trial of the device began on May 5, 2018, after Ms. Strom trained staff on use of the device. An IEP team meeting to review results of the trial and make adjustments had been scheduled for May 31, 2019. Ms. Strom scheduled training with Mother and Student after the IEP meeting. Mother cancelled the meeting and training. Ms. Strom was not able to obtain mutually agreeable dates to reschedule the IEP meeting or training before the end of the school year.

Student began using his device at the beginning of the 2018-2019 school year. In October 2018, Ms. Taylor spent approximately two hours providing staff training while working with Student on the device. Training included classroom staff and Student's speech language pathologist.

Garvey attempted to reschedule the device review meeting for September, but Mother could not attend a meeting until October 24, 2018. Ms. Taylor continued attempts to train Mother and home providers to use the device with Student. Mother had not signed the release to send the device home until after the October 24, 2018 IEP meeting. Thereafter, Mother did not agree to a training date until January 2019.

Garvey was not responsible for any delay in training Mother or Student's use of the device at home. Any delay in trial of the device at school was not material. Services provided to Student did not fall significantly short of that offered in his IEP. He continued to use pictures, gestures, and signs to communicate pending receipt of the device. Student presented no evidence that he failed to progress in his educational

program.

Student did not prove Garvey materially failed to implement his IEP as to assistive technology.

REMEDIES

REMEDY – INDEPENDENT EDUCATIONAL EVALUATIONS

ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a denial of FAPE, student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.)

Garvey effectively denied meaningful parental participation by failing to respond to Parents' request for independent educational evaluations, at all. It would be unfair to allow Student no relief for Garvey's procedural violation and only stand to encourage future violations. At the same time, Student did not demonstrate a deprivation of educational benefit in the areas of speech and language, functional behavior, occupational therapy, and assistive technology, over the statutory timeframe. The purposes of the IDEA would not be served by ordering blanket assessments in all requested areas given the underlying fact of this matter. Student's January 2017 speech and language assessment was the only assessment not reviewed during the course of this hearing. Given the age of the assessment, an independent speech and language assessment functions as an appropriate equitable remedy in this matter.

REMEDY - STAFF TRAINING

Staff training is an appropriate compensatory remedy in this case. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025,1034.) Appropriate relief

considering the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.*; see also, *Student v. Reed Union School Dist.* (Cal. SEA 2008) Cal. Ofc. Admin. Hrngs. Case No. 2008080580 [requiring training on predetermination and parental participation in IEP's].)

Here, Garvey special education teachers, aides, services providers and IEP administrative designees were on notice of Student's tantrum behaviors moving into the statutory period, through the 2017-2018 school year. Yet not one of them recommended a functional behavior assessment be conducted. Student's January 2016 IEP identified behavior goals as a means of addressing behaviors impeding learning. However, none of Student's IEP team members proposed behavior goals during the statutory period. Most significantly, Student's providers did not recognize that responding to Student's tantrums by allowing him to escape non-preferred activities served to reinforce this behavior.

Therefore, to ensure students within Garvey School District receive appropriate behavior supports and services, training is an appropriate remedy.

ORDER

1. Garvey shall fund at public expense independent educational evaluations of Student in the area of speech and language.
 - a. Garvey shall initiate the independent evaluation process within 30 calendar days of the date of this decision.
 - b. Garvey shall pay for up to three hours, at the assessor's customary rate for attendance at an IEP meeting to discuss the assessment results.
2. Garvey shall, before the end of the first semester of the 2019-2020 school year, provide three hours of training to its preschool and elementary school staff.
 - a. Trainees shall include all teaching staff and paraprofessionals or aides, school

- administrators including principals and vice principals, school psychologists, behaviorists, and related service providers.
- b. The training shall focus on general principles of behavior intervention, including identifying behavior needs, developing behavior goals, when to refer students for functional behavior assessments, positive behavior reinforcement, development of behavior plans, and implementation of behavior plans.
 - c. Qualified professionals who are either employed by or contracted with Garvey, or a private provider selected by the school district, or its legal counsel, shall provide the training.
 - d. This Order does not preclude Garvey from offering this training to other staff or at other schools within the school district.
3. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue Two as to the timing of the functional behavior assessment and Issue Three as to failure to respond to requests for independent educational evaluations. Garvey prevailed on Issue One, Issue Two as to the occupational therapy assessment, and Issues Four and Five.

RIGHT TO APPEAL

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

DATED: September 16, 2019

/s/

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings