

OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

EAST SIDE UNION HIGH SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2019010414

DECISION

The East Side Union High School District filed a request for due process hearing with the Office of Administrative Hearings on January 11, 2019, naming Parents on behalf of Student. On January 25, 2019, OAH granted a continuance at Student's request.

Administrative Law Judge Charles Marson heard the matter in San Jose, California, on March 19, 20, 21, 26, 27 and 28, 2019.

Eliza J. McArthur, Attorney at Law, represented East Side and was assisted by Crystal Tidwell. Dr. Barbara Moore, East Side's Director of Special Services, represented East Side.

Nicole Hodge Amey, Attorney at Law, represented Student and was assisted by Tanya Whitcock. Student was not present. Student's Father attended on some hearing days on behalf of Student. When he was present and during his testimony, Father received the assistance of a Spanish language interpreter.

On March 28, 2019, at the parties' request, OAH continued the matter to April 22, 2019, for closing briefs. On that day the parties filed closing arguments, the record was

closed, and the matter was submitted for decision.

## ISSUES

1. May East Side exit Student from special education and related services because he is no longer eligible for them in any category?
2. Did East Side provide Parents with meaningful participation in the individualized education program process at the IEP team meeting on December 4, 2018?<sup>1</sup>
3. Was the assessor who conducted the independent educational evaluation of Student's speech and language actually an employee of East Side?
4. Were East Side's triennial assessments appropriate such that Student is not entitled to independent educational evaluations of his speech and language or psychoeducational status at East Side's expense?<sup>2</sup>

## SUMMARY OF DECISION

The Decision finds that the speech and language assessment conducted by Dr. Yvana Uranga-Hernandez was a component of Student's triennial evaluation and not an

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<sup>1</sup> In the Order Following Prehearing Conference issued on March 11, 2019, this issue included whether East Side provided Parents meaningful participation in an IEP team meeting on May 17, 2018. At the beginning of hearing, East Side withdrew its request for a ruling on that meeting.

<sup>2</sup> At the beginning of hearing East Side also withdrew the following issue: Was East Side's independent educational evaluation of Student's speech and language in compliance with the requirements of section 300.502 of Title 34 of the Code of Federal Regulations?

independent educational evaluation. Accordingly, the assessment's legal compliance was considered as part of Issue 4.

The Decision finds that East Side's triennial assessments, including both the psychoeducational and speech and language assessments, were legally compliant except in minor ways that had no adverse effect on Father or Student. Accordingly, Student is not entitled to an IEE in either area at public expense.

The Decision finds that East Side gave Parents a meaningful opportunity to participate in the IEP process at the December 4, 2018 meeting, and that Father did so. He spoke scores if not hundreds of times, took the opportunity to express his views on his son's condition and treatment at length, criticized East Side's assessments, and advocated for assessments he had obtained.

The Decision finds that Student is no longer eligible for special education and related services due to a language or speech disorder or in any other category, such as autism, other health impaired, specific learning disorder or emotional disturbance. This conclusion is supported by assessments, by the observations and testimony of Student's teachers and other school staff, by contemporaneous documents and by Student's success in school. No professional testified that he was eligible for any reason.

The Decision does not make a determination regarding Dr. Hernandez's employment status. Whether she was a district employee or an independent contractor has no effect on the outcome of this Decision. An inquiry into her employment status for any reason not related to special education is outside OAH's jurisdiction.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is a 17-year-old boy who has been receiving special education and related services in the category of Language or Speech Disorder. He is a junior at

East Side's Mount Pleasant High School and is expected to graduate with a diploma in May 2020. He is bilingual; he speaks Spanish at home and English at school.

2. At IEP team meetings on May 17 and December 4, 2018, East Side considered exiting Student from special education and related services on the ground that he no longer was eligible for or needed them, but was unable to obtain Parents' participation in a discussion of eligibility. On December 12, 2018, East Side informed Parents by prior written notice that it sought to dismiss Student from special education and related services. It then filed the instant request for due process.

#### LANGUAGE OR SPEECH DISORDER

##### East Side's Evidence

##### STUDENT'S EARLIER ELIGIBILITY

3. Student entered special education at age four after a speech and language assessment revealed serious delays in his expressive and receptive language. He was then an English language learner. In preschool he appeared overly sensitive to noise or sensory stimulation and was easily distracted. He also had some difficulty socializing with peers. Cognitive testing showed him to be at or below the first percentile in expressive and receptive vocabulary.

4. In his early school years, Student was eligible for special education in the category of Speech and Language Impairment (as it was then known). He was also eligible in the category of Specific Learning Disability because of a severe discrepancy between his nonverbal reasoning skills and academic performance, and a processing disorder in his cognitive ability of expression. He received speech and language therapy and specialized academic instruction (resource support) in those years. According to Parents, he was also diagnosed in 2006 and 2009 as having Attention Deficit Hyperactivity Disorder.

5. In the fifth grade, Student began to demonstrate significant improvement in his academic and social performance. By seventh grade he scored in the average range in all areas and subtests of the Woodcock-Johnson Tests of Achievement.

6. In 2014, when Student was 12 years old and in the 7th grade in the Alum Rock Elementary School District, he was assessed for a triennial review. A speech and language pathologist reviewed Student's records, spoke to him and his teachers, and administered a battery of standardized tests. The assessor found that Student was "functioning within the mean in the basic foundation in Spanish and English oral language abilities."

7. As part of the same triennial review, a school psychologist reviewed Student's records, interviewed him and his parents and teachers, and administered several normed assessment measures. Cognitive testing showed Student in the average to low average range of intelligence. The psychologist concluded in his report that "a significant discrepancy does not exist between [Student's] cognitive abilities and his standard achievement scores in reading, mathematics, or written language." Student's Father protested these findings, and Alum Rock's IEP team allowed Student to remain eligible in the category of speech and language disorder. It no longer found him eligible due to a specific learning disorder, but continued to offer specialized academic instruction.

#### STUDENT'S TRANSITION TO HIGH SCHOOL

8. Student entered East Side's Mt. Pleasant High School as a freshman in August 2017. His IEP from Alum Rock provided him 60 minutes a week of specialized academic instruction and 30 minutes a week of group speech and language therapy outside of class. At the time of Student's first IEP from East Side on October 6, 2016, he was receiving 4 A+ grades and 2 A- grades in his first semester of high school. His speech therapist reported that his word choice was age-appropriate, and social

language checklists from his teachers revealed no concerns in the area of pragmatic language. His teachers found him "one of their highest functioning students in class" and did not see any difficulties that could warrant further language therapy or being pulled out of class. The IEP team recommended a speech assessment "to re-determine his needs." In the meantime, it continued his specialized academic instruction but reduced speech support to 30 minutes a month of "consultation to staff and student." It also offered accommodations, including checks for understanding, an opportunity to re-take failed tests, simplified complex directions, re-teaching or review in small group or individually, nonverbal cues for redirection, and support in organizing his binder.

9. Student thrived in his freshman year of high school. At a meeting on May 12, 2017, teachers reported that Student was receiving A's in all his classes except Computer Science, in which he had been marked down due to a behavior incident. His English teacher reported some failing grades on assignments, but overall stated he was ahead of most students and should take the Honors English class as a sophomore. Father expressed concerns that Student might be held back by ADHD, emotional difficulties or autism, and the IEP team developed and gave Father an assessment plan for the upcoming triennial assessments that he did not sign and return until the next school year, on October 5, 2017. The IEP team continued Student's 30 minutes a month of individual speech support. Student did not receive specialized academic instruction after his freshman year.

10. The IEP team met again in the fall of Student's 10th grade year, on October 18, 2017, for his annual meeting. Teachers reported he was at or above grade level in all classes, was strong in reading and writing, played alto saxophone in the band, was on the soccer team, was earning an A- or B+ in the English Honors class ("our most rigorous sophomore English class") and was interested in a career in computer programming or engineering. They also reported he made minimal use of his

accommodations. He had been late with some assignments, which Father attributed to his ADHD. However, he was respectful and friendly in class, was not a behavior problem, was very social and well-liked by peers, was able to work well in small or large groups, had a positive attitude and put forth his best efforts. The teachers had no concerns about his social or emotional status. The team recommended a comprehensive speech and language evaluation to determine his strengths, weaknesses and eligibility. Student's speech therapy and accommodations were not changed.

#### THE RETENTION OF DR. URANGA- HERNANDEZ

11. By the time of the October 2017 IEP team meeting, East Side had not yet assessed Student's speech and language or psychoeducational status. The team agreed to reconvene the meeting when those assessments were complete.

12. Father insisted that the speech and language assessment be performed by a bilingual speech pathologist, and he requested that East Side select one from its staff but not one from Mt. Pleasant. In a prior written notice, East Side denied that request on the ground that Student was fluent in English and had no discernible need for an assessment in Spanish. Father continued to request a bilingual speech and language assessment, either from a district assessor or as an IEE. His last email on the subject asked that he be informed when the district provided a bilingual assessment "from a district assigned SLP . . . or authorize[d] an independent IEP Evaluation IEE (Outside the School District at the district expense)." Eventually East Side agreed to a bilingual assessment, without specifying whether it was a district assessment or an IEE.

13. East Side did not give Parents a list from which a speech and language assessor could be selected or a copy of the criteria used by the local Special Education Local Planning Area in selecting independent assessors. Dr. Barbara Moore, East Side's

Director of Special Services,<sup>3</sup> explained at hearing that there were no bilingual speech and language pathologists on the SELPA list, and she did not know of any in the area other than those employed by East Side.

14. Dr. Moore, who is also a speech and language pathologist, arranged the speech and language assessment. She testified at length at hearing and was thoroughly familiar with Student's records and history and her many interactions with Father. Her testimony was careful, specific and detailed, and no weaknesses in it emerged during extensive cross-examination. She was a credible witness and her testimony is given significant weight here.

15. Dr. Moore did not know any speech and language pathologists in the area who were bilingual in Spanish except those employed by East Side. However, as a speech-language pathologist herself she was professionally acquainted with Dr. Yvana Uranga-Hernandez (Dr. Hernandez), a professor at Biola University in La Mirada. Dr. Moore contacted Dr. Hernandez, who agreed to do the bilingual assessment. Both Dr.

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<sup>3</sup> Dr. Moore received a bachelor's degree in communication disorders and linguistics in 1980, a master's degree in communication disorders in 1982, and a doctorate in educational leadership in 1998. She has an administrative services credential and a clinical rehabilitative services credential. She began her educational career teaching a special day class, and later was a resource specialist, a program specialist, and the director of special education in several different school districts. She has published many articles and given many presentations on speech disorders in children and related topics. Dr. Moore is a state-licensed speech pathologist and has a certificate of clinical competence from the American Speech-Language-Hearing Association (ASHA). She has held her present position since 2015.



Moore and Dr. Hernandez believed the assessment was to be an independent educational evaluation.

16. Dr. Hernandez's credentials were especially strong, and Father was initially pleased that East Side had selected her for the bilingual speech assessment. Dr. Hernandez is an associate professor of communicative disorders at Biola. She obtained a bachelor's degree in communicative disorders in 1996 from California State University at Fullerton, a master's degree in speech pathology in 1999 from California State University at Los Angeles, and a doctor's degree in educational studies from Biola in 2016. Dr. Hernandez is a state-licensed speech pathologist and has a certificate of clinical competence from the American Speech-Language Association, as well as a clinical rehabilitative services credential. She has worked as a speech and language pathologist, a special education home teacher, a severe disorders of language classroom teacher, a program specialist in the El Rancho Unified School District, and as the clinical director of Biola's speech-language clinic. She has authored or co-authored numerous articles on speech and language pathology and has delivered many presentations around the state, some of which earned awards. She has taught such courses as Childhood Language and Literacy Disorders, and Multicultural Issues in Communicative Disorder. She has also authored or co-authored many presentations on autism, and has taught a course entitled Childhood Autism and AAC [Augmentative and Alternative Communication]. In addition to her professorship, Dr. Hernandez also is a speech-language consultant and an assistive technology consultant.

17. Dr. Moore introduced Dr. Hernandez in an email to Father. The email informed Father that Dr. Hernandez was employed by Biola University, and discussed some of her credentials. It did not directly address whether the assessment was an IEE.

18. Father agreed to the retention of Dr. Hernandez by East Side. He communicated with her by email in Spanish about Student, and sent her a package

containing some of his medical records. When Father met Dr. Hernandez in person, he brought a binder of Student's educational records with him, and he discussed Student's educational history and records extensively with Dr. Hernandez. He sent her several reports in another email. Dr. Hernandez did not need the educational records he offered her because she already had them from East Side.

#### DR. HERNANDEZ'S BILINGUAL SPEECH AND LANGUAGE ASSESSMENT

19. Dr. Hernandez evaluated Student on February 7, 8 and 9, 2018, spending one full day with him and then another morning and another afternoon. She provided a written report to East Side which she did not date, but which East Side received and sent to Father in March 2018. She conducted the assessment in English and Spanish.

20. For her assessment and report, Dr. Hernandez reviewed Student's records and summarized his family history, language background, health and developmental history, and educational history. Dr. Hernandez administered the Comprehensive Assessment of Spoken Language, Second Edition (CASL-2); the Clinical Evaluation of Language Fundamentals, Spanish Edition (CELF-4); the same measure in English (CELF-5); the Expressive One-Word Picture Vocabulary Test in Spanish, Fourth Edition; and the Receptive One-Word Picture Vocabulary Test in Spanish, Fourth Edition. On every one of these measures, Student scored in the average or above average range compared to his peers.

21. Dr. Hernandez observed Student's demeanor and behavior while she assessed him. He walked right up to her, shook her hand, and introduced himself with appropriate eye contact. He conversed easily about many different topics and was able to follow all directions. "Throughout the entire assessment time," she reported, "[Student] was very appropriate, responsible and dedicated to the task at hand."

22. Dr. Hernandez interviewed Parents in Spanish for an hour. She also interviewed Student's case manager, who said reading and writing were Student's

strengths; Student's speech therapist, who said she saw no evidence of a speech-language disorder; and his English teacher, who said Student had no difficulty in his class. She sent a questionnaire to Student's teachers and obtained answers from his math teacher, band teacher, and chemistry and engineering teacher (who taught him in two classes), and received similar responses.

23. Dr. Hernandez reviewed a written work sample from Student's Honors English class which he had titled: "Why Othello is an Honorable Man?" Student explained it to her at length. She then observed Student throughout an English class. She heard him talk with peers before class. During the class, she saw him perform "just as the other students." She concluded that he felt very comfortable in his class and was quite able to engage in the work assigned. She added: "No communication deficits or difficulties with language, including interpersonal communication or academic language challenges, were observed."

24. In her report, Dr. Hernandez observed that although Student sometimes used accommodations like retaking tests, there were "no assessment measures that seem to indicate a need for these." Father was the only person she interviewed who reported that Student had communication difficulties. He had told her that Student exhibited a tic while speaking, but in three days with Student, she looked for it but did not find it. Father told her that Student had a very limited conversational repertoire, but she found, to the contrary, that he discussed many different topics, all of which were appropriate for a teenage boy. She concluded:

All assessment tools and procedures indicate that [Student] has average to above average language skills in all areas of language including his pragmatic skills. There are currently no indications of any other area of need such as fluency, voice, or speech, as all are deemed to be within average

limits by clinical judgment through observation.

....

[Student] is able to access the general curriculum. His current cumulative GPA was a 3.85 and is on track for graduation. He has primarily As in all of his general education courses. He is able to participate as a full member of his English honors class . . . and per teacher questionnaire this is the same for all of his other classes. His written work samples also demonstrate an ability to put coherent and organized thoughts into written word.

25. Finally, Dr. Hernandez concluded that Student did not have a language or speech disorder that would qualify him for special education. Overall, she found him “a respectful, polite and . . . intelligent young man who should be very successful in his academic career” without speech and language support.

26. Dr. Hernandez testified at hearing in support of these conclusions. Her testimony was careful, showed thorough familiarity with Student and his records, and reflected a thoughtful evaluation of his abilities and needs. Dr. Hernandez’s opinions were not damaged by cross-examination. She was a credible witness, and her opinions are given substantial weight here.

#### The Opinions Of Student’s Speech Therapists And His Teachers

27. Trinnie Calabresse has been a speech and language therapist for East Side for three years. Student has been on her case load since August 2018 in order to receive the thirty minutes a month of consultation either to him or his teachers called for in his

governing IEP, and in order to work on his speech goal.<sup>4</sup> Ms. Calabresse testified that Student had long since mastered his goal, and that she has to search for assignments to give him because he “knows his stuff really well.” She had sometimes just met with his teacher instead. Suzy Chen, Student’s speech therapist in the previous school year, told Dr. Hernandez that in her opinion there was no evidence that Student had a speech-language disorder.

28. Ms. Calabresse has been providing therapy to Student once a month by pulling him out of band class, as requested by Father to avoid interruption of academic classes. She testified that she recently was required to provide two make-up sessions of speech therapy, but Student did not want to participate; he asked her to consult with his teachers instead. He preferred to stay in class.

29. Julia Hamak is Student’s general education teacher for both his chemistry and engineering classes. She testified that his speech is typical and unremarkable; that he is perfectly capable in expressive language; and that he knows and uses a typical number of words.

30. Aaron Jensen is Student’s band teacher. He testified that he had never noticed that Student had any kind of speech impairment and was surprised to learn he was receiving speech therapy. He testified: “I can understand every word he says.”

31. For her assessment, Dr. Hernandez distributed a questionnaire asking all of Student’s teachers whether they noticed any sort of speech and language difficulties in class. All replied in the negative.

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<sup>4</sup> His goal, from an August 2015 IEP, was to present an argument for a claim, supported by logically organized evidence and a concluding statement, in 3 of 4 trials with 80 percent accuracy.

## Student's Evidence Of Language Or Speech Disorder

### FATHER'S TESTIMONY

32. Father repeatedly informed assessors, and testified at hearing, that Student's speech difficulties are apparent in conversations with him. He believes Student has a "very difficult" time conversing. According to Father, Student never uses pronouns correctly and does not use past tense verbs. He looks down or away rather than at someone conversing with him, speeds up when he is talking, has a verbal tic during which he repeats words two or more times, and needs repetition of words he does not understand. He has difficulty learning new vocabulary. Father asserted at hearing that Student has these difficulties in English and Chemistry classes in which there are a lot of new words and concepts, although his source of knowledge for this claim is unclear because he has never observed Student in those or any other high school classes.

33. Student did not present any speech therapist as a witness, or call any witness in any discipline who would give a professional opinion that he still had a speech and language disorder or that he needed special education. Father was the only witness who expressed those opinions.

### MS. YOST'S PRIVATE SPEECH AND LANGUAGE ASSESSMENT

34. On August 17, 2018, Father took Student to Defining Voice, a private speech and language provider in San Jose. Susan Yost, the organization's speech and language pathologist, assessed Student and found that he demonstrated impairments in expressive language, receptive language, and social/pragmatic language. She wrote a report with two pages of analysis and one page of recommended goals. Father then employed Defining Voice for private speech-language therapy supported by insurance, and gave the report to East Side, arguing that it showed Student was eligible for special education due to a language and speech disorder.

35. Ms. Yost's report is not given significant weight here. She did not testify at hearing. Her report suggests that Father played an outsized role in the assessment, acting as Student's "informant" during testing. Ms. Yost accepted Father's representations that Student was autistic and "exhibits delays in academic, expressive language, receptive language, and social language skills."

36. Ms. Yost administered a single standardized test to Student, the Test of Pragmatic Language, Second Edition. On that measure Student placed in the second percentile in a normed population of his peers. Ms. Yost concluded that he had "difficulty demonstrating basic comprehension of cognitive perspectives . . ." At hearing, Dr. Hernandez persuasively opined that administering just one standardized test to determine a speech-language disorder was poor practice.

37. Ms. Yost also obtained a 25-utterance conversational speech and language sample by asking Student open-ended questions, and perceived that he had a mean length of utterance of six words. At hearing, Dr. Hernandez established that measuring speech and language delays by mean length of utterances reliably required a 100-utterance sample at minimum, and a 200-utterance sample would be more consistent with best practices. She correctly pointed out that state law requires a minimum of 50 utterances for such a test in order to determine eligibility for a language or speech disorder. (See Cal. Code Regs., tit. 5, § 3030, subd. (11)(D)(2).) In addition, Dr. Hernandez established that using mean length of utterance is an effective way to measure speech delay only in children up to age six; after that, the results vary too much according to vocabulary and type of sentence.

38. Dr. Hernandez also pointed out in her testimony that Ms. Yost did not conduct a record review or a classroom observation, and relied entirely on Father for a medical history. Dr. Hernandez persuasively testified that Ms. Yost's assessment was inaccurate and painted an unreliable picture of Student that was at odds with all she had

learned about him. The detailed goals Ms. Yost proposed for Student were unsuitable because he could already do everything they required. Dr. Hernandez's criticisms of Ms. Yost's assessment were persuasive, and no witness contradicted them at hearing. Ms. Yost did not appear at hearing to defend her assessment, and Father refused to give East Side permission to contact her during the IEP process. East Side acted reasonably in disagreeing with her findings. Her assessment was not persuasive.

39. The preponderance of evidence showed that Student does not have a language or speech disorder.

#### OTHER POSSIBLE GROUNDS FOR ELIGIBILITY

##### Mr. Coleman's Triennial Psychoeducational Assessment

40. In fall 2017, Dr. Moore asked William Coleman to conduct Student's triennial psychoeducational assessment. Mr. Coleman was highly qualified for the task. He received a master's degree in clinical child psychology and counseling from California State University at Hayward in 1990. He is a state-licensed educational psychologist and has a pupil personnel services credential. He has 30 years of experience as a school psychologist for East Side and has conducted thousands of assessments, many of them in high schools, non-public schools and juvenile facilities, and for the Marin County Office of Education. He has been trained extensively in autism intervention, educationally related mental health services (ERMHS) assessments and crisis intervention. From 1989 to 2006 he provided mental health therapy or counseling to emotionally disturbed students. In 2015 he received an award for his work from Legal Advocates for Children and Youth, which represents young people in foster care and juvenile courts on educational matters.

41. In addition to conducting the usual psychoeducational assessment, Dr. Moore asked Mr. Coleman to investigate specific areas. Father had often asserted to



East Side staff that his son had ADHD and was therefore qualified for special education in the category of other health impaired, and in addition that he had Autism Spectrum Disorder, a specific learning disability, and was emotionally troubled. Mr. Coleman addressed all of these in his 50-page assessment report, which was unusually thorough.

42. For his assessment and report, Mr. Coleman reviewed Student's cumulative records, including his educational and developmental history starting with kindergarten, noting his early difficulties with speech and attention. He reviewed numerous previous evaluations back to 2006. Mr. Coleman gave Student a questionnaire and interviewed him. He gave Father various rating scales and interviewed him as well. He conducted a classroom observation and reviewed teacher progress reports. He administered a variety of standardized tests that included the Wechsler Intelligence Scale for Children, Fifth Edition; the Wechsler Individual Achievement Test, Third Edition; the Comprehensive Test of Phonological Processing, Second Edition; the Test of Visual Perceptual Skills, Fourth Edition; and the California Verbal Learning Test, Children's Version. While administering these measures, Mr. Coleman kept the publishers' instructions in front of him on his computer screen and followed them.

43. Mr. Coleman also administered the Autism Spectrum Rating Scale, the Vineland-3 Adaptive Behavior Scales, the Comprehensive Executive Function Inventory, and the Connor Behavior Rating Scales. He obtained Father's answers on a questionnaire concerning Student's developmental history and on a Parent Executive Functioning Inventory. He also reviewed Student's mental health status and attendance.

44. Mr. Coleman assessed Student in English, and observed that Student "has a history of academic success in classes taught solely in English and there is no evidence that he requires instruction in Spanish." While assessing Student, Mr. Coleman found him cooperative and attentive, with a firm handshake and adequate eye contact. He was enthusiastic about being tested. His activity level was age- and situation-appropriate.

His expressive language was clear, and he followed the conventions of social rules of communication, including appropriate phrasing and turn taking. His mood was stable and appropriate to the circumstances. Mr. Coleman did not observe any unusual habits, mannerisms or verbalization. Student told Mr. Coleman during his assessment that “he has ‘lots’ of friends. He hangs out with them at brunch and lunch.” Every time he came to Mr. Coleman’s office he was accompanied by friends.

45. On the Wechsler Intelligence Scale, Student had occasional difficulty, but overall scored in the average range, and above average on some subtests. He displayed a full scale IQ of 107, which was in the average range. His working memory was relatively weak, but did not interfere with his verbal comprehension. His visual perceptual skills were somewhat low compared to his other abilities, but his fluid reasoning scores were very high and showed “a well-developed ability to abstract conceptual information from visual details and to effectively apply that knowledge.”

46. Mr. Coleman also tested Student’s processing speed, and found it “typical for his age.” His nonverbal skills, general ability and cognitive proficiency were all in the average range, as were his scores on the other measures Mr. Coleman administered.

47. Going beyond standardized measures, Mr. Coleman analyzed Father’s responses to the Vineland-3 Adoptive Behavior Scales. Since at least 2009, assessors had noted a wide divergence between Father’s view of his son’s skills and behavior, and the views of school personnel. Father’s responses to Mr. Coleman on the Vineland were consistent with that pattern. Father reported Student could never follow instructions with one action and two objects, or with two unrelated actions, or with three actions. He also reported that Student never used pronouns correctly and did not use past tense verbs. He could only occasionally use “and” in phrases or sentences, follow if-then instructions, respond to questions that use the word “when,” or say both his first name and last name when asked. Father also reported that Student only occasionally

understood that money is used to buy things, only occasionally used the toilet without help, and never tried to make friends with others his age.

48. The scores of Student's teachers on the Vineland-3 rating scales were sharply different from Father's scores, and much more positive. Some of Student's teachers reported that he was somewhat hyperactive and restless in class, and sometimes moved around the room to chat with peers when he should have stayed in his seat. But overall, the teachers found him in the average range in functional communication, daily living skills and socialization. They had no concerns about his use of the bathroom. His Advanced Band teacher wrote that he was a "great student," his PE teacher stated that Student was "a very normal student in my class," and his chemistry and engineering teacher described him as being overly chatty with other students but otherwise as having good social skills. The same dichotomy between Father's ratings and those of school staff pervaded the scores from Mr. Coleman's testing of attention, executive functioning and other areas.

49. Mr. Coleman routinely checks rating scale responses for "outliers"; something that does not make sense or that he perhaps did not explain properly. He noticed that the Vineland rating scale returned by Steven Nelson, Student's PE teacher, contained scores that were "uniquely low," although still in the low average range. Mr. Coleman was struck by an answer from Mr. Nelson that stated Student "could never say his first and last name." Thinking that might be an error, he asked Mr. Nelson if the rating was an accurate rating. (That was all he asked; he did not tell Mr. Nelson he thought his answer was wrong or that it conflicted with everything else he had learned except from Father.) Mr. Nelson responded that it was not an accurate statement, and asked him to send another Vineland rating scale. Mr. Nelson explained that many of the questions addressed things PE teachers do not really see, which was why he had marked

most of his responses “estimated.” Mr. Nelson’s second response was similar to the Vineland scales from the other teachers.

50. Mr. Coleman observed in his report that Student had a 3.9 grade average<sup>5</sup> at the time of assessment, even though he was taking 7 classes instead of the usual 6 and was in Honors English. He had only one behavior referral.

51. Mr. Coleman observed Student in a chemistry class for 40 minutes as he completed a project with a partner. The two were so intent on their project the teacher had to ask them to circulate and view the projects of others. When Student did so, he was “quite focused.” His interactions with other students were “similar to other students’ behavior as they reviewed their peers’ projects.” The chemistry teacher reported that this was Student’s typical behavior.

52. On an interview based on the Mental Status Review, Student admitted to occasional depression and stress during final examinations, and an occasional suicidal thought due to suffering an assault by another student the previous year. Another student had pushed him over; he hit his head, which required stitches. This incident caused him to seek counseling for a brief period. But Student told Mr. Coleman that he did not think these problems had negatively affected any area of his life such as school, home, peer relationships, family relationships or physical health. By contrast, Father’s ratings on the same subjects were frequently dire. Teacher responses placed Student in the average range in all areas.

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<sup>5</sup> Throughout Student’s educational records for the 2017-2018 school year, his grade point average is stated slightly differently depending on when in the school year it was examined. The final cumulative grade point averages set forth in the text below are from Student’s official end-of-semester transcripts. The minor differences are insignificant; every description of his grade point average was very high.

53. Mr. Coleman was a credible witness. His assessment was detailed and specific, and he was fully familiar with all its findings. He testified clearly and without exaggeration or apparent bias, and withstood extensive cross-examination well. His opinions are given significant weight here.

#### THE POSSIBILITY OF AUTISM

54. Father has long suspected that his son is autistic, and at IEP team meetings and at hearing produced letters from doctors that he claimed confirmed that diagnosis. His principal reliance was on a Kaiser Permanente report in June of 2006, when Student was four years old, in which a Kaiser physician diagnosed "suspect" and "probable" autistic spectrum disorder but referred Student elsewhere for a definitive diagnosis. There was no evidence that Father ever took Student for a definitive diagnosis.

55. Father also produced a February 2018 report from Dr. Roxanne Almas, a physician at Kidscope Assessment Center in San Jose, which diagnosed Student as having mild-to-moderate autism spectrum disorder. In a single visit in which she observed Student in the presence of Father, Dr. Almas accepted as established the many claims by Father that were refuted at hearing: that Student had a short attention span, was easily distracted, has difficulty understanding rules, taps on objects, makes humming noises, perseverates on a few topics, and the like. Based on this information and rating scales completed by Father and by Ms. Hamak, Student's chemistry teacher, and on observation of Student in the presence of his father, Dr. Almas found that Student displayed decreased eye contact, facial expressions, gestures and social reciprocity, and spoke in a monotonous tone, and concluded that he was on the autism spectrum.

56. Mr. Coleman established at hearing that Dr. Almas's report was seriously flawed. It shows that Father selectively gave Dr. Almas obsolete school documents but withheld from her more recent information. Dr. Almas was over-reliant on information

from Father. She used an inappropriate rating scale, the Vanderbilt Assessment Scale, which is not to be given to children beyond 12 years of age. Student was 15 years old when Dr. Almas saw him. Mr. Coleman also established that Father would not grant him permission to speak directly to Dr. Almas about her report. Father repeated that refusal at the December 4, 2018 IEP team meeting, offering instead to take written questions from East Side staff, deliver them to Dr. Almas, and return her written responses. East Side was therefore unable to make an independent evaluation of Dr. Almas's views. East Side acted reasonably in disagreeing with them.

57. Dr. Almas did not testify. No witness at hearing contradicted Mr. Coleman's criticisms of Dr. Almas's diagnosis or defended that diagnosis.

58. In his own assessment, Mr. Coleman administered several rating scales associated with a diagnosis of autism and reported that Student "does not have clinically significant symptoms associated with an Autism Spectrum disorder," nor did he display significant difficulties with behavior, social communication skills, or self-regulation. He reported that behaviors associated with autism "are seen frequently by [Student's] Father, but are not observed in a clinically significant way by any of his teachers." Student's teachers all placed him in the average or low range with respect to symptoms and behaviors associated with autism, meaning that they did not see those symptoms.

59. Mr. Coleman summarized his findings concerning possible autism as follows:

[Student's] assessment results do not indicate the presence of significant difficulties with verbal communication, nonverbal communication, or social interaction. He does not exhibit significant difficulties with engagement in repetitive activities, stereotyped movements, resistance to

environmental change, resistance to change in daily routines, or unusual responses to sensory experience that would require specialized academic instruction . . . .

60. Mr. Coleman also noted that the CASL-2 administered by Dr. Hernandez as part of her speech and language assessment showed Student in the average range in pragmatic language. Dr. Hernandez, who has considerable expertise in the area of autism, established that Student's demeanor and behavior during her two full days of testing did not show any of the characteristics of autism.

61. Two of Student's teachers confirmed at hearing that Student did not display typical symptoms of autism in their classes. Ms. Hamak, who taught him in both engineering and chemistry, saw that he was generally friendly with others; did not engage in tapping, humming, or other repetitive behaviors reported by Father; had good eye contact and an ordinary range of facial expressions and emotion; did not have a monotonous voice or little variation in pitch; and was comfortable conversing with peers and teachers.

62. Mr. Jensen, Student's band teacher, has had autistic students and is familiar with the way they often present. He saw none of those characteristics in Student, who concentrated better than his average students on a piece of music, switched easily from one score to another, had good eye contact, made no strange noises, had a normal rate of speech, no monotony in his voice, and did not engage in repetitive behaviors such as tapping.

63. The preponderance of evidence showed that Student does not have an autism spectrum disorder.

#### THE POSSIBILITY OF ADHD

64. Father often told IEP teams, and testified at hearing, that Student has a

diagnosis of ADHD from Dr. Richard Coolman, a pediatrician at Kidscope who saw Student in April 2009, when he was 7 years old. In his report of that visit, however, Dr. Coolman specifically avoided a diagnosis of ADHD on the ground that it was not apparent in his testing in more than one setting. In addition, Dr. Coolman's report was written so long ago it has little relevance to Student's eligibility in December 2018. In Dr. Almas's Kidscope assessment in 2018, she specifically declined to diagnose ADHD.

65. Mr. Coleman was careful to assess for ADHD. He obtained responses from Father and Student's teachers on the Comprehensive Executive Functioning Inventory, which revealed a typical disjunction between Father's view and those of school personnel. All teacher responses placed Student at least in the average range among his peers, except for a Low Average score in Inhibitory Control in chemistry class by Ms. Hamak, who had told Mr. Coleman that Student was restless and excessively chatty in class. The only evidence of impulsivity seen by Mr. Coleman was Student's frustration and anger when he apparently misunderstood the instructions for a timed laptop test and did poorly on a measure of hesitation.

66. Mr. Coleman noted in the summary of his report that Student's occasional inattention in class and excessive movement and socializing could be regarded as symptomatic of ADHD. However, Mr. Coleman concluded that this did not interfere with Student's education, so he was not qualified for special education in the area of other health impaired.

67. At hearing, all of Student's teachers who testified thought his occasional inattention was no worse than that of his peers. Ms. Hamak characterized Student's level of distraction in her chemistry and engineering classes as "typical" of her other students. Joe Lovato, Student's teacher in Honors English, thought Student lost attention no more than any other student in the class. Mr. Jensen, the band teacher, found him very



attentive in class. Ms. Perez, Student's case manager, established that Student's level of distraction was "completely normal" for teenage boys.

#### THE POSSIBILITIES OF SPECIFIC LEARNING DISABILITY AND EMOTIONAL DISTURBANCE

68. Mr. Coleman compared his assessment results regarding Student's intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation and mathematical reasoning, and did not find a severe discrepancy between his ability and any of his achievement scores.

69. He also analyzed Student's social emotional functioning. Student did not have an inability to learn or to develop and maintain satisfactory interpersonal relationships, his behavior was appropriate under normal circumstances, and he did not exhibit physical symptoms or fears concerning personal problems or school. His feelings of depression were fleeting, and he no longer had suicidal thoughts related to a past incident.

70. Mr. Coleman's overall conclusion was: "There appears to be no disability impacting [Student's] performance in general education to the degree that he requires specialized academic instruction." The evidence supported that conclusion.

#### LATENESS OF ASSESSMENT REPORTS AND MEETING

71. Father signed the authorizing assessment plan and gave it to East Side on October 5, 2017. Allowing for the Thanksgiving break, East Side should have held an IEP team meeting to review its assessments by December 11, 2017.

72. Mr. Coleman was slow in completing his report, and East Side was slow in ensuring that it was discussed at an IEP team meeting. Mr. Coleman finished all or nearly all of his assessment tests and information gathering in December 2017 and gave Father

a draft of his report before the end of the year, and later made at least two minor modifications at Father's request. However, he did not produce a final version until February 26, 2018.

73. Dr. Hernandez's assessment was not conducted until February 2018, so East Side scheduled an IEP team meeting for March 29, 2018, to discuss both reports, but Father cancelled it. Another meeting was set for April 27, 2018, but the hosting SELPA cancelled it. The report was finally discussed at a meeting on May 17, 2018.

74. East Side's delays in conducting the two assessments and holding an IEP team meeting to discuss them did not have any adverse effect on Father or Student. Father's conduct throughout these events was consistent with the purpose of prolonging and delaying any eligibility decision by Student's IEP team. His methods included having few dates available for IEP team meetings; proposing those dates and then cancelling the meetings scheduled to accommodate those dates; prolonging IEP team meetings with outbursts, threats to leave, perseveration on minor matters or irrelevancies, meritless legal arguments, attacks on the character and credentials of East Side staff, and walkouts; repeatedly claiming that new assessment information supported his position but not having the information immediately available to the IEP team; and insisting on unreasonable conditions for IEP team meetings, such as all-day meetings, four hours to present his position, a room away from the campus where most team members worked, the absence of any noise typical of a school, and the like. Father also filed numerous formal complaints with the school district, the California Department of Education and one or more federal agencies, and announced that he would attend no further IEP team meetings until his many pending local, state and federal complaints were resolved. By these techniques and others, Father successfully delayed any IEP team decision on Student's eligibility, and continues to do so. As long as Father can prevent a final IEP team decision on eligibility, Student remains in special

education. The delays in completing and discussing the assessments actually worked to Father's advantage and kept Student in special education longer than he otherwise would have been.

#### STUDENT'S NEED FOR SPECIAL EDUCATION

75. Whether Student is eligible for special education turns in part on whether he is within one of the 13 categories of potentially qualifying disabilities. But it also turns on whether, even if he fits one of those categories, he needs special education. East Side introduced persuasive evidence that he does not.

#### Student's Success in School

76. At present, Student receives special education and related services, but it is minimal. His IEP calls only for 30 minutes of speech therapy in the form of "consultation to staff and student" and the implementation of six accommodations. His specialized academic instruction ceased at the end of his freshman year. Nonetheless, Student is quite successful in school academically, athletically, artistically and socially.

#### STUDENT'S GRADES

77. Since he entered Mt. Pleasant, Student has been performing at or above grade level in every course. According to his latest transcript, he received a B+ in biology in his freshman year, but every other grade was an A-, A or A+. In his sophomore year, he received a B in Honors English and A's in everything else. In the first semester of this school year (2018-2019), taking seven courses instead of the usual six, he received a C+ in math, a B- in forensic science, a B in computer science, and A's in his three other courses, including Honors English. At the time of hearing, his cumulative grade point average was slightly over 3.9 on a 4.0 scale. An East Side special services coordinator told the IEP team in December 2018 that Student was on track to graduate

magna cum laude.

#### STUDENT'S MUSIC AND ATHLETICS

78. Student played clarinet in elementary school but now plays alto saxophone in the high school band, and has been receiving A's in Band class. Mr. Jensen, his band teacher, testified that Student sight-reads very well and has a nice sensitivity to the rest of the ensemble. Student also played in an after-school jazz band in his sophomore year and excelled; according to Mr. Jensen "he's a great jazz player." He is not in the jazz band this year because Father prefers that Student concentrate on his studies.

79. Student is a competitive soccer player who was on the junior varsity soccer team in his freshman year and on the varsity as a sophomore and junior. It is a winning team.

#### STUDENT'S FRIENDS

80. According to all reports, Student has many friends at school. The consensus among those of Student's teachers and service providers who testified was that he makes friends easily, laughs and talks with them routinely in and out of class, and is usually seen in groups on the campus. One typical comment, from his October 2017 IEP, was: "[Student] is very social and enjoys social interaction with peers. He is well liked by peers and is able to work well in small or large group settings."

#### Father's View of Student's Success

81. Father does not disagree that Student has friends at school, but he is concerned that school is Student's "whole life" and that he does not have friends outside of school. Father testified that Student has difficulty making friends, and expressed concern that on nights and weekends Student does not go out with other

students, and does not go to birthday parties and outside activities. In his conversations with Mr. Coleman, Student agreed he did not go out on weekends, but explained that staying home on weekends was his choice. He likes to stay home, play video games, and keep in touch with friends over Instagram.

82. Student works hard in school and on his homework, and sets high academic standards for himself. Father's standards are at least as high. (Father once appealed an A grade Student received on the ground that it should have been an A+.) Whenever Student gets less than a satisfactory grade, Father investigates. He contacts the teacher, inquires about the grade, and sometimes challenges it. He testified that he attributed all Student's "low" grades to his ADHD: his grade could only be explained by a lapse of attention, which could only be explained by his ADHD, and therefore his disability interfered with his education by preventing him from getting better grades.

83. Father's reasoning was not persuasive because it did not account for normality. As Student's case manager Cynthia Perez observed at hearing, it is "completely normal" for teenage boys to sometimes be distracted and off task. Some of Student's teachers, and particularly Ms. Hamak, noted that he was sometimes overly social in class, wandering around the room when he should have been seated and chatting with his friends. Most importantly, no professional testified that Student's ADHD, if any, had any connection with his occasional "low" grade.

84. Father testified that Student's success in school is the result of the special education support he has received, but no professional supported that conclusion either. Father has obtained private speech therapy through insurance, although it has been sporadic, and argues that Student's success is partly the result of that outside support. However, none of the occasional outside providers testified, and no one else supported that claim. Student's teachers, providers and assessors were more persuasive in testifying that Student succeeds because he is intelligent and is a hard worker who is

determined to succeed in school and attend a four-year university.

85. Student sometimes uses the accommodations in his IEP, primarily by re-taking tests. But those accommodations are available at Mt. Pleasant whether or not a student is in special education.<sup>6</sup>

86. Student is remarkably successful in all important ways at school. If he has any disability, it does not interfere with his education.

#### FATHER'S PARTICIPATION IN THE IEP TEAM MEETING OF DECEMBER 4, 2018

##### The IEP Team Meeting of May 17, 2018

87. As noted above, East Side no longer seeks a declaration that Father had a meaningful opportunity to participate in the May 17, 2018 IEP team meeting. However, the May meeting cannot be completely separated from the December 4, 2018 meeting, which was a continuation of the May meeting. Father's participation in December is best understood as a continuation of his participation in May.

88. An audio recording of the May 17, 2018 IEP team meeting was introduced in evidence. It showed that East Side staff repeatedly tried to have Dr. Hernandez and Mr. Coleman discuss and summarize their reports. Dr. Hernandez had just begun to describe her testing when Father (who had received the report in advance) interrupted

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<sup>6</sup> Accommodations like Student's are commonly available in 504 plans. A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning. In many schools, like Mt. Pleasant, accommodations are also available less formally.

and stated he did not want to hear the rest; he wanted her just to skip to her recommendations. Father then dominated the meeting. He announced that he was in charge of the meeting and had a right not to be interrupted, although he interrupted others hundreds of times. He lectured the team on IDEA requirements and repeatedly threatened to walk out. He denounced Dr. Hernandez's report as biased and attacked her credentials. He argued that her assessment was not an independent educational assessment because she was an employee of East Side. Dr. Hernandez had no further opportunity to explain her report because Father prevented it. He disagreed vehemently with its recommendations, and described his own view of Student's difficulties at length.

89. Mr. Coleman had more success in presenting his report at the May 2018 meeting, and was able to describe much of it. However, the meeting became even more acrimonious when Father refused to listen to further description, instead demanding the dates of all Mr. Coleman's testing and interviews and demanding his notebook. He argued that the delay in finishing the report violated the law. He had ample opportunity to ask questions about both reports, but he had no questions about the contents of either report and did not give any indication he did not understand them. He made many claims about Student's condition that contradicted Mr. Coleman's report. Altogether, Father spoke more and more often at the May 2018 meeting than any other participant, and his statements probably consumed more than half the meeting's time.

90. About an hour and a half into the meeting, a staff member asked for a bathroom break, but Father opposed the request. The break was taken anyway, and when the East Side members of the team returned, Father declined to participate further in the meeting and departed.

#### The IEP Team Meeting of December 4, 2018

91. Shortly after the May 17, 2018 IEP team meeting, East Side began an effort to schedule a continuation of that meeting. In summer and fall it scheduled several such

meetings. A pattern developed in which Father would state that he was available only on a few specified dates. East Side would select one of those dates and notice a meeting. Father would then cancel the meeting and propose more dates. This pattern persisted through November 2018.

92. On August 20, 2018, Father made a written request for Student's educational records. East Side was not at the time able to locate the IEP document from a May 12, 2017 IEP team meeting, and did not produce a copy of that document. It later located the document and produced it in East Side's exhibit binder five business days before the hearing. The document showed that Father recorded the May 17, 2017 IEP team meeting.

93. The continuation of the May 2018 IEP team meeting finally occurred on December 4, 2018. An audio recording of the meeting was also introduced in evidence. The recording showed that Father participated extensively in the meeting. The meeting lasted about an hour and forty-five minutes and was terminated by Father, who left.

94. Mr. Coleman attended the December 4, 2018 meeting, and managed to complete summarizing most of his report, although he could not reach his eligibility recommendations. Dr. Hernandez was on the telephone and attempted to finish presenting her report, but was prevented from doing so by Father's comments. She was allowed to describe her objections to the Defining Voice speech and language assessment described above.

95. Once again Father dominated the meeting. He was the most frequent speaker at the meeting, and probably consumed more than half of the meeting's time with his statements. He promised to produce a new private assessment report and argued its validity. He stated again his views of his son's condition. Father had sent Mr. Coleman several critical emails in January in response to his draft report, and had recently learned that Mr. Coleman had conducted another classroom observation of



Student in early February 2018. Father claimed that this was illegal because it was not done with his permission, and threatened to complain to the school district or the State.

96. In the December 4, 2018 IEP team meeting, Father again had ample opportunity to ask questions about the content of the assessors' reports. He used the opportunity to attack Mr. Coleman on the ground that his report did not contain references to every other assessment, and that he made an alleged mistake about the date of an interview. Again there was no indication in any of Father's statements in the meeting that he did not understand anything in the Coleman or Hernandez reports. The conversations at the meeting made clear that his objections were to their recommendations.

97. During the December meeting, East Side staff repeatedly attempted to raise the subject of eligibility, but Father's interruptions and arguments prevented any substantial discussion of it. When the meeting had been underway for about an hour, Father announced that there would not be enough time to conclude it, and it would have to resume at another time. East Side staff was able, about fifteen minutes later, to begin a discussion of eligibility, but Father asked instead to postpone the meeting. He spoke at length about having obtained, in November 2018, a report from a psychiatrist that confirmed Student was autistic, but he did not distribute copies of the report; he promised instead to bring them to the next meeting. He insisted that the IEP team could not fairly decide the issues before it without that report, and the meeting was adjourned with East Side's agreement on the understanding that Father would immediately produce the new report and the meeting would resume the following Tuesday, December 11, 2018.<sup>7</sup>

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<sup>7</sup> The record does not clearly show that Father ever produced a psychiatrist's November 2018 report. It was not introduced at hearing.

98. After the December 4, 2018, IEP team meeting, East Side found it was not possible to reassemble the team the next week. On December 5, 2018 Father wrote that all IEP team meetings would be on hold until his pending federal and state complaints had been resolved by administrative agencies and courts if necessary. East Side nonetheless began proposing other dates for the continued meetings. Father rejected those dates, proposed others, and demanded that conditions be put on the meeting, including that he would be allowed to control the agenda; would be given four hours to present his position; and would be given advance written explanations of the roles of each district participant in the meeting. By the time of hearing, no such meeting had been held.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>8</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);<sup>9</sup> Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special 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);

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<sup>8</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>9</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version unless otherwise stated.

see Ed. Code, § 56000, subd. (a).)

2. A FAPE means appropriate 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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) Related services are called "designated instruction and services" in California (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subds. (a), (b)(12).)

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

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_ [137 S.Ct. 988, 197 L.Ed.2d 335]. It explained in *Endrew F.* that *Rowley* held that when a child is fully integrated into a

regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student like *Andrew F.*, who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Andrew F.*, *supra*, 137 S.Ct. at p. 1001.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) 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].) By this standard, East Side had the burden of proof.

6. A procedural error 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 regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subds. (f)(1) & (2), (j); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

7. East Side's primary contention is that Student is not eligible for special education and related services under any category and that it may lawfully exit him from special education. East Side contends Father was provided an opportunity to meaningfully participate in the December 4, 2018 IEP team meeting. East Side further contends that Dr. Hernandez conducted an IEE and that she is not a district employee.

Finally, East Side asserts that Student's triennial assessments were legally compliant such that Student is not entitled to IEE's at public expense. The contention that Student is no longer eligible depends, in part, on the validity of Student's assessments. Accordingly, the assessments are analyzed first.

ISSUE NO. 4: WERE EAST SIDE'S TRIENNIAL ASSESSMENTS APPROPRIATE SUCH THAT STUDENT IS NOT ENTITLED TO INDEPENDENT EDUCATIONAL EVALUATIONS OF HIS SPEECH AND LANGUAGE OR PSYCHOEDUCATIONAL STATUS AT EAST SIDE'S EXPENSE?

General Requirements For Assessments

8. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (34 C.F.R. § 300.301(a)(2007); Ed. Code, § 56320.) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e).)

9. 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 [the 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).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).)

10. Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

11. The assessment must be sufficiently comprehensive to identify all of the

student's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6).)

#### SELECTION OF ASSESSMENT INSTRUMENTS

12. A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) An assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).)

13. In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Tests and other assessment materials must be used "for purposes for which the assessments or measures are valid and reliable." (20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be "tailored to assess specific areas of educational need . . ." (Ed. Code, § 56320, subd. (c).) "Special attention shall be given to the [child's] unique educational needs . . ." (*Id.*, subd. (g).)

14. Assessors must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) 'Technically sound instruments' generally refers to assessments that have been shown through research to be valid and reliable." (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug.14, 2006).)

#### REQUIREMENT OF OBSERVATION

15. A district must ensure that the child is observed in her learning

environment (including the regular classroom setting) to document her academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a).)

#### ASSISTANCE TO IEP TEAM AND PARENTS

16. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(iii)(A)(2007); 300.306(a)(1)(2017).) To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment. The report must include (a) whether the pupil may need special education and related services; (b) the basis for making the determination; (c) the relevant behavior noted during the observation of the pupil in an appropriate setting; (d) the relationship of that behavior to the pupil's academic and social functioning; (e) the educationally relevant health and development, and medical findings, if any; (f) for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; (g) a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and (h) the need for specialized services, materials, and equipment for pupils with low incidence disabilities. (Ed. Code, § 56327.) The report must be given to the parent or guardian, though that duty has no fixed time limit. (Ed. Code, § 56329, subd. (a)(3).)

17. Under certain conditions, a parent is entitled to obtain an IEE 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 IEE as set forth in Ed. Code, § 56329].) To obtain an IEE, the parent must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1).)

18. When a student requests an IEE, the public agency must, without

unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

#### Legal Status Of Dr. Hernandez's Assessment

19. East Side contends that Ms. Hernandez's assessment was an IEE, and as such, must only comply with the requirements governing IEE's. Student argues that Dr. Hernandez's assessment was not truly an IEE but a district assessment, entitling him to request another speech and language assessment as an IEE. If Dr. Hernandez's speech and language assessment was an IEE, Father would not be entitled to another one. (34 C.F.R. § 300.502(b)(5); Ed. Code, § 56329, subd. (b).) Dr. Hernandez and Dr. Moore both believed it was an IEE, but their understandings do not establish that it was.

20. The preponderance of evidence supported Student's argument that Dr. Hernandez's assessment was a district assessment. There was no recent speech and language assessment with which Father could disagree, and the triennial assessment plan necessarily called for a speech and language assessment by East Side because speech and language was Student's qualifying disability. East Side did not take several steps that would be typical for an IEE: it did not clearly describe Dr. Hernandez's assessment to Father as an IEE, obtain a written waiver of Student's privacy rights to permit Dr. Hernandez to access Student's educational files, or provide him the SELPA list of independent assessors and the SELPA criteria for selecting them as required by federal regulation. (34 C.F.R. § 300.502(b)(2).)<sup>10</sup> East Side had never before assessed

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<sup>10</sup> East Side's failure to provide to Father the information and criteria required by the above regulation was harmless. Father had insisted upon, and East Side had agreed to find, a non-district speech and language pathologist fluent in English and Spanish who was qualified to conduct the assessment. Dr. Moore, though familiar with the local



Student's speech and language needs. Doing so for the first time as an IEE would mean that Father would never be able to disagree with the assessment and obtain an IEE as a result.

21. Dr. Hernandez's assessment was therefore a component of Student's triennial assessment. The appropriateness of her assessment is analyzed as a component of the triennial and not as an IEE.

#### Timeliness Of Triennial Assessments

22. 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).) Mr. Coleman's assessment took significantly longer than the statute allows. East Side received the signed assessment plan on October 5, 2017. The assessment should have been completed, and the meeting held, by December 11, 2017. Mr. Coleman did not complete and distribute his report until February 26, 2018, and it was not discussed at an IEP team meeting until May 17, 2018 at the second portion of the triennial meeting.

23. Father was responsible, in part, for the fact that the triennial assessments still remained to be done on October 18, 2017. Father was given an assessment plan on May 12, 2017, and did not sign and return it until October 5, 2017.

24. However, Father was not responsible for Mr. Coleman's delay in completing his report. The tardiness of the meeting to discuss that report was due in

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speech-language community, did not know one in the area who did not work for East Side. Father routinely relied on East Side to propose assessors, and it is unrealistic to expect that Father could or would have sought or found one on his own. There was no bilingual speech-language pathologist on the SELPA list, so sending it to Father would have been meaningless.

part to Father's cancellation of a scheduled March 29, 2018 meeting, and in part because the IEP team had agreed in October 2017 to wait for both Mr. Coleman's and Dr. Hernandez's assessments to be completed before they held a meeting to discuss them. That process was not complete until well after the 60-day period had expired.<sup>11</sup>

25. East Side began the triennial assessment process in May 2017 by giving Father an assessment plan that he did not return until October. Then and later, East Side had to choose between further delaying its eligibility decision to ensure Father's continued participation, or insisting on statutory time requirements. It made the right choice; the Ninth Circuit has held that a district forced to choose between statutory timelines and parental participation should favor the latter. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1046; see also *Oskowis v. Sedona Oak-Creek Unified Sch. Dist. #9* (D. Ariz., Feb. 26, 2019, Case No. CV-15-08064-PCT-DJH) 2019 WL 935712, p. 8.)

26. The lateness of the assessment reports and meeting were procedural violations subject to the harmless error rule. (Ed. Code, § 56505, subds. (f)(1) & (j); *R.C.Z. v. North Shore Sch. Dist.* (9th Cir. 2018) 755 Fed.Appx. 658, 660 [nonpub. opn.]; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) In his closing brief, Student is unable to identify any specific harm that came to him or Father from the

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<sup>11</sup> East Side argues that there is no need to analyze procedural errors for prejudice because a student who is ineligible for special education may not receive relief for procedural violations. (See *R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940-942.) However, the student in *Napa Valley* was never eligible for special education. The procedural rights of a student who is receiving special education when the district decides to exit him may be different. It is not necessary to decide this issue, and it is not decided here.

tardiness of Mr. Coleman's report and the meeting to discuss it. As set forth in more detail in the Factual Findings, these delays were not just harmless to Father and Student; they assisted Father in his overall plan to delay Student's exit from special education.<sup>12</sup>

27. Student makes the related argument that since the IEP team has not yet made a final decision on eligibility, OAH lacks the "authority" to declare him ineligible for special education.<sup>13</sup> In support of this argument, Student cites only the statutes and regulations that require the IEP team to make an eligibility decision. Student cites no authority for the proposition that when the IEP team cannot make that decision, OAH may not address the matter, and that proposition is incorrect. A parent or district may initiate a due process proceeding if "[t]here is a *proposal* to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child." (Ed. Code, § 56501, subd. (a)(1)(italics added).) East Side has proposed by its prior written notice to exit Student from special education, so OAH has jurisdiction to rule on that proposal. (See *T.W. v. Leander Indep. Sch. Dist.* (W.D. Texas, March 7, 2019, Case No. AU-17-CA-00627-SS) 2019 WL 1102380, p. 5 (hearing officer may rule on eligibility without decision of IEP team).)

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<sup>12</sup> Because of this conclusion, it is not necessary to decide East Side's contention that "appropriate" within the meaning of the IEP statutes does not include a requirement of timeliness, which is addressed elsewhere in special education law.

<sup>13</sup> Student also relies upon a provision of the federal regulations requiring certifications for a finding of ineligibility under the category of specific learning disability. (34 C.F.R. § 300.311(b)(2017).) Since the IEP team has been prevented from making a final determination of eligibility, the occasion for those certifications has not yet arisen.

## Compliance With Technical Requirements

### MR. COLEMAN'S PSYCHOEDUCATIONAL ASSESSMENT

28. Independent examination of Mr. Coleman's report, considered together with his testimony, shows that his assessment and report complied with the technical requirements of both federal and state law set forth above. (34 C.F.R. §§ 300.304-300.311; Ed. Code, § 56320.) The parties agree that Mr. Coleman was fully qualified to conduct the assessment. He is a credentialed school psychologist. In his assessment he assessed Student in all areas of suspected disability, including autism, specific learning disability, emotional disturbance, and other health impairment, and he cross-referenced Dr. Hernandez's speech and language report. To assess in those areas, Mr. Coleman selected a variety of assessment tools and strategies to gather relevant information and used valid tools for the purposes for which they were designed. He followed the publisher's instructions, keeping them continually on his computer screen as he assessed.

29. In addition, Mr. Coleman observed Student at length and interviewed him, his parents, his teachers and his case manager. He did not rely on a single score, set of scores or procedures in making his recommendations. Mr. Coleman considered Student's primary language, racial and ethnic background in selecting his evaluation procedures and measures, and there was no evidence that he said or did anything that could have been racially, culturally or sexually discriminatory. He conducted his assessment using English as Student's primary language because Student is fully bilingual in English and Spanish, and has been educated entirely in English. For educational purposes, Student's primary language is English.

30. Mr. Coleman then produced a written report that addressed whether Student needed special education and related services and the bases for making those determinations. It contained all the subject matter required by statute. (Ed. Code, §

56327.) His 50-page assessment report was thorough and was sufficiently comprehensive to identify all of Student's special education and related service needs.

31. Mr. Coleman involved Father in the assessment process in ways that the law did not require, such as giving him a draft of the report in December 2017, inviting his comments, and making changes to the report in response to those comments. Mr. Coleman then spoke at length about the report at the May and December 2018 IEP team meetings and fully explained to Father and other members of the IEP team all of its relevant findings except those concerning eligibility, which he was prevented from discussing.

32. Student finds technical fault in Mr. Coleman's assessment in the following ways, none of which made his assessment inappropriate:

- Contrary to Student's claim, Mr. Coleman did not base his recommendation that Student was not eligible for special education in the category of language and speech disorder on a single measure. Student cites the regulatory provision requiring that in determining the existence of a discrepancy, "[n]o single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the IEP team as to the pupil's eligibility for special education." (Cal. Code Regs., tit. 5, § 3030, subd. (a).) Student claims in his closing brief that Mr. Coleman violated this rule by relying solely on the "severe discrepancy model" in concluding Student had no specific learning disorder. The regulation cited does not address models of determining discrepancies; it addresses scores, tests, and procedures. Mr. Coleman's report showed he relied on multiple sources for his conclusion, including the WISC-5 and the WIAT-3, as well as Student's excellent grades and reports from his teachers. In addition, the prohibition of use of a single

score to determine eligibility is directed at the entire IEP team, not an assessor.

- Mr. Coleman’s occasional mention of Student’s need for “specialized academic instruction” rather than “specially designed instruction” (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(a)(1); Ed. Code, § 56031) was without consequence; it was clear what he meant.
- Mr. Coleman was not required to address whether Student still needed his accommodations, because accommodations are not specially designed instruction. His failure to do so likely reflected his knowledge that Student could have those accommodations whether he was in special education or not, and that a need for accommodations, by itself, does not establish eligibility for special education. (See *T.K. v. Leander Indep. Sch. Dist.*, *supra*, 2019 WL 1102380 at p. 5 (upholding hearing officer’s ruling that student’s receipt of accommodations available to all students as needed did not show a need for special education).)
- Mr. Coleman was not required to disclose in his report the first set of Vineland-3 responses from Mr. Nelson, who stated one of his responses was incorrect and asked for a second document so he could change it. Both Mr. Nelson and Mr. Coleman regarded the second version as the accurate one, and Mr. Coleman properly used it instead of the first one.
- The fact that Mr. Coleman did not consider some of Father’s views to be reliable did not indicate bias. Father’s descriptions of Student’s conditions were sometimes extreme, unsupported by any reliable professional source, and thoroughly contradicted by everything else Mr. Coleman learned. It was reasonable for Mr. Coleman to conclude that some of Father’s descriptions were unreliable.

- Student's assertion that Mr. Coleman "failed to correlate the assessment results with the criteria for OHI" and other eligibility categories is simply wrong. His report clearly measures his results against the relevant eligibility categories.

33. It is not clear what Student means by alleging, in his closing brief, that "[t]he District's consent included a Mental Health Assessment" and that Mr. Coleman failed to perform one. The assessment plan signed and returned by Father on October 5, 2017, did not call for a mental health assessment; it called for an assessment of Student's social and emotional condition, which Mr. Coleman did conduct. Mr. Coleman's recommendation that Student did not require educationally related mental health services was additionally based on all of the teacher reports he received, Student's self-report, and on his own impressions in his conversation with Student. That conclusion was consistent with all other relevant data in the record except for Father's claims.

34. Mr. Coleman's psychoeducational assessment was "appropriate" within the meaning of section § 300.502, subdivision (b)(2)(i) of the Code of Federal Regulations and Education Code section 56329, subdivision (c). Father is not entitled to an independent educational evaluation of Student's psychoeducational status at East Side's expense.

#### Dr. Hernandez's Speech And Language Assessment

35. As determined previously, Dr. Hernandez's assessment was a district assessment. Dr. Hernandez's assessment was also "appropriate" within the meaning of the IEE statutes. (20 U.S.C. § 1415(b)(1) & (d)(2)(A); 34 C.F.R. § 300.502(b)(2)(i); Ed. Code, § 56329, subd. (c).)

36. Independent examination of Dr. Hernandez's assessment report, considered together with her testimony, shows that her assessment and report complied

with the technical requirements of both federal and state law set forth above. (34 C.F.R. § 300.304-300.311; Ed. Code, § 56320.) The parties agree that she was fully qualified to conduct the assessment. She selected a variety of assessment tools and strategies to gather relevant information and used valid tools for the purposes for which they were designed. She followed the publishers' instructions for the measures.

37. In addition, Dr. Hernandez observed Student at length and interviewed him, his parents, his speech and language provider, three of his teachers, and his case manager. She did not rely on a single score, set of scores or procedures in making her recommendations. Dr. Hernandez considered Student' primary language, racial and ethnic background in selecting her evaluation procedures and measures, since she used measures both in English and Spanish. Dr. Hernandez interviewed Student and Father in both English and Spanish, and Mother in Spanish. There was no evidence that he said or did anything that could have been racially, culturally or sexually discriminatory, and Student identifies none.

38. Dr. Hernandez then produced a written report that addressed whether Student needed special education and related services and the bases for making those determinations. It contained all the subject matter required by statute. (Ed. Code, § 56327.) Her assessment report was thorough and was sufficiently comprehensive to identify all of Student's special education and related service needs.

39. Student finds technical fault in Dr. Hernandez's assessment in the following ways, none of which made her assessment inappropriate:

- In a questionnaire to Student's teachers, Dr. Hernandez asked whether Student had "any speech and language difficulties that hinder his progress in your class." Student misinterprets this as asking about "speech and language impairment" and faults Dr. Hernandez for not defining "speech and language impairment" for the teachers, but that is not what she asked. "[S]peech and



impairment” and faults Dr. Hernandez for not defining “speech and language impairment” for the teachers, but that is not what she asked. “[S]peech and language difficulties” was not a technical term and was readily understandable by Student’s teachers.

- Contrary to Student’s representation, Dr. Hernandez expressly testified that she followed the producer’s instructions (the protocols) for the tests she administered. On cross-examination she was given a list of the assessment measures she had administered and was asked: “And did you follow the protocols when giving [Student] these assessments?” She answered: “Yes.” Student does not identify any alleged divergence from those instructions.
- Dr. Hernandez did not “fail[] to interpret the data” in her report; she interpreted it thoroughly and correlated her conclusions to eligibility requirements.
- Whether East Side violated the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g; 34 C.F.R. § 300.622(a)) in furnishing Student’s records to Dr. Hernandez is not a question over which OAH has jurisdiction, and such a violation would not affect the appropriateness of her assessment for these purposes.

40. Dr. Hernandez’s speech and language assessment was “appropriate” within the meaning of section § 300.502, subdivision (b)(2)(i) of the Code of Federal Regulations and Education Code section 56329, subdivision (c). Father is not entitled to an independent educational evaluation of Student’s speech and language needs at East Side’s expense.

41. East Side’s two triennial assessments that are at issue – Mr. Coleman’s psychoeducational assessment and Dr. Hernandez’s speech and language assessment -- were appropriate and legally compliant. They provided valid bases for evaluating

Student's continuing eligibility for special education.

ISSUE NO. 2: DID EAST SIDE PROVIDE PARENTS WITH MEANINGFUL PARTICIPATION IN THE IEP PROCESS AT THE IEP TEAM MEETING ON DECEMBER 4, 2018?

42. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

43. A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP team meeting, expresses his disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

44. The evidence, and in particular the audio recording of the December 4, 2018 IEP team meeting, showed convincingly that Father participated meaningfully in that meeting. East Side expended unusual efforts to find a time for the meeting that Father could and would attend. Father had all district assessment information well in advance of the meeting. He spoke more than anyone else. He addressed his son's condition and on his disagreements with the Coleman and Hernandez assessments at length. He chose to spend much of the time attacking the assessors on various grounds, and much of the rest of it advocating the merits of various assessments he claimed supported his position. East Side did not end the meeting; Father did. He unilaterally

decided that there was not enough time to discuss eligibility and that the discussion would have to occur at some later time. He then made it difficult, if not impossible, for another continuation meeting to occur by imposing onerous conditions on his participation.

45. Student now argues that Father was denied meaningful participation in the December 4, 2018 IEP team meeting because East Side withheld “vital educational records” from him. The one record Student can specifically identify as withheld was the IEP document from the IEP team meeting on May 12, 2017. Father requested his son’s educational records on August 20, 2018, but East Side could not immediately locate the document and therefore did not provide it to him. It was later located and provided after the December 4, 2018 IEP team meeting.

46. The late production of the May 12, 2017 IEP document had no effect on Father’s participation in the December 4, 2018 IEP team meeting. Father almost certainly had his own copy of the document ever since the meeting occurred, and Student does not assert that he did not. Father also had a recording of that meeting. Father showed throughout his conversations and correspondence with East Side, and throughout his testimony at hearing, that he was extraordinarily familiar with all the educational records involving his son. He appeared at IEP team meetings, assessments, and at hearing with a satchel full of those records, and at hearing demonstrated his ability to retrieve an old and tangential missing document from that container. The evidence showed that Father had full knowledge of the May 12, 2017 meeting when, a year and a half later, he attended the December 4, 2018 meeting.<sup>14</sup>

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<sup>14</sup> In his closing brief, Student raises two new arguments: that the December 4, 2018 IEP team was improperly constituted because the teachers who were present were not the same teachers as those who were present at the May 2018 meeting, and

47. Nor did the late disclosure of the May 12, 2017 IEP document hamper the participation of others in the December 4, 2018 IEP team meeting; its contents were obsolete by then or fully disclosed elsewhere. The May 2017 IEP meeting notes showed that, during the meeting, East Side gave Father an assessment plan for the upcoming triennial assessments. By December 2018 those assessments had long since been conducted and the assessment reports produced. The May 2017 notes also referenced a discussion of an incident in which Student had been the victim of an assault in his freshman year. After that incident, he briefly entertained suicidal thoughts and sought counseling. By December 2018 that incident, too, was far in the past. Its significance was considered and discussed in Mr. Coleman's assessment, which was available to the December 2018 IEP team. The May 2017 notes also contained references to Father's reports of Student's inattention, but those reports were in every IEP in the record. Father had ample opportunity at the December 2018 meeting to remind team members of anything he might have thought they did not know or had forgotten.

48. East Side eventually provided the May 12, 2017 IEP document to Student five business days before the hearing. (See Ed. Code, § 56505, subd. (e)(7).) Student now argues that was far too late to allow him to prepare for the hearing because he had no time to examine "thousands" of pages of documents in five business days. However, it is the Legislature's statutory judgment that five business days is sufficient for that purpose. And Student did not receive "thousands" of pages of new documents in East Side's five-day disclosure; he received the bulk of the documents – about 1800 – from the District

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because two of them were unsure about eligibility requirements. These were not stated as issues in the complaint or in the Order Following Prehearing Conference and were not litigated. East Side had no notice of them or any opportunity to refute or brief them. They are therefore not addressed here.

in its original disclosure on February 5, 2019, and several others in the days and weeks following that disclosure. He saw very few for the first time five days before the hearing. Student's counsel was prepared to use, and did use, the May 12, 2018 IEP document extensively in witness examination, so the delay in producing it had no practical consequence.

49. East Side proved that Father participated meaningfully in the December 4, 2018 IEP team meeting. Mother, a Spanish speaker, was listed as a participant, and East Side provided an interpreter for her, but she chose not to participate.

ISSUE NO. 1: MAY EAST SIDE EXIT STUDENT FROM SPECIAL EDUCATION AND RELATED SERVICES BECAUSE HE IS NO LONGER ELIGIBLE FOR THEM IN ANY CATEGORY?

Language or speech disorder

50. A pupil is eligible for special education and related services in the category of language or speech disorder when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services. (Ed. Code, § 56333.) That difficulty must result from any of the following disorders:

- (a) Articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention.
- (b) Abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness. An appropriate medical examination shall be conducted, where appropriate.
- (c) Fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener.

- (d) Inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be significantly below the language performance level of his or her peers.
- (e) Hearing loss which results in a language or speech disorder and significantly affects educational performance. (*Ibid.*)

51. A qualifying language or speech disorder is defined in more detail by regulation. (Cal. Code Regs., tit. 5, § 3030, subd. (11).) The definition of an expressive or receptive language disorder is technical, and involves either of the following measurements:

1. The pupil scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics . . . .
2. The pupil scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in subdivision (A) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of 50 utterances . . . .

(Cal. Code Regs., tit. 5, § 3030, subd. (11)(D).)

52. East Side introduced convincing evidence showing that Student does not have a language and speech disorder within the meaning of the above requirements. Dr. Hernandez concluded in her assessment that he did not have such a disorder based upon 1) the absence of the required severe discrepancy between ability and achievement in any of her standardized tests, on which he scored average or above

average; 2) her review of Student's records; 3) his excellent academic scores; 4) her own observations of his speech and behavior through two full days of testing; 5) the reported observations of his teachers, service providers, and case manager; 6) her interviews of Student, his Parents, his case manager, his speech pathologist and his English teacher; 7) her review of his written work, and his explanation of it; and 8) her comparison of all her data with the legal requirements for eligibility set forth above. Her persuasive testimony at hearing reinforced her conclusions.

53. Dr. Hernandez's conclusions were buttressed by the testimony at hearing of Ms. Calabresse, Student's current speech therapist at East Side, that he had long since mastered his speech goal and she had difficulty finding things for him to do in speech therapy. It was further supported by the reported views of Student's earlier speech therapist at East Side, who believed there was no evidence Student had any speech disorder. It was additionally confirmed by the testimony of Ms. Hamak, his general education teacher in two classes, and Mr. Jensen, his band teacher, both of whom found his speech so normal that they were surprised to learn he was receiving speech therapy; and by Student's academic, athletic, musical and social success in school.

54. The contrary evidence was not persuasive. Father perceived that Student was unable to use pronouns correctly or past tense verbs at all; that he spoke with inappropriate speed and a verbal tic; that he repeated words unnecessarily, had a restricted vocabulary, perseverated on a limited range of topics and needed repetition of words he did not understand. But he could not establish that this occurred at school because he never observed Student there. No witness, lay or professional, confirmed Father's views. Every other witness who knew Student disagreed.

55. The only current professional information tending to support Father's view was the two-page analysis written in 2018 by speech and language pathologist Yost at Defining View, but that analysis was so flawed, for the many reasons set forth in the

Factual Findings, that Student does not mention or rely on it in his closing brief. Ms. Yost did not testify.

56. Student's closing brief does not forthrightly assert that Student has a qualifying speech or language disorder, nor does it make any attempt to compare the evidence at hearing with the requirements for eligibility in that category.

57. For the reasons above, the preponderance of evidence showed that Student is no longer eligible for special education in the category of language or speech disorder.

#### Autism

58. A pupil is eligible for special education by reason of autism when he has:

... a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

59. East Side introduced substantial evidence showing that Student does not have autism within the meaning of the above requirements. Mr. Coleman's assessment concluded he did not have that disorder based primarily upon the results of his administration of the Autism Spectrum Rating Scale, the Vineland-3 Adaptive Behavior Scales, the Comprehensive Executive Function Inventory, and the Connor Behavior Rating Scales. On those scales, Father's perceptions of Student were starkly different



from those of all other reporters. Father's responses to the Autism Spectrum Rating Scale rated Student as having a wide variety of clinically significant symptoms of autism, but no one else saw these symptoms.

60. Dr. Hernandez's report and testimony confirmed Mr. Coleman's view that Student did not display the symptoms of autism, as did the testimony of his teachers, Ms. Hamak and Mr. Jensen. Student's excellent academic, musical, athletic and social performance makes it highly unlikely that he suffers from autism.

61. Student's evidence that he is autistic was unpersuasive. The Kaiser diagnosis from 2006 was tentative and too old to be substantially probative. Dr. Almas's 2018 diagnosis was badly flawed, for the reasons set forth in the Factual Findings. Neither report addressed the educational impact of Student's alleged autism. Student has apparently abandoned reliance on the Almas diagnosis, as it is not mentioned in his closing brief. No professional testified that Student is autistic or that autism interferes with his education.

62. Student's closing brief does not forthrightly assert that he is eligible for special education because of autism, and makes no attempt to compare the evidence at hearing to the legal requirements for eligibility in that category. Instead, Student lists selective excerpts from the answers to Mr. Coleman's test protocols, which are the raw material generated by use of the rating scales provided by Student's teachers to Mr. Coleman, and from the notes of various IEP team meetings. These comments were, for example, that Student's capacity in social situations was limited, that he sometimes talked too much in class, that he was sometimes distracted in class, and that he once became angry because of his poor performance on a math test. Almost all of the comments were made by people who testified at hearing that he or she did not think Student had autism. All of them were considered and reported by Mr. Coleman. Student overlooks the fact that none of these rating scale responses rose to the level of clinically

significant, and all of Student's teachers rated him in the average or low range with respect to symptoms of autism, which meant he presents no more as autistic than the average student does. No professional testified that these comments supported a diagnosis of autism.

63. For the reasons above, the preponderance of evidence showed that Student was not eligible for special education in the category of autism.

#### Other Health Impairment

64. A student may be eligible for special education in the category of other health impaired if his condition conforms with the following definition:

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that:

(A) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(B) Adversely affects a child's educational performance.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(9.)

65. The evidence showed that Student is sometimes inattentive in class, and sometimes restless and overly social, moving around the classroom and talking to his peers. Student argues that this amounts to Attention Deficit Hyperactivity Disorder, and that it is serious enough to qualify him as other health impaired. No professional testified in support of that argument, and the evidence did not support it.

66. Dr. Hernandez reported that through two full days of testing, Student was

fully attentive. Mr. Coleman's experience during his testing was the same. Three of Student's teachers and his case manager testified at hearing that his level of distraction in class was typical of boys his age.

67. Most importantly, Student's excellent grades strongly suggest that his concentration in class is at least as good as that of most of his peers. ADHD by itself is not a qualifying disability; before special education is required, ADHD must manifest itself so obviously at school that the student's difficulties with speech and language "cannot be corrected without special education and related services." (Ed. Code, § 56333 [1st par.].) No evidence met that requirement. Student is not eligible for special education in the category of other health impairment.

#### Specific Learning Disability

68. A student may be eligible for special education in the category of specific learning disability if he has:

. . . a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The basic psychological processes include attention, visual processing, auditory processing, phonological processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).)

69. In determining whether a student has a specific learning disability, a school district:

. . . may consider whether a pupil has a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).) The mathematical formula for determining whether a severe discrepancy exists is set forth by regulation and is complex. ((Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B)(1).) Only when “standardized tests are considered to be invalid for a specific pupil” must the district measure the discrepancy by alternative means specified on the assessment plan. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B)(2).)

70. In his closing brief, Student does not argue that he has a specific learning disability, and does not claim that any reliable measure showed he had a severe discrepancy between ability and achievement. Nor does he address the technical requirements for eligibility in that category. Every school-based assessment since 2014, including Mr. Coleman’s, concluded he had no such discrepancy, and the record fully supports that conclusion. No professional testified to the contrary. Student’s level of academic achievement is not only high; it is higher than his cognitive scores would forecast. Student is not eligible for special education in the category of specific learning disorder.

#### Emotional Disturbance

71. A student may be eligible for special education in the category of emotional disturbance according to the following definition:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

72. Student argues that he qualifies as emotionally disturbed because he has inappropriate types of behavior or feelings under normal circumstances. The only bases for this claim, aside from unverified claims by Father, are that teacher reports showed Student occasionally became angry and frustrated when he scored poorly on tests and experienced stress during final examinations. Student confirmed that those reports were correct. But those behaviors and feelings are typical in ambitious students. Those scattered instances did not show emotional disturbance, or that it existed over a long period of time and to a marked degree, as the regulation requires, or that it adversely affected Student's educational performance. Student himself reported that they did not affect his performance, and the record supports his view. No assessment established emotional disturbance, and no professional testified that Student was emotionally disturbed within the meaning of California's definition. Student is not eligible for special education in the category of emotionally disturbed.

73. In sum, East Side proved that Student is no longer eligible for special education and related services in any of the defined categories of special education law that are potentially applicable. In addition, it proved that even if he did fit within one or more of those definitions, he would not be eligible because he does not need special education. Student no longer needs individualized speech services, only occasionally uses his accommodations, and nonetheless enjoys considerable academic, musical, athletic and social success in school.

ISSUE NO. 3: WAS THE ASSESSOR WHO CONDUCTED THE INDEPENDENT EDUCATIONAL EVALUATION OF STUDENT'S SPEECH AND LANGUAGE ACTUALLY AN EMPLOYEE OF EAST SIDE?

74. This issue is not decided. East Side withdrew its prayer for a declaration that Dr. Hernandez's assessment was in compliance with section 300.502 of Title 34 of the Code of Federal Regulations, which requires that an IEE be conducted by a person not an employee of the school district. OAH does not have jurisdiction over whether Dr. Hernandez was an employee in any other context. Since Dr. Hernandez's assessment is properly regarded as a district assessment for other reasons, her employment status makes no difference to the outcome of this matter.

## ORDER

1. East Side may exit Student from special education and related services because he is no longer eligible for them in any category.
2. East Side provided Parents meaningful participation in the IEP process at the IEP team meeting on December 4, 2018.
3. East Side's triennial psychoeducational assessment by Mr. Coleman and its speech and language assessment by Dr. Hernandez were appropriate, so Father is not entitled to an IEE of Student's psychoeducational or speech and language status at East

Side's expense.

## 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. East Side prevailed on all issues decided.

## RIGHT TO APPEAL

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

Dated: May 17, 2019

\_\_\_\_\_/s/\_\_\_\_\_  
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CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings