

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

WILLIAM S. HART UNION HIGH
SCHOOL DISTRICT.

OAH CASE NO. 2013051148

DECISION

Administrative Law Judge (ALJ) Alexa J. Hohensee, Office of Administrative Hearings (OAH), heard this matter in Santa Clarita, California on September 10 and 11, and October 2, 3, 7, 9, 10, 16, 17, and 18, 2013.

Andrea Marcus and David Boyer, Attorneys at Law, represented Student. Student's Mother (Mother or Parent) attended the hearing.

Ian T. Wade, Attorney at Law, represented the William S. Hart Union High School District (District). Sharon Amrhein, Director of Special Education, and Brandi Davis, Program Specialist, attended the hearing as representatives of the District.

On May 24, 2013, Student filed a request for due process hearing (complaint). The matter was continued on July 9, 2013, and during the hearing. Oral and documentary evidence was received at the hearing. At the close of the hearing, the ALJ granted the parties' request for a continuance to file written closing arguments through November 11, 2013. On that day, the briefs were timely filed, the record was closed, and the matter was submitted.

ISSUES¹

1. Whether the District denied Student a free appropriate public education (FAPE) from September 2011 through January 2013 by failing to assess Student in all areas of suspected disability, specifically:

- (a) Speech and language,
- (b) Behavior, and
- (c) Social emotional functioning.

2. Whether Student was denied a FAPE, from November 14, 2011 through October 3, 2012, by being bullied at school.²

3. Whether the District denied Student a FAPE from August 2011 through January 2013 by failing to offer or implement an appropriate behavior support plan for Student.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student was 14-years-old at the time of the hearing and had just begun the ninth grade during the 2013-2014 school year. He was in the eighth grade for the 2012-2013 school year.

2. Student has lived within the boundaries of the District at all times relevant to

¹ Prior to, or at the hearing, Student withdrew all issues regarding the appropriateness and implementation of Student's behavior interventions after January 2013 and the alleged failure to include measurable annual goals in Student's IEP's.

² This issue has been restated to more closely align to the recent federal clarification of guidance on bullying and the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400, et seq.)

this proceeding. Student has been eligible for special education since 2008, under multiple eligibility categories as set forth below.

3. Student's complaint challenged only past placement and services. His current program was not at issue.

ELEMENTARY SCHOOL ASSESSMENTS AND MATRICULATION IEP TEAM MEETING

4. Prior to entering junior high school in the District, Student attended elementary school in the Sulphur Springs School District (Sulphur Springs). At Sulphur Springs, Student's individualized education programs (IEP's) identified Student as eligible for special education under the primary category of other health impairment (OHI) due to behaviors that impeded his learning as a result of his attention deficit hyperactivity disorder (ADHD) and obsessive compulsive disorder (OCD), and under the secondary category of specific learning disability (SLD) due to significant discrepancy between Student's ability and achievement in the area of written language.

5. For two years at Sulphur Springs (2009-2010 and 2010-2011), Student was placed in a combination fifth and sixth grade special day class (SDC) for students with behavioral issues due to Student's disruptive outbursts. Student was very bright and motivated, but was also inattentive and impulsive. Student blurted out, interrupted the teacher and other students, and would whine and cry when he was frustrated or did not get his own way. Student's SDC was taught by Brenda Sparks³, who used a classroom behavior reinforcement system and token economy⁴, among other strategies, to teach

³ Ms. Sparks had married prior to the hearing, and was sometimes referred to as Brenda Watkins.

⁴ A "token economy" is a system under which students earn points or lose points based on their behavior. Typically, a student can use his points or tokens to buy items from a school store, receive special privileges, or engage in preferred activities.

appropriate behavior.

6. Student learned to control his behaviors so well in Ms. Sparks' classroom that at the end of fifth grade and the beginning of sixth grade, Student was gradually transitioned into general education for most of his school day. Unfortunately, by the middle of sixth grade, Student was returned to Ms. Sparks' SDC classroom for all of his academic subjects due to escalating argumentative and immature behaviors. By his return to Ms. Sparks' SDC, Student's classroom behaviors included whining, fussing, and negative attention seeking behaviors such as crying, rolling on the floor in a fetal position, and verbal outbursts such as "You don't understand" and "I can't, I'm frustrated."

7. Prior to and concurrent with Student leaving the Sulphur Springs and matriculating to the District, Sulphur Springs conducted a routine triennial psychoeducational assessment in preparation for Student's upcoming April 2011 triennial IEP review. Student was assessed in the areas of cognitive ability, visual-motor processing, academic achievement, behavior, social emotional functioning, and adaptive behavior during March 2011.

8. The assessment found that Student had overall abilities in the average range. The data on Student's attention processing was inconsistent, but the Sulphur Springs school psychologist and assessor, Ada Ocasio, stated that it was a concern anecdotally and, with Student's significant discrepancy between ability and achievement in written language, made him eligible for special education under the SLD criteria. However, Ms. Ocasio concluded that Student's social and emotional behaviors, and the symptoms of ADHD and OCD, were the primary factors negatively impacting Student's educational performance, and recommended that the primary eligibility category of OHI be maintained.

9. In anticipation of Student's transition into the District for junior high school in the seventh grade, Sulphur Springs convened a "matriculation amendment" IEP team meeting on March 28, 2011 to discuss Student's placement in junior high. Sulphur Springs

invited a representative of Student's future home school, La Mesa Junior High School (La Mesa), to discuss appropriate placement for Student within the District. At that meeting, the team learned that an SDC program very similar to Ms. Sparks' classroom was available at Sierra Vista Junior High School (Sierra Vista), and the meeting was continued to invite staff from Sierra Vista to describe the program.

10. On April 1, 2011, the matriculation amendment IEP team meeting was reconvened at Sierra Vista. It was attended by Sulphur Springs staff (who were conducting the meeting), Mother, and representatives from Sierra Vista.

11. At that meeting, the teacher of Sierra Vista's SDC3 classroom, Rick Pendleton, described his class and provided a written description of the program. The SDC3 program was for students who were at grade level, but experienced emotional or behavioral difficulties that interfered with their ability to learn. Mr. Pendleton was familiar with Ms. Sparks' classroom, and informed the team that the SDC3 program was very similar. He explained that the SDC3 program utilized a positive behavior point system that allowed students to earn their way to more privileges through the completion of class assignments and proper behavior. SDC3 program goals included increases in positive appropriate behavior, self-confidence and self-esteem, academic performance, and the student's acceptance of responsibility for his or her behavior through reinforcement and consequences.

12. The team agreed that the SDC3 program was a good fit for Student, and the matriculation IEP offered Student, for the upcoming 2011-2012 school year, placement in Sierra Vista's SDC3 classroom for four core curriculum classes, with physical education (PE) and an elective in general education. The IEP also offered designated instructional service (DIS) counseling, in a group or individually, for 30 minutes per week. The matriculation IEP team did not review the assessment results or discuss goals.

13. On April 12, 2011, Sulphur Springs convened a third IEP team meeting, which was designated Student's "triennial review." This meeting was attended by Sulphur Springs

staff and Parents, and reviewed Student's latest assessments and his progress on goals. The team reported in the IEP that Student had met the majority of his goals, but continued to have needs in the areas of written language and social emotional functioning. The IEP reported steady progress in organization of behavior, such as Student appropriately requesting help in the SDC classroom by raising his hand or waiting his turn. It also reported that Student continued to present with non-compliant, argumentative, and immature behaviors when asked to participate in non-preferred activities, and still needed assistance to implement the strategies he had learned for improved attention to task, task completion and compliant behavior.

14. The April 12, 2011 IEP document stated that the triennial psychoeducational report was "attached," and indeed, the assessment results were summarized on four densely written pages of the IEP. However, Ms. Ocasio had prepared a 16-page psychoeducational assessment report that was not attached to the IEP, and was not provided to Parents or the District with the IEP or Student's educational records. Parents and the District were unaware that Ms. Ocasio had drafted a report separate from the results documented within the IEP until the District received the report, and provided it to Parents, a few days prior to commencement of the hearing, in September 2013.⁵

15. Ms. Ocasio's report, which was not seen by the District, included scores for the Behavior Evaluation Scale (BES) and the Behavior Assessment System for Children (BASC), derived from rating information provided by Mother, Ms. Sparks and Student. On the BES, Ms. Sparks had rated Student "at-risk" for learning problems, interpersonal difficulties, and inappropriate behaviors. On the BASC, both Mother and Ms. Sparks had rated several areas "at-risk" or "clinically significant," including aggression, depression,

⁵ Student was granted a continuance from September 10, 2013 through October 2, 2013 to obtain review of the assessment report by a psychologist, Dr. Perry Passaro, who testified at hearing.

somatization, atypicality, adaptability, social skills, and leadership. Student rated himself "at-risk" for hyperactivity, depression, and relations with parents, and clinically significant on locus of control and attitude to teachers.

16. The IEP summarized Student's "social emotional behavioral" functioning in narrative form, without reference to test results. It reported that Student's social emotional behaviors fluctuated, with less control and more social and behavioral concerns in general education settings, and greater control and understanding of his strengths and weaknesses in this area in the SDC. The IEP summarized Student's "communication development" as age-appropriate and not an area of concern.

17. The Sulphur Springs IEP team adopted three goals for Student: a written language goal and two social emotional goals. The social emotional goals were (1) to calmly and clearly state to an adult what is wrong when upset or agitated, and (2) to decrease the use of inappropriate behaviors to engage other students when in play or an activity that requires social interaction.

18. The April 12, 2011 IEP listed Student's new goals and incorporated the placement and services determined at the matriculation IEP's. It offered placement in Ms. Sparks' class for the remainder of the 2010-2011 school year, and the SDC3 program at Sierra Vista during the 2011-2012 school year through the next annual IEP review. This IEP was in place when Student entered the District.

FALL SEMESTER OF 2011-2012 SCHOOL YEAR

19. Prior to the beginning of the 2011-2012 school year, the SDC3 teacher at Sierra Vista, Mr. Pendleton, reviewed Student's cumulative file and had several conversations with Ms. Sparks concerning Student. A number of students had transitioned from Ms. Sparks' class to Mr. Pendleton's SDC3 class over the years, and they had visited each other's classrooms. Mr. Pendleton noted that the triennial IEP stated that Student became disruptive and extremely emotional in class and on the playground, and needed

adult assistance to calm down and re-group, but Ms. Sparks drew a more positive picture of a student who was bright and capable and responded well to a classroom behavior reinforcement system. From his review and these conversations, Mr. Pendleton was convinced that Student was a good fit for the SDC3 program.

20. Mr. Pendleton is a highly qualified special education teacher. He has been a teacher for 35 years in public and private schools, and has taught the SDC3 class for the last nine years. In 2010-2011 he was voted "Teacher of the Year" by the District's certificated faculty, and the following year he received an autism certificate for his teaching credential.

21. The SDC3 classroom is small and structured, and in 2011-2012 served 12 seventh and eighth grade students. Students were placed in the SDC3 program if an IEP team determined that they could benefit from its structure and its system of rewards and consequences under the classroom's positive behavior plan. Mr. Pendleton analogized the "arc" of behavioral progress typically seen in his class as occurring in spurts with varying regressions. That is, while the students are learning appropriate behavior and decreasing the behaviors in which they have engaged for years, each student takes "two steps forward and one step backwards." As appropriate behaviors are learned and replace maladaptive behaviors, Mr. Pendleton sees the most improvement in eighth graders who have been in the SDC3 program for two years.

22. At hearing, Mr. Pendleton answered all questions thoughtfully and completely, and readily elaborated. His manner and responses displayed genuine good will and concern towards Student, and he was helpful and informative in describing Student's conduct and statements in the SDC3 classroom. Mr. Pendleton was calm and straightforward in demeanor.⁶ Mr. Pendleton is a highly qualified teacher of students with

⁶ Mr. Pendleton invoked his Fifth Amendment rights with regard to an alleged incident in which he touched Student's chin with one hand to tilt Student's head and make eye contact, on the grounds that Parents had threatened civil and criminal prosecution for

emotional and behavioral issues, and has extensive experience in observing and identifying classroom behaviors with emotional origins. He worked with Student for four periods per day, five days per week, for several months, and subsequently worked with Student individually as a home study teacher. Mr. Pendleton's testimony regarding Student's emotional state, performance, areas of need, behaviors impeding Student's ability to learn, and appropriate educational interventions was given great weight.

23. In the SDC3 classroom, Student had good days and bad days. Student did well in class at the beginning of the year, and was talkative, funny and endearing. He had friends inside and outside the classroom, and joined the Sierra Vista book club. Student resisted doing classwork on non-preferred tasks, but Mr. Pendleton never observed the argumentative or oppositional behavior described in Student's past IEP's. It was particularly difficult for Student to write out his thoughts despite good ideas and understanding, and Mr. Pendleton modified assignments to accept partial work when Student was "maxed out." Mr. Pendleton frequently let Student complete his work in increments that could be turned in late, in order to maintain forward momentum on the curriculum when Student displayed understanding of the material, rather than waiting for Student to complete all his work before moving on to new concepts. Student was not atypical of the students in his class in finding writing to be difficult and laborious, but he was making adequate progress on his writing assignments.

24. Mr. Pendleton observed that Student had friends and interacted effectively with other students in class. Student displayed sophisticated understanding during conversations with Mr. Pendleton that was not only appropriate, but above that of the typical seventh grader. It was Mr. Pendleton's opinion that Student had adequate social

assault and battery for that incident, but freely responded to all other questions posed. Given the circumstances, his invocation of constitutional rights was not a factor in determining his overall credibility.

communication skills.

25. Student displayed increased ability to control his behaviors while following the SDC3 classroom behavior intervention plan. Mr. Pendleton implemented the classroom behavior plan in ways that worked best for Student from both an academic and behavioral perspective. Student, like all students in the SDC3 classroom, would sometimes break the rules, but he responded appropriately to redirection. Student learned to request breaks by using words, which was significant progress on his social emotional goal of calmly and clearly stating what is wrong to an adult when upset or agitated. Mr. Pendleton tempered negative reinforcement, such as receiving consequences for not following directions, with positive reinforcement, such as praise, and had a good student/teacher relationship with Student. Despite some setbacks, Student's behavior was improving the majority of the time. Mr. Pendleton opined persuasively that Student was making good academic and behavioral progress in the SDC3 program.

STRESSORS AT HOME

26. As the fall semester of the 2011-2012 school year progressed, Student's family began to experience a series of tragic and substantial medical and career setbacks, which played out over the ensuing year. These life altering events placed tremendous time and financial strains on Mother and Father, and had a significant emotional toll on all members of the family, including Student.

27. As the fall semester progressed, Student began to struggle in his general education PE and elective art class, even as he continued to do well in Mr. Pendleton's SDC3 classroom.

28. Student wore his gym uniform to school under his clothes at the beginning of the year. Most elementary schools do not require students to change clothes for PE, and it is not unusual for new junior high students to feel uncomfortable about undressing in front of their classmates and to wear their gym uniform under their clothes. Mother was

upset that Student was wearing two sets of clothes. When she mentioned this to Student, he told her that some students called him "fat" during PE, but that he was handling everything, and did not want her to complain to the school or PE teacher. Mother did not contact the school about Student wearing his PE uniform under his clothes, or other students calling Student names.

FIRST INCIDENT

29. On November 9, 2011, Student reported to school counselor Justine Saunders that he had been "bullied" by Students A and B, who had called him "baby" and had pushed him and called him "fat" in PE class. Assistant principal Thomas Flores promptly investigated Student's complaint. Mr. Flores determined that Student and several other students had been kept after class in general education Woodshop, and that Student had begun to cry because he was anxious that the cafeteria would run out of pizza, and he always ate pizza that weekday. Mr. Flores determined that Students A and B, who denied going near Student in PE, had been attempting to console Student by telling him that he would have plenty of time to eat lunch. Mr. Flores concluded that this was not an incident of bullying, but one of peer conflict, and notified Mother. The next day, Mr. Flores conducted a meeting, or "mediation," where he counseled all three students on understanding what occurred and how to respond or react differently if a similar situation arose again. Students A and B apologized to Student for hurting his feelings and explained that they had been trying to help. Student never reported to District staff any further interaction with Students A or B.

30. Mr. Flores has been an assistant principal for over nine years. He has received extensive training on handling conflicts between students, and is very knowledgeable about bullying in schools. Over his educational career, he has interviewed over 1,000 victims or aggressors where bullying has been alleged, including incidents with disabled children, emotionally disturbed children, and autistic children. He opined that after years of

responsibility for conflict management, he is very capable of determining whether a student is telling the truth, telling a falsehood, or something in-between. Mr. Flores' demeanor was calm and professional, except when he testified concerning his own bullying as a young student, at which times he appeared obviously saddened but resolute. Mr. Flores seemed sincere and genuinely concerned about the welfare of Student and all the students at Sierra Vista. Mr. Flores testified persuasively, and his testimony regarding his investigations, and information he had received or not received from Mother, was given great weight.

31. On November 14, 2011, Mother took Student to an appointment with his treating psychiatrist, Dr. Lazar. Dr. Lazar did not testify at hearing. According to Mother, on that day Dr. Lazar wrote a letter for her to give to the school stating that Student was very depressed and had regular thoughts of suicide, and that Student reported regular teasing at school about his weight (the Lazar letter). Mother did not inform the District of the letter, or provide the District with a copy of it, until months later in January 2012.

32. According to Mother, she hand-carried the Lazar letter to Sierra Vista's school counselor Justine Saunders, and Ms. Saunders photocopied the letter and returned the original while Mother waited for her.

33. Ms. Saunders denied that she had been given the letter by Mother or anyone else, or that she had seen the letter before she left Sierra Vista on maternity leave in mid-December 2011. Ms. Saunders has been a school counselor for 10 years, and her duties included, among other things, counseling students for emotional stress and running counseling programs for teenage grief. Ms. Saunders testified confidently and persuasively that had she been given a letter about Student experiencing suicidal ideation, she would have taken the information very seriously and immediately followed District protocol regarding suicide assessment.

34. Ms. Saunders' testimony that she would have acted immediately upon receiving information that Student had suicidal ideation was persuasive because it was

consistent with that of Sharon Amrhein, Thomas Flores, and Brenda Bennett, who testified unanimously and with strong feeling that reports of student thoughts of suicidal ideation are taken very seriously by school staff and acted upon immediately. Ms. Saunders testified that, unfortunately, the District receives two such suicidal ideation reports each week. Mr. Flores testified with obvious emotion and distress that if a student is assessed to be an immediate danger to themselves and sent home with parents or to a treatment center, District staff stay in touch with the parents because staff themselves cannot sleep at night knowing that one of their students is at risk of taking his or her life. The testimony of Sierra Vista staff that they would have responded immediately to a report of Student's suicidal ideation was persuasive.

35. In contrast, Mother testified with an unconcerned demeanor that, in her ongoing contacts with Sierra Vista staff after November 15, 2011, she did not discuss Dr. Lazar's letter or her son's reported depression or suicidal ideation. In light of the fact that Student was placed under the responsibility of Sierra Vista's teachers and administrators for over six hours each day, it would be reasonable to assume that had Mother actually provided the District with the Lazar letter, she would have followed up with school staff. Also, with regard to Mother's testimony in general, she was frequently unable to provide specificity, and she often admitted on cross-examination to erroneously testifying to facts or not actually recalling information. Her hazy recall of events was understandable in light of the extreme stress on all family members during the period at issue, but it adversely impacted her credibility. Mother's testimony on this point was neither logical nor persuasive.

THE SECOND INCIDENT

36. On November 17, 2011, an incident involving Student was reported and investigated by District staff. It was determined that, in PE, Student C took a basketball away from Student and tried to shoot, but Student swatted at the ball so hard that he

scratched Student C's chest; Student C then called Student "fat butt," and in response Student threw the ball back, shouted "fuck you," and walked away. District staff met with Student and Student C to counsel them regarding proper conduct. Student never reported to District staff any further interaction with Student C.

THE THIRD INCIDENT

37. On December 6, 2011, Student reported to Ms. Saunders that he had been bullied by Students D, E, and F, who he said had pulled his hair and called him names. The next day, during Mr. Flores' investigation, Student added that Student D had "tea bagged" him. "Tea bagging" is a slang term that refers to a male touching something with his bare genitals. Student also reported that Student E had thrown something at him.

38. The incident occurred near the bicycle racks during a break, and Mr. Flores was able to view surveillance footage that showed Student sitting on the ground and a fully clothed Student D walking up behind Student and leapfrogging, or jumping, over him. The video also showed Student E throwing a milk carton near Student, and Student F was not in the video. Mr. Flores interviewed Student D, who said that he thought Student looked sad, and that leapfrogging over him would be funny and cheer Student up. Mr. Flores counseled Student D concerning appropriate conduct and told him not to leapfrog over other students again, but did not impose any discipline, or "consequence." Student E was disciplined for throwing something near Student. Mr. Flores reported the results of his investigation to Mother. Student did not report to District staff any further interactions with Students D, E, or F.

39. In December 2011, Student's outbursts in the classroom intensified. Prior to that time, Student's behaviors were generally quiet, and Student had a tired affect. Mr. Pendleton spoke to Mother about it, and she indicated that Student was having emotional difficulties at home and asked that Mr. Pendleton give Student a break after an emotional outburst.

40. Later in December 2011, Student had a particularly difficult day and asked to go home. Student had never asked to go home before, but he did not calm down with a break, and Mr. Pendleton called Mother to pick up her son. Student had not calmed down by the time Mother arrived. Mother testified that she watched Mr. Pendleton touch Student's chin in an attempt to tilt Student's face and make eye contact, and that Student did not calm down until Mr. Pendleton spoke to him quietly for a while.

THE FOURTH INCIDENT

41. On December 12, 2011, Student and Student G were brought to the office after an altercation at lunch. Assistant principal Brenda Bennett investigated the incident. Ms. Bennett has been a middle school assistant principal for nine years, and investigates approximately 30 alleged fighting incidents, and 50-60 alleged bullying incidents, each year. During testimony, Ms. Bennett's demeanor was calm and professional, and she was extremely knowledgeable concerning her duties as an assistant principal, her experiences with junior high school students, and her role in disciplinary investigations. Ms. Bennett's testimony concerning the incidents she investigated, and her observations and opinions of Student's conduct, were given great weight.

42. Several witnesses reported to Ms. Bennett that Student had repeatedly poked Student G, who had his arm in a sling, stating that Student G was "pretending" to be hurt. They reported that Student G had asked Student stop several times, then called Student names, and begun to walk away, at which point Student had to be held back from going after Student G. Ms. Bennett spoke with Student and informed him that Student G had a doctor's note for the arm sling, but Student continued to insist to Ms. Bennett that Student G was "faking."

43. Ms. Bennett was not convinced that Student thought that Student G's injury was fake, and she believed that Student had been angry with Student G for other reasons, and had called the injury a fake as an excuse for accosting Student G. Ms. Bennett

understood that Student had emotional issues and displayed disruptive behaviors, and imposed a one-day suspension on Student, which was lighter discipline than she would have otherwise imposed.

44. Parents did not send Student to school on December 14, 2011.

45. On December 15, 2011, Ms. Bennett contacted Student's father (Father) by telephone to inquire about Student's attendance, and inform him of Student's suspension. During that call, Father informed Ms. Bennett that Parents would not be returning Student to Sierra Vista.

46. Student did not return to school for the remainder of the fall semester.

47. During the time Student attended Sierra Vista, he had never reported bullying inside or outside the classroom to Mr. Pendleton. Student would sometimes be sullen and want to put his head down or be still for a few minutes, but he did not complain about any classmates bothering him and Mr. Pendleton never heard name calling in the classroom. Student's behavior in the classroom was consistent with his dual diagnoses of ADHD and OCD, and his documented history of anxiety, obsessive behavior, and emotional outbursts, and did not indicate that Student was being bullied.

48. Upon hearing that Parents were pulling Student out of school, District staff attempted to arrange an IEP team meeting in December 2011, but at Parents' request, the IEP team meeting was scheduled for January 23, 2012.

49. Sierra Vista's winter break lasted from December 23, 2011, through January 13, 2012. Student did not return to school after the winter break.

50. For the first semester of the 2011-2012 school year, Student earned C's in all his SDC3 classes and adaptive PE. In his general education classes, he received a B in Art, a B in History and an A in Woodshop.

JANUARY 23, 2012 IEP TEAM MEETING

51. On January 23, 2012, the District convened an IEP team meeting to address

Parents' concerns. It was attended by: assistant principal Brenda Bennett, SDC3 teacher Rick Pendleton, program specialist Sharon Amrhein, general education art teacher Ms. Frandsen, and Parents.

52. Parents reported to the team that Student was on a waiting list to be admitted to a therapeutic program at the University of California, Los Angeles, Stewart and Lynda Resnick Neuropsychiatric Hospital (UCLA-RNPH), and was expected to be admitted within two weeks. Parents explained that Student was entering the program due to escalating behaviors they had observed at home, such as tantrums, and that Student had been on increasing medication due to anxiety. Parents informed the team that they had no intention of returning Student to school before he entered UCLA-RNPH.

53. At the meeting, the District was informed for the first time of the contents of the Lazar letter. Mother did not indicate that Student continued to have suicidal ideation.

54. Parents informed the team that although Student had been excited to start junior high at Sierra Vista, Parents did not believe that Student was safe at Sierra Vista due to bullying. In response to those concerns, the team went over each of the reported incidents, which District team members asserted did not rise to the level of bullying, and had been investigated and treated responsibly. Father disagreed, and felt that his son's complaints were being treated dismissively. Mother complained that one of the students in Student's DIS group counseling sessions was bullying Student.

55. The IEP team changed Student's DIS counseling services from group to individual sessions, and placed Student on home study until he entered UCLA-RNPH. The team informed Parents that Student could access his DIS counseling services on the Sierra Vista campus. Parents consented to the IEP.

56. Home study for Student had already begun on January 17, 2012, and continued through Student's admission into UCLA-RNPH on March 5, 2012.

57. Katie Hoggatt, a credentialed special education teacher, provided instruction to Student in his home for five hours per week until he was admitted to UCLA-RNPH. She

occasionally had to reschedule a session when Mother reported that Student had had a rough morning. Ms. Hoggatt only saw Student upset once, when he initially didn't want to meet with her, but Student eventually sat down with her and worked for the rest of that session. Mr. Pendleton provided Ms. Hoggatt with the same materials the rest of Student's class was working on. Student completed the materials daily, did all assigned homework, and kept up with the SDC3 class. The parties do not dispute that Student works well one-on-one, and made academic progress during home study.

58. Student was in the ABC Partial Hospitalization Program at UCLA-RNPH (ABC Program) for eight weeks, through April 27, 2012. The ABC Program attended by Student was a day program, with therapeutic components and a daily educational component taught by special education teachers from Los Angeles Unified School District (LAUSD). Parents received a detailed report of Student's behaviors every day, but they did not provide these daily reports to the District or submit them into evidence at hearing. Parents did not see a behavior support plan, only daily reports.

APRIL 27, 2012 IEP TEAM MEETING

59. On April 27, 2012, the day of Student's discharge, an IEP team meeting was convened to discuss Student's post-hospitalization placement, and as the annual review of Student's IEP. The meeting was attended by: SDC3 teacher Rick Pendleton, school psychologist Stephanie Chun-Ho, assistant principal Thomas Flores, program specialist Sharon Amrhein, Parents, and the chair of the special education department at La Mesa, Teri Minch.

60. Ms. Hoggatt reported that, in home study, Student had learned the material, completed his homework assignments, kept up with his class, and had shown good academic ability. She noted that she was sometimes unable to meet with Student, and Parents explained to the team that there had been a number of things going on at home that may have caused Student to have emotional meltdowns.

61. Mr. Pendleton reported that Student had performed well academically, with the exception of some written assignments. Mr. Pendleton reported that Student had transitioned well into the SDC3 classroom, had friends at school, and had expressed an interest in extracurricular activities, such as school dances.

62. Parents reported that Student appeared to be more stable behaviorally after his discharge from UCLA-RNPH. They provided the team with a "to whom it may concern" letter from a psychiatry fellow at UCLA-RNPH, Katherine Revedoro, MD, describing Student's participation in the ABC Program, and making recommendations for Student's educational services and placement (Dr. Revedoro's letter).

63. Dr. Revedoro's letter reported that Student had been admitted into the ABC Program due to marked anxiety, oppositionality, and deficits in socialization and communication. It indicated a diagnosis for Student of Autism Disorder and Anxiety Disorder Not Otherwise Specified.

64. Dr. Revedoro's letter stated that Student had been placed on an individualized positive behavioral support plan, but it did not attach a copy of the individualized plan or identify the target behaviors. The letter stated that Student's behavior goals were (1) following directions/accepting no, (2) expressing feelings appropriately, and (3) interacting with others appropriately. It explained that Student could earn points for good behavior and that he "was part of the group behavioral reinforcement program, wherein he (like all children in the program) could receive plastic 'chips' throughout the day"⁷ which were totaled at the end of the week to be used for a "positive group activity."

65. Dr. Revedoro's letter directed the reader to refer to a neuropsycholinguistic assessment summary for information on Student's language skills. The letter asserted that the assessment report documented (i) low abstract thinking and reasoning skills, despite a

⁷ The parenthetical comment is original to Dr. Revedoro's letter.

strong vocabulary, and (ii) poor pragmatics, such as taking the perspective of others and using oral language for appropriate social communication. The letter stated that, over the course of his admission, Student "made gradual improvements in social and communication skills, and reports that he does not feel as anxious as he did when first admitted to the ABC Program."

66. Dr. Revedoro's letter concluded that, based on Student's response to interventions during his admission, Student would respond well to interventions in a small, highly-structured, specialized school setting, and recommended the following accommodations: (i) allowances for oral information to be repeated and broken down into smaller sections, (ii) extended time to complete certain tasks and to respond to information, (iii) adjustments to writing requirements in all subjects, (iv) use of a modified writing program, (v) adjusting homework requirements during his initial transition back to school with a gradual increase as he exhibits readiness, (vi) having very brief breaks scheduled into his day, (vii) opportunities to earn time engaging in appropriate, high interest activities, and (viii) praise for his efforts, and not solely outcome.

67. The letter also recommended that Student be given weekly opportunities to individually meet with a counselor or language specialist to reinforce adaptive coping skills and to provide support for appropriate social behavior in a supervised context. It recommended that a positive behavior support plan be developed and implemented across all settings, and that Student and his family obtain in-home behavioral support to decrease Student's emotional lability in the home setting.

68. The District team members took the diagnoses at face value, and agreed to change Student's primary eligibility for special education to autism, with a secondary eligibility of OHI. The team members also agreed to begin implementing the recommendations in Dr. Revedoro's letter pending receipt of records from UCLA-RNPH.

69. Mr. Pendleton was stunned to hear that Student was diagnosed with high functioning autism. Mr. Pendleton admits that he is not an autism expert, but asserts that

he is an expert in students dealing with emotional issues, and that he had observed on a daily basis that Student engaged in behavior resulting from anxiety and emotional outbursts. However, based on UCLA's prestigious reputation and not having seen the reports himself, Mr. Pendleton did not disagree with the team's decision to incorporate the recommendations in Dr. Revedoro's letter into Student's IEP.

70. Seventh grade boys are immature in how they communicate, and no team members had previously observed, or been informed, that Student engaged in atypical communication with his peers beyond that explained by his attention deficit, anxiety, and obsessive compulsive behavior. Nonetheless, the team was willing to accept the letter's conclusion that social communication was an area of need for Student, and to offer group speech services pending receipt of records from UCLA-RNPH.

71. The team discussed, and then offered, placement in a program at La Mesa for high functioning autistic students in a small, self-contained classroom that included embedded social skills and communication components. This program, SDC7, also included a classroom positive behavioral support plan reinforced by a token economy, and a classroom aide who went with SDC7 students to their general education classes to ensure consistent implementation of the classroom behavior support plan across school settings. The SDC7 program devoted one period each day to a social skills class called "Yes, I Can" (YIC), which was taught by a licensed marriage and family therapist. The YIC class focused on anger management, stress, social skills and maintaining friendships, and would address Student's social and emotional functioning.

72. Mother reported that Student had felt isolated in the ABC Program and was looking forward to coming back to school. However, to allow Student to become acclimated to school again, the team agreed that for the remainder of the school year Student would attend the YIC class each day at La Mesa, and receive an additional period per day of home instruction. Student would begin attending full days in the SDC7 class at La Mesa in 2012-2013, with the addition of 30-minute sessions of speech and language

services. The team also agreed that the District would conduct a comprehensive speech and language assessment of Student before his next annual IEP in April 2013.

73. The IEP team did not feel that any further assessments were necessary at that time. Instead, the District requested, and Parents executed, a release for UCLA-RNPH records.

74. Stephanie Chun-Ho, the school psychologist who attended the meeting, testified concerning the IEP team's decisions. In her opinion, Student had just completed a large battery of testing at UCLA-RNPH, and it would have been inappropriate for the District to put Student through additional testing without first attempting to obtain and review UCLA-RNPH's assessment results. Dr. Revedoro's letter had not recommended any further communication or behavioral assessments, but if it had, Ms. Chun-Ho indicated that the IEP team would have considered conducting such assessments when Student was back in a school program. Ms. Chun-Ho was a highly qualified school psychologist, and her demeanor was calm and thoughtful. Her responses were thorough and informative, and her testimony, particularly on the impropriety of conducting additional testing without information on the UCLA-RNPH assessments, was given great weight.

75. The team also agreed that there would be a "30-day review" IEP team meeting after the 2012-2013 school year began, to discuss a health care plan, DIS counseling, and a behavior support plan. Parents consented to the IEP.

76. Student was eager to go to La Mesa, and promptly began attending the YIC class. Parents approved Mr. Pendleton to provide Student with home instruction, and Student did well academically and behaviorally while working with Mr. Pendleton.

77. Student enjoyed being back in school for the YIC class so much that, after a few days, Mother contacted the District and made arrangements for Student to attend additional time on campus the remainder of the 2011-2012 school year.

78. Student earned A's and B's in all his classes for the Spring 2012 semester. Although Mr. Pendleton modified Student's work to test mastery, Student was graded on

grade level standards, and Student's grades were not inflated.

2012-2013 SCHOOL YEAR

79. For the 2012-2013 school year, Student attended the SDC7 classroom at La Mesa taught by Victoria Johnson. Ms. Johnson was also assigned as Student's case manager.

80. Ms. Johnson is a highly qualified teacher, and has taught students with autism in the SDC7 program for the last 10 years, and her testimony was thoughtful and persuasive. Her SDC7 classroom had 12 students, most with high functioning autism, who were expected to perform grade level work. Ms. Johnson implemented a classroom positive behavior plan under which the students earned points and tickets which they could redeem for items from the student store or student activities. She also used praise and free time as a positive reinforcer. She sent home daily point sheets for parents to review and sign, although Parents never signed and returned any of Student's point sheets. She incorporated all of the accommodations recommended in Dr. Revedoro's letter into her classroom.

81. Ms. Johnson employed multiple strategies to assist Student and his classmates in handling anxiety, such as breaking requests down step by step, changing topics, or asking what was on the student's mind. She worked with a DIS counselor and speech pathologist, and had a variety of effective techniques for teaching appropriate behavior and social emotional skills to her students. Ms. Johnson taught strategies to make her student more self-aware and to help them learn to appropriately ask for what they wanted. Ms. Johnson practiced these strategies with her students and reinforced the strategies every day.

82. Throughout the first quarter, Ms. Johnson observed positive behavior improvements in Student. He was blurting out less often, appropriately seeking attention by raising his hand, and was very proud of himself when he started turning in his late work

and catching up. Ms. Johnson modified the assignments to allow Student extra time, and to show fewer problems to demonstrate mastery, but Student was still responsible for, and met, grade level outcomes. Nonetheless, Student's grades were adversely impacted by his missing assignments.

83. The YIC class was taught for one period each day by James Walsh, a licensed marriage and family therapist with extensive education in special education and counseling, and 20 years of working with students with a variety of disabilities. Mr. Walsh has worked with hundreds of students with autism, as well as students with ADHD and OCD.

84. The YIC class focused on social skills for students with high-functioning autism and learning disabilities. DIS counseling and speech therapy were embedded in the program. One day each week was devoted to DIS group counseling and addressed coping strategies to deal with negative emotions (everything from anger to fear) and peer conflicts. One day each week was devoted to group speech therapy addressing pragmatics. Student received 25 minutes of DIS counseling after the YIC class once per week. Mr. Walsh met with his students' teachers, case managers, and DIS providers at least monthly to discuss behaviors and collaborate on strategies for behavior support.

85. Student was successful in the YIC class. He was engaged, participated, answered questions readily, was easily redirected, and made good progress on the DIS component of the program. Student was better able than some to benefit from that specific program, as he had verbal skills better than the rest of the class, followed teacher cues, and attended to task. Student was capable and worked well with the material presented on dealing with peers, anger management, and empathy. Student did display less ability to attend to task in the YIC at the end of the semester, but always responded well to encouragement and praise for work completed.

86. Mr. Walsh observed that Student had much higher communication skills than his classmates. Student did not present like the other students with autism with which

Mr. Walsh had worked, as Student was better able to understand language, nuances, idioms, and jokes. At hearing, Mr. Walsh opined that Student presented more as a student with ADHD and OCD than autism, but benefitted from the YIC class regardless of his disability.

87. One day each week of the YIC class was devoted to social communication skills, and a District speech pathologist, Linda Hamilton, provided speech therapy to the YIC students in small groups of three to four students who would work on pragmatic skills. Ms. Hamilton also worked with Student for 30 minutes per week individually.

88. Student made excellent progress in group and individual speech therapy. Student was friendly, witty, charming, quick-witted, and enjoyed banter with Ms. Hamilton. Student made good eye contact. Ms. Hamilton formed the opinion that it was not Student's language skills that impacted his education, but his emotional state, as his performance was dependent upon his emotional status. She believed that Student understood social integration and how to communicate within social groups, and observed him during free time on the playground striking up conversation with other students his age and moving freely between groups.

OCTOBER 3, 2012 IEP TEAM MEETING

89. On October 3, 2012, the District convened the 30-day review IEP team meeting. The meeting was attended by: Parents, SDC7 teacher Ms. Johnson, school psychologist Eboni Shields, school counselor Steve Paterson, YIC instructor Jim Walsh, and the general education and adaptive PE teachers. The meeting was also attended by Student.

90. Student's general education teacher sent a report to the team that Student was very smart, but did not complete his homework. She authorized Student to use a computer to complete his work, and noted that Student liked to "subtly challenge" her by asking questions and making comments.

91. Ms. Johnson reported to the team that Student was focused, asked for clarification as needed, and wanted to do a good job. English was a strength for Student, and he had joined La Mesa's book club. She reported that Student continued to struggle in math, resisting help, failing to maintain a reference notebook like the other students, and putting his head down on the desk during math lessons and practice work.

92. Mr. Walsh reported that Student was an active listener in the YIC class, but resisted class participation. Mr. Walsh suggested that the team consider re-instituting DIS counseling services to help Student deal with stress and anxiety. Student told the team that he was not interested in individual DIS counseling, and preferred to drop in with school counselor Steve Paterson, with whom he had a good relationship, as needed.

93. The team agreed that Student would remain in the SDC7 classroom with speech services. They agreed that Student could meet with Mr. Paterson when he needed to calm down or speak with someone. Parents consented to the IEP.

94. As the fall semester of the 2012-2013 school year progressed, Student's home life became even less stable than it had been the previous fall. As a result of these stresses, Student, who already suffered from ADHD, OCD, and anxiety disorder, began to lose sleep and would come to school mentally and physically exhausted. He often placed his head on his desk instead of attending to lessons or completing his work. Student visited Mr. Paterson once or twice a week, to take a break and talk with someone he trusted.

95. On October 15, 2012, Mr. Paterson called Mother about an inappropriate comment Student made in class, and Mother reported that a lot was going on at home.

96. On October 22, 2012, Mr. Paterson met with Mother and Student when Student arrived late one morning because he did not want to go to school after being punished the night before for earning a "D+" in math.

97. Student's behaviors of blurting out and refusing to participate began escalating in November 2012, but by December 2012 Student was not as responsive to his

teachers as he had been previously. At one point, Ms. Hamilton asked Student if everything was OK, and he responded that his mother wasn't home much and he missed her. In December, he told the SDC7 classroom aide that "It's rough at home," "You don't know how bad it is," and "I can't do my homework at home."

98. Ms. Johnson became alarmed by Student's conduct, which was having an impact on his progress her classroom. Ms. Johnson believed that Student's increasing inability to cope with frustration in the classroom was due to emotional issues, and that Student required more than a classroom positive behavior support plan to address his anxiety and behaviors. Just as Ms. Johnson was about to call an IEP team meeting, Mother requested a meeting, which was mutually scheduled for the end of January 2013.

99. On December 10, 2012, Student went to Mr. Paterson very upset, saying that his Mother had called the Department of Children and Family Services, and that he was afraid that he was going to be taken away from his home. Mr. Paterson left a message for Mother, and when she returned his call the next day, she reported that Student was having a rough time, and had run away from home, and had been found a few hours later. One day in December, Student went to Mr. Paterson's office to sleep in a corner.

100. At the end of the fall semester, Student had earned a B in YIC, C's in English, his general education elective, and PE, and D's in pre-algebra and history. Student's grades were adversely impacted by missing assignments, and were not inflated.

SPRING SEMESTER 2012-2013 SCHOOL YEAR

101. After Student returned from winter break, he initially did very well in the SDC7 classroom and made up a lot of late work, of which he was very proud. However, behaviorally, Student resisted opportunities to make up missing work in class by arguing, giving excuses, placing his head on the desk, and commenting "I can't do it," "I'm tired," and "I don't have time." Student also told Ms. Johnson that he didn't feel well, that his stomach hurt, that he couldn't sleep at night, and Student visited the nurse's office twice

after returning from winter break. Two days before the IEP team meeting, Student came into a class late from the counselor's office, curled up under a table for 35 minutes and refused to respond to Ms. Johnson, only getting up when the bell rang for the next class. Over a period of three days prior to the IEP team meeting, Student put his head down on his desk for 21 percent of class time. Student also failed to respond to prompts to sit up and begin doing his work, although he still earned tickets, praise, and Friday Free Time for task completion and class participation in which he did engage.

JANUARY 29, 2013 IEP TEAM MEETING

102. On January 29, 2013, the District convened an IEP team meeting for Student. In attendance were: Student, Parents, school psychologist Eboni Shields, school counselor Steven Paterson, and two of Student's general education elective teachers. Ms. Johnson was unable to attend, but sent a report.

103. Student's general education Business Math teacher reported that after a difficult initial transition, Student was enthusiastic in class, although he sometimes blurted out, interrupted others, and resisted the keyboarding program used in the class. His general education History teacher reported that Student did not like completing work, but was capable of learning the material, and did well when she modified the work to test learning. She reported that Student was missing assignments again at the end of the semester and exhibiting some behavior problems in class.

104. Ms. Johnson reported that, academically, Student had a B grade in English, but that he was missing assignments, which she would accept late as an accommodation. She noted that Student enjoyed reading, and was again a member of the La Mesa book club. However, Student was failing in math, as he had missed a quiz and failed to turn in any homework in the current quarter (third quarter of the 2012-2013 school year). She also reported on Student's deteriorating classroom behavior.

105. Parents reported that Student was increasingly agitated at home, and was

more argumentative, engaging in increased tantrums, and becoming physically aggressive. The team reported that these behaviors were not being seen at school.

106. Parents requested a one-on-one special academic instructional aide (SCIA) assessment, referral to educationally related instructional counseling services (ERICs), and consideration of a nonpublic school (NPS) placement.

107. The team agreed that Student needed additional counseling services to address his increased anxiety and stress, and agreed to make a referral for ERICS services, which provided intensive counseling services, more experienced professionals, longer counseling sessions, and family counseling. The team also agreed to conduct an SCIA assessment to determine if one-on-one intervention in the classroom would meet Student's behavioral needs, and to hold another IEP team meeting to review the referral and assessment results. The team agreed that Student would remain in the SDC7 classroom pending the next meeting, but would begin receiving individual DIS counseling services while the ERICS referral was in process. Mother consented to the January 29, 2013 IEP.

STUDENT'S EXPERTS

Dr. Perry Passaro – Psychologist

108. Dr. Perry Passaro is a licensed psychologist, educational psychologist, and a credentialed school psychologist. He is very highly qualified in his field, and has worked in public education for over 20 years with students with a wide range of disabilities, including ADHD, OCD, anxiety disorder and autism. Dr. Passaro is widely published, and is particularly well known for a study he conducted that found that implementation of a classroom-wide positive behavior plan caused a dramatic and significant improvement in the behavior of all students in the classroom.

109. Dr. Passaro performed a review of Student's educational records. He did not review any reports from UCLA-RNPH, and did not speak to Parents or Student's teachers.

Dr. Passaro opined that he had seen substantial evidence in the records that Student needed a small, structured classroom environment like the SDC3 or SDC7 classrooms, but was uncomfortable with how Student had gotten there. He believed that best practices would have been for the District to gather more information on Student to inform the IEP teams prior to placing him.

110. Dr. Passaro lamented that the IDEA's provisions are more reactive than proactive. He stated that best practice would have been for the District to proactively assess Student's behavior on three occasions: (i) after the March 28, 2011, matriculation team meeting when District staff were informed that Student had been moved from general education to an SDC, to determine why Student's behaviors had regressed, (ii) when the Lazar letter was received, again to determine why Student's inappropriate behaviors were increasing, and (iii) when UCLA-RNPH did not send its assessment reports.

111. With regard to returning Student to school after his discharge from UCLA-RNPH, Dr. Passaro opined that best practices required that any student with anxiety-based disorders have exposure to school increased gradually, with participation in preferred classes for partial days, to keep the Student connected but at ease, and to "grow" his return.

112. Dr. Passaro conceded that Student's behaviors and anxiety were consistent with his diagnoses of ADHD and OCD, the symptoms of which can last a lifetime, as well as autism. He also conceded that individualized behavior support plans were not necessary for students where routine and classroom-wide behavior interventions were successful in improving the students' behaviors

113. Dr. Passaro was very knowledgeable and articulate, and effectively explained concepts and his reasoning. He declined to answer questions that were not in his area of expertise and was professional, thoughtful, and serious in demeanor. He expressed genuine concern for Student. However, Dr. Passaro had not seen any UCLA-RNPH reports, and had not been informed prior to much of his testimony that Student was transitioning

between school districts from sixth to seventh grade, or that the District had not performed the triennial assessments, which adversely affected the persuasiveness of his testimony regarding what the District should have known. He also consistently and repeatedly testified as to best practices, which is not the standard to which the District is held in this proceeding. These factors adversely impacted the weight given to his opinions.

Nancy Bagshaw – Speech Language Pathologist

114. Nancy Bagshaw testified for Student in lieu of Karen Schnee, a speech pathologist who had performed a comprehensive speech and language evaluation of Student in July 2013. Ms. Bagshaw has advanced degrees in communication disorders, is a credentialed speech language pathologist, and had provided speech therapy to students with IEP's as a school speech therapist for 18 years.

115. Ms. Bagshaw reviewed Student's files, and noted that neither an elementary school 2008 speech assessment, nor the April 2011 triennial assessment, had assessed Student for social communication. She opined that when a student scores "at-risk" on the BASC in the areas of social skills and leadership, as Student did according to Ms. Ocasio's report, the IEP team reviewing the results should discuss whether social communication appears to be a problem area that needs to be assessed. She did not know whether or not this had been done at Student's April 12, 2011 IEP team meeting.

116. Ms. Bagshaw explained that the scores on the Woodcock-Johnson (WJ) and Comprehensive Assessment of Spoken Language (CASL) in Ms. Schnee's assessment report indicated that Student had a weakness in retrieving words quickly, determining the meaning of words from contextual clues, thinking outside the box, and cognitive flexibility for determining multiple meanings for ambiguous words, all of which could lead to shallow comprehension. Ms. Bagshaw conceded that Student scored in the average range in all other subtests of the CASL, and in the subtest for "pragmatic judgment" had been able to generate questions, requests, or expressions of gratitude or sorrow, initiate conversation or turn-taking, and judge the appropriateness of certain language in a given situation. Ms.

Schnee had concluded that Student's "social skills are age appropriate." Ms. Schnee recommended that Student participate in a social skills group for one hour per week, and receive one hour per week of speech services to work on abstract language skills.

117. Ms. Bagshaw criticized a speech assessment performed for the District by Linda Hamilton in May 2013, for not including an "interpreting ironic statements" subtest in the Social Language Development Test (SLDT) when Student didn't understand the instructions, because a zero score would have been informative on Student's lack of skills in that area of social language. She also testified that Ms. Hamilton had mis-scored the "making inferences" subtest of the SLDT, and incorrectly given Student a higher score in this area of social language than Ms. Schnee.

118. Ms. Bagshaw was not familiar with the SDC3 or SDC7 programs, or the YIC class, and was justifiably hesitant to opine on Student's programs. She was forthcoming in stating that she had been retained to conduct a file review regarding suspected areas of disability and the need for assessments, had not interviewed Student, Parents, Student's teachers, or Student's assessors nor seen the UCLA-RNPH's neuropsycholinguistic assessment report, and was not prepared to weigh in on the types of therapeutic interventions required by Student. Her opinion that the District should have assessed Student for social communication deficits when he entered the District, despite the IEP statement that communication development was not an area of concern, based upon the BASC scores in Ms. Ocasio's report was given no weight, as (i) the District was unaware of the report at that time, (ii) her testimony that such scores should prompt an IEP team discussion, as opposed to an assessment, contradicted that opinion, and (iii) she is not a school psychologist, has never administered the BASC, and has had no training in interpretation of the BASC to support a conclusion that the at-risk scores indicate social communication deficits. In addition, Ms. Bagshaw's criticism of how Ms. Hamilton scored the inferences subtest SLDT was tentative, and Ms. Bagshaw was not familiar with the SLDT guidelines for scoring nonverbal responses, and her testimony attacking the accuracy of

Ms. Hamilton's SLDT scores was given no weight.

Jeffrey Hayden – Behavior Analyst

119. Student called Dr. Jeffrey Hayden, a board certified behavior analyst (BCBA) who has observed Student in his current program, to discuss applied behavioral analysis (ABA), Parents' preferred methodology for addressing behavior. Dr. Hayden was highly critical of implementing a token economy system without collection of data in conformance with ABA principles, and of the goals in Student's May 24, 2013 IEP. However, Student did not present any opinion from Dr. Hayden concerning Student's needs, or the appropriateness of Student's program from August 2011 through January 2013.

DISTRICT'S EXPERTS

Meghan Yolles – School Psychologist

120. Meghan Yolles is a highly qualified credentialed school psychologist and has been a BCBA since 2008. She has performed hundreds of psychoeducational assessments, including approximately 250 for the District during the last five years.

121. Ms. Yolles was critical of Dr. Passaro's opinion concerning the need for assessment of Student upon his entry into the District as based myopically on a records review. She opined that the discussions Mr. Pendleton had with Ms. Sparks provided the additional information that Dr. Passaro felt the District lacked, and that no further assessment was warranted at that time, as Student's behaviors were well documented and understood. In addition, she explained that "at risk" and "of concern" scores on the BASC warrant monitoring, but are not so significant as to require intervention or further assessment.

122. Ms. Yolles was of the opinion that no further assessment was warranted upon the District's receipt of the Lazar letter, because the letter did not request further assessment, the letter indicated that Student was already receiving care for depression, and the letter was two months stale when received.

123. With regard to Student's escalating behaviors in December 2012 and January 2013, she opined that the ERICS referral was appropriate, as Student was demonstrating emotional concerns. She explained that Student putting his head down was a behavioral choice that appeared to be driven by emotions, and that Student was articulating to Ms. Johnson that he was shutting down due to feelings. She opined that a functional behavior analysis (FBA) was not needed to determine if Student's behavior was an escape from demands when Student was telling everyone why he was shutting down, and the circumstances instead warranted the ERICS referral for a mental health assessment.

124. Ms. Yolles explained that it would not have been appropriate to conduct another battery of tests after Student was discharged from UCLA-RNPH, and that a space of 18 months is generally considered appropriate. Ms. Yolles took issue with the suggestion that ABA data collection was the only means to detect patterns of behavior, and explained that behavior could be analyzed in reference to progress on goals.

125. Ms. Yolles concluded that the programs offered to Student had been appropriate, were designed to meet Student's unique needs, and that Student had made educational progress in those programs.

126. Ms. Yolles was very well prepared, promptly answered all questions, and readily referred to those portions of the record or conversations with Students' teachers that supported her analysis and opinions. She was knowledgeable and comfortable with the subject, was interested and helpful in demeanor, and her testimony was persuasive and accorded great weight.

Linda Hamilton – Speech Language Pathologist

127. Linda Hamilton has degrees in communication disorders and speech and language pathology, and is a credentialed speech and language pathologist. She has worked as a school speech pathologist since 2004, most recently as a contractor for the District. In addition to providing weekly group and individual speech therapy to Student from September 2012 through December 2012, she conducted a comprehensive speech

and language assessment of Student in May 2013.

128. During her four months of working with Student, Ms. Hamilton observed that Student participated most of the time, and rarely put his head down or refused to participate. Student sometimes made inappropriate comments, used inappropriate language, or blurted out information, but when he was engaged he performed above grade level with insightful comments on topic and mastery of language. Student became disorganized when trying to hold his place while gathering thoughts (“Umm...”), but not so much that it was a problem. Student occasionally went off topic and to a preferred topic, and perseverated a little, but it was minimal and fell within acceptable limits.

129. During the May 2013 assessment, Student scored within the average range in both receptive language skills and expressive language communication skills, which is within acceptable limits for language and vocabulary knowledge and application. On the SLDT tests of pragmatic language, which Ms. Hamilton used as a screening tool, Student scored in the high average range in making inferences, interpreting social language, stating and justifying solutions, and in the low average range in social interaction (taking the perspective of others). Ms. Hamilton attempted administration of the “interpreting ironic statements” subtest, but Student was not able to reject the literal meaning of the statement in order to interpret the irony or sarcasm. For example, Student did not understand that the statement “That was easy” after finishing a particularly difficult task was sarcastic. Ms. Hamilton noted that this score was itself ironic, as she had often observed Student use both irony and sarcasm as part of his communication style, which added wit and color to his communication, but Student was unable to identify it in others. She was also aware that irony was part of the curriculum in junior high, and chose not to complete administration of that subtest or report it in the SLDT scores.

130. During testing, Ms. Hamilton found Student’s pragmatic skills to be within acceptable limits, and noted good eye contact, adequate topic maintenance, animated expression appropriate to topic, and conversational skills above those of his peers. Student

checked for listener understanding and consistently made “conversational repair” when Ms. Hamilton expressed confusion. However, based upon her observations of Student in the YIC program and during group speech therapy, and the impact of his emotional status on his social pragmatic skills, Ms. Hamilton recommended monitoring Student because even mildly decreased skills might impact his access to the curriculum or communications in a general education setting.

131. Ms. Hamilton has worked with students with ADHD and OCD as well as autism. In her opinion, autistic children don’t understand why other people don’t understand them, or why behavior is inappropriate. In contrast, Ms. Hamilton observed that Student would push the limits, make statements calculated for a response, and did not feel that Student failed to understand social consequences. She was qualified to diagnose communication deficits that go hand in hand with disorders like autism, OCD, and bi-polar disorder, and noted that it is problematic that many of them share the same symptoms.

132. Ms. Hamilton opined that Student did not need speech therapy as a related service in order to benefit from special education. Student’s receptive and expressive language skills tested in the average range, and she did not believe that Student’s language skills were drawing attention to him in a way that was impacting his access to education. However, although Student’s pragmatic skills were appropriate 90 percent of the time, they broke down when student got emotional, which is appropriate for a young child, but not a student in eighth grade, and she opined that his emotionality needed to be addressed. In her opinion, the SDC7 program, in particular the YIC class, was addressing Student’s emotionality. Ms. Hamilton agreed with Ms. Schnee that Student would benefit from speech services, but opined that such services were not necessary for Student to receive educational benefit within the meaning of special education law.

133. Ms. Hamilton had an extensive time to observe Student’s use of language in the classroom and with peers. Her testing of Student’s speech and language skills was thorough, and for the most part consistent with that reported by Ms. Schnee. Notably,

where Ms. Schnee's assessment results differed from those of Ms. Hamilton, Ms. Schnee often commented in her report that such results were unexpected, for example, she found Student's extremely low score in the "meaning from context" subtest of the CASL to be "surprising given his facility in other language areas," and his borderline score on the "inferences" subtest to be surprising because Student had excelled in nonliteral language. For these reasons, Ms. Hamilton's testimony was very persuasive, and was given more weight than that of Ms. Bagshaw and her report of Ms. Schnee's assessment results.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of persuasion on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

ISSUE 1-DENIAL OF A FAPE FROM SEPTEMBER 2011 THROUGH JANUARY 2013 BY FAILING TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY, SPECIFICALLY (A) SPEECH AND LANGUAGE, (B) BEHAVIOR AND (C) SOCIAL EMOTIONAL FUNCTIONING.

2. Student contends that the District should have assessed Student to determine if his problems with behavior and social emotional functioning were the result of autism or speech and language deficits. Specifically, Student argues that the District failed to conduct pragmatic language, behavior, or social emotional functioning assessments at four points: (i) when Student entered the District, (ii) when the District became aware of the Lazar letter, (iii) when Student was discharged from UCLA-RNPH and (iv) when Student's behaviors escalated in the first half of the 2012-2013 school year.

3. The District contends that Student's triennial assessments had been completed a few months before Student entered the District, and that it had no reason to suspect that Student's behaviors and difficulty accessing the curriculum were due to disabilities other than his diagnosed ADHD, OCD, and attention processing deficit. The District contends it responded appropriately when it received the Lazar letter just prior to the January 2012 IEP, by which time Student was scheduled to enter a neuropsychiatric

hospital program, and argues that when Student was discharged, it appropriately adopted and implemented the recommendations of UCLA-RNPH based upon the assessments conducted during Student's admission. The District also contends that it promptly called an IEP team meeting in January 2013 after Student's behaviors escalated and agreed to conduct multiple assessments.

4. Under the federal IDEA and companion state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

5. IDEA and state law require that, in order to provide FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 203 [102 S.Ct. 3034, 3049] ("Rowley").) The IDEA requires a school district to provide a student eligible for special education with a "basic floor of opportunity," which "consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" the child. (*Id.* at p. 200.) In *Rowley*, the Supreme Court 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. (*Ibid.*) 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.)

6. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting IDEA 1997, Congress was presumed to be aware

of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “‘meaningful’ educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

7. In order to meet the continuing duty to develop and maintain an appropriate educational program, the school district must assess the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) Each student must be assessed in all areas of his or her suspected disability. (20 U.S.C. § 1414(b)(3); Ed. Code, § 56320, subd. (f).)

8. With regards to the assessment process, special education law references “initial evaluations” (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301 (2006); Ed. Code, § 56320), and “reevaluations.” (20 U.S.C. § 1414(a), (c); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (a)(1).) “An initial evaluation is the first complete assessment of a child to determine if the child has a disability under the IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated. . . any subsequent evaluation of that child would constitute a reevaluation.” (71 Fed.Reg. 46640 (Aug. 14, 2006).) California law refers to a reevaluation as a “reassessment.” (Ed. Code, § 56381.)

9. The district must conduct a reassessment if it “determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation,” or if the student’s parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the district agree otherwise, and shall occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).)

10. The student must be assessed in all areas related to his or her suspected

disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2),(3); 34 C.F.R. §§ 300.304(b)(2), (c)(4) (2006); Ed. Code, § 56320, subs. (e), (f).) The IDEA provides no specific right for a student to be classified under a particular disability, but requires that the student's educational program be designed to suit the student's demonstrated needs. "Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them ... the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs." (*Fort Osage R-1 School District v. Simms* (8th Cir. 2011) 641 F.3d 996, 1004.)

11. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

12. A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable... at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*))

Issue 1(a): Speech and Language Assessment

13. Student contends that the District should have suspected upon enrollment that Student had autism and anxiety disorders, and committed a procedural error by failing

to conduct a comprehensive speech and language assessment, based upon (i) Student's failure to meet behavior and social emotional goals from the April 2010 IEP and (ii) the triennial BASC scores identifying Student's functional communication, atypicality and social skills as areas of concern. Student also contends that the District should have reassessed Student for communication deficits when it received notice of his autism diagnosis. The District contends that the triennial assessment had found Student's communication development not to be of concern, and that even after two assessments in May and July 2013, Student did not meet the criteria for a language disorder.

14. The weight of the evidence established that the communication difficulties experienced by Student were identified and addressed by the District at all times during the period at issue, and that the District was not required to further assess Student in the area of speech and language.

15. The District had no reason to assess Student's speech and language skills upon his entry into the District. The April 2011 IEP in effect when Student enrolled stated that Student's communication development was "age appropriate and not an area of concern." The District did not have Ms. Ocasio's report with Student's BASC scores, and even if it had, Ms. Chun-Ho and Ms. Yolles testified persuasively that scores of "at-risk" on the BASC do not identify problems requiring immediate intervention, but areas that require monitoring. Ms. Bagshaw was unable to definitively state that the "at-risk" scores on the BASC in social skills and leadership indicated social communication deficits, only that the scores would warrant an inquiry as to their meaning by the IEP team. Review of Student's triennial assessments took place mere months prior to his entry into the District, and Student's triennial IEP team had not determined that a social communication assessment was required. Ms. Sparks did not report that Student had pragmatic communication deficits to Mr. Pendleton. After Student was enrolled, Mr. Pendleton did not observe pragmatic communication deficits beyond those consistent with Student's ADHD and OCD, and which were being addressed by Student's behavior/conflict resolution and social

emotional goals (to use words to express his needs, and to use self-regulation skills when experiencing frustration or anxiety). During the time that Student was unilaterally removed from school during the first semester by Parents, the District had no opportunity to observe Student exhibiting pragmatic speech difficulties while interacting with peers. Student was performing well academically and progressing functionally after enrollment in the District, and the District had no reason to assess Student's speech and language abilities.

16. Student contends that the District should have obtained the triennial assessment report from Sulphur Springs when Student entered the District, but fails to explain how the District was supposed to accomplish this. The District had requested and received Student's educational records upon his transfer from Sulphur Springs, and Ms. Ocasio's report was not included. The District reasonably believed that the triennial assessment report consisted of the summarized test results extensively documented in the April 12, 2011 IEP. This decision declines to impose on the District an obligation to discover a document that it did not know, and had no reason to suspect, existed. The District had no knowledge of Ms. Ocasio's report, and per *Adams*, whether the District should have assessed Student cannot be judged in hindsight based upon the information contained in Ms. Ocasio's report. Student also failed to explain, let alone establish, how the information in Ms. Ocasio's report would have changed the educational approach used for the student. At the time of Student's enrollment in the District, the BASC and BES test results were consistent with his known diagnoses of ADHD and OCD, which were addressed by the SDC3 program offered.

17. At all times prior to Student's discharge from UCLA-RNPH, his difficulty in interaction with his peers was consistent with, and satisfactorily explained by, his ADHD and OCD. Student crying in front of peers, clashing with students when he did not get his own way, and perseveration on a former friend's injury, were all consistent with these known diagnoses. Student's escalating anxiety and inability to control his behaviors at

school was consistent with, and explained by, his lack of sleep and extreme anxiety about the problems he and his family were experiencing at home. None of these events or actions suggested that Student had abstract thinking or pragmatic language deficits. To the contrary, there was significant evidence that Student's behavior was dependent upon his emotional state, and that Student interacted well with peers and adults when he was not upset about things not going his way. Throughout Student's attendance in the District he failed to exhibit the common indicia of autism: he made good eye contact, sought reactions from teachers, participated in extracurricular activities and maintained friendships in and outside of the classroom. The weight of the evidence established that the District had no reason to suspect that autism, rather than ADHD and OCD, was responsible for Student's communication difficulties, or to assess for autism-related communication deficits.

18. To the extent Student contends that Dr. Revedoro's letter should have triggered additional speech and language assessment, Student's claim fails because the District responded appropriately in seeking UCLA-RNPH's neuropsycholinguistic assessment results first. Upon receipt of Dr. Revedoro's letter indicating that Student demonstrated "relative weaknesses" in social communication, the District immediately sought and obtained a release from Parents to obtain the neuropsycholinguistic assessment summary from UCLA-RNPH with current assessment information and recommendations. Multiple experts testified consistently that it is not good practice to reassess a child immediately after another assessment unless it is first determined what prior assessment was done and how often the test can be administered without affecting the validity of the result. Ms. Chun-Ho and Ms. Yolles testified persuasively that it is reasonable for a school district to seek the results of a private assessment prior to conducting its own assessment, not only for this reason, but also because if the district finds the assessments persuasive it can adopt the results without subjecting the student to additional testing. Therefore, the District reasonably and appropriately sought the records

of the private speech assessment from UCLA-RNPH for its own review prior to determining whether a reassessment of Student's communication skills was necessary.

19. At no time has the District been provided with any information from UCLA-RNPH, despite the District's reasonable efforts to obtain it. No data, assessments, protocols, or reports from the ABC Program or UCLA-RNPH were offered into evidence by Student and no one from the ABC Program or UCLA-RNPH testified at hearing. Mother had not, as of the date of the hearing, provided copies of any data, assessments, protocols, or reports concerning Student from the ABC Program or UCLA-RNPH to the District. Mother herself has been unable to obtain any such records, and although Mother executed a release for the District, the District has not received the records from the ABC Program or UCLA-RNPH. Accordingly, the District cannot be said to have denied Student a FAPE by failing to further assess Student on the basis of reports or data that it had never seen.

20. Although Dr. Passaro testified that the District's failure to receive the UCLA-RNPH's assessment records should have prompted further assessment, by the time it became apparent that those records would not be promptly produced, the 2012-2013 school year had begun and Student was exhibiting success in the YIC class' pragmatics-based curriculum and higher communication skills than his classmates. Student also made excellent progress in his group speech sessions and was on target to meet pragmatic language goals set by Ms. Hamilton. Further, Student's progress in his pragmatic language skills indicated that reassessment was not needed before the comprehensive speech and language assessment scheduled to take place in preparation for Student's April 2013 IEP review. Student's abstract thinking and pragmatic skills were not an area of concern prior to or at the January 2013 IEP team meeting, and reassessment prior to that time was not warranted.

21. In sum, Student failed to meet his burden of establishing by a preponderance of the evidence that the District committed a procedural violation by failing to assess Student in the area of speech and language from September 2011 through January 2013.

22. Even had a reassessment of Student's communication development been necessary, a denial of FAPE may only be shown if a procedural violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. As discussed below, even assuming for the sake of argument that the District should have assessed Student, the evidence did not demonstrate a denial of a FAPE occurred.

23. Student demonstrated increased ability in social communication in the fall of the 2011-2012 school year. Student made behavioral gains in Mr. Pendleton's class, which included progress in social communication pursuant to his two goals: to calmly and clearly state what is wrong to an adult when upset or agitated, and to decrease inappropriate behaviors to engage other students in play or an activity requiring social interaction. Although Student had communication challenges, as when he cried in detention and perseverated on pizza, Mr. Pendleton worked with Student on his communication skills by teaching him strategies for calm and appropriate communication, such as deep breathing and taking the perspective of others. The District was unable to work with Student on his peer interaction goal while he was on home study, but Student was able to interact calmly and clearly with his home study teachers. The weight of the evidence established that Student was receiving meaningful educational benefit in the area of social communication prior to his discharge from UCLA-RNPH. After Student's discharge from UCLA-RNPH and his enrollment in the SDC7 program, Student made good progress on his social communication skills and his pragmatic speech goals. When Student was later assessed in April and July 2013, Ms. Hamilton found Student within acceptable limits for social pragmatic language with the exception of interpreting irony, which Student hadn't yet learned in the curriculum. Even Student's private assessor, Ms. Schnee, found Student's social skills to be "age appropriate" during this time period. In addition, based solely on Dr. Revedoro's letter, the District provided Student with 25 minutes per week of individual

speech therapy and 45 minutes of group therapy in the YIC class, and a daily class on social skills, which exceeded Ms. Schnee's service recommendations.

24. Ms. Hamilton's testimony that Student's scores in the average to above average range in receptive and expressive speech, and that his abstract language and social communication skills were not an area of concern, was particularly persuasive because her observations of Student's good communication skills was corroborated by the testimony of Mr. Pendleton, Mr. Walsh, and Ms. Johnson, who each had extensive time to observe Student in the school environment. Ms. Hamilton's testimony and assessment information was given greater weight than the testimony of Ms. Bagshaw and the assessment report of Ms. Schnee. On the evidence offered, Student received speech services that met or exceeded his speech and language needs from April 2012 through January 2013, and received educational benefit from them.

25. Dr. Revedoro did not testify at hearing, and her roles in UCLA-RNPH or the ABC Program, if any, are unknown. Also unknown is whether she had any personal knowledge of Student and his participation in the ABC program, or was reporting information in her letter from a records review. It is unknown what records were reviewed by Dr. Revedoro, if any, and whether the review was thorough or cursory. No evidence was submitted that Dr. Revedoro was a certified school psychologist, licensed speech pathologist or had any education, training, or experience in school programs or curriculum. No evidence was submitted that Dr. Revedoro had ever observed Student in a classroom setting, or had contacted the District for any of Student's educational records. Dr. Revedoro's letter was given no weight in establishing Student's educational needs, whether academic, behavioral, or in social communication. Her letter was considered only as unsupported information with recommendations provided to the District by Parents.

26. Finally, the District did not impede Parents opportunity to participate in the decision making process regarding Student's social communication needs. Parents were active participants in the IEP team meetings throughout the 2011-2012 and 2012-2013

school years, and present when reports of Student's progress in social communication were reported. A parent has meaningfully participated in the IEP process when he or she has an opportunity to discuss a proposed IEP and when parental concerns are considered by the IEP team. (*Fuhrmann, supra*, 993 F.2d at p. 1036.) The District implemented speech services based on Dr. Revedoro's letter, and agreed to a comprehensive speech and language assessment, at Parents' request.

27. The weight of the evidence did not demonstrate that the lack of reassessment in the area of social communication due impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused Student deprivation of educational benefits from September 2011 through January 2013. Therefore, Student failed to meet his burden of establishing by a preponderance of the evidence that a procedural violation in failing to timely conduct an assessment of social communication resulted in a substantive denial of a FAPE.

Issue 1(b): Behavior Assessment

28. Student contends that his behaviors became steadily worse due to application of inconsistent and unsuccessful behavior intervention strategies that resulted in his behavior needs remaining unidentified and unmet, and that the District should have conducted an FBA or functional analysis assessment (FAA) using ABA principles. The District contends that Student did not exhibit serious behavior problems that warranted an FAA or a behavior intervention plan (BIP), and that suicidal ideation would not give rise to a behavior assessment, but a threat assessment.

29. Legal Conclusions 1 through 12 are incorporated herein by reference.

30. Federal law provides that when a school district subjects a child to certain types of discipline that result in a change of placement, it must conduct an FBA. (20 U.S.C. §§ 1415(k)(1)(D)(ii), 1415(k)(1)(F)(i); 34 C.F.R. § 300.530(d)(ii)(2006); Ed. Code, § 48915.5.)

31. California law requires a school district to conduct an FAA when a student is

found to have caused a serious injury as the result of his disability. (Ed. Code, §§ 56520 through 56525 and Cal. Code Regs., tit. 5, § 3052 (commonly referred to as the “Hughes Bill”).⁸ A behavior intervention plan (BIP) is required when a student “exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student’s IEP.” (Cal. Code Regs., tit. 5, § 3001, subd. (f).) Serious behaviors that may require a BIP are “self-injurious, assaultive, or cause serious property damage, and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student’s IEP are found to be ineffective.” (Cal. Code Regs., tit. 5, § 3001, subd. (ab).) The requirements for a behavior intervention plan and an FAA are specific and extensive. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f) & 3052.)

32. However, where a child has not been subject to a disciplinary change of placement, nor engaged in serious behaviors, an IEP team must still generally consider whether a child’s behavior impedes his learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).)

33. The weight of the evidence established that the behaviors that impeded Student’s learning were identified by the District during the period at issue, and the District was not required to further assess Student in the area of behavior, or to conduct an FBA or FAA.

34. Student was not subject to a disciplinary change of placement between September 2011 and January 2013, and therefore the District had no mandatory duty to conduct an FBA.⁹

⁸ This statute was repealed effective July 1, 2013, but was in effect during the period at issue.

⁹ Student’s one-day suspension in December 2012 did not constitute a change of placement. School personnel may remove the student from his or her educational

35. Student did not cause a serious injury from September 2011 through January 2013, and at most poked a former friend in the arm, and the District was not required to conduct an FAA under the former Hughes Bill. Neither did Student engage in serious behaviors that were “self-injurious, assaultive, or cause serious property damage, and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student’s IEP are found to be ineffective” requiring development of a BIP.

36. It was undisputed by the parties that Student had behaviors that impeded his learning and that of others, and that were required to be considered by his IEP teams. Prior to enrollment in the District, Student’s behaviors had been extensively documented in his IEP’s, including negative attention seeking behaviors when frustrated and crying when things did not go Student’s way. Student contends that he developed “school refusal” behavior that required assessment to determine the underlying cause, but the evidence put forward by Student to establish school refusal does not survive scrutiny. Student was excited about attending Sierra Vista, complained about being isolated during his UCLA-RNPH admission, wanted to return to school full-time at the end of the 2011-2012 school year, had friends at school, and participated in extra-curricular activities. Dr. Lazar’s letter, had it been presented to the District when written in November 2011, said nothing about school refusal, and Student continued to attend school for weeks after the letter was written. As discussed at Issue Two, below, Student did not establish that he was being bullied, let alone that its severity resulted in school refusal. Mother’s testimony that Student was exhibiting school refusal because he didn’t want to wake up and get ready for school in the morning was conclusory, and unpersuasive because her memory on the

placement for violating a student code of conduct without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3) (2006).)

nature of the disagreements in the morning was vague. Lastly, there was no evidence that Mother notified the District of Student's school refusal. The weight of the evidence did not establish that Student was engaged in school refusal, and no behavior assessment was required to determine the cause therefor.

37. Similarly, the weight of the evidence did not establish that Student required a behavior assessment after the Lazar letter was disclosed to the District in January 2013. At that time, the letter was over two months stale, and there was no evidence that Student continued to have suicidal ideation. Also, the consistent testimony of Ms. Amrhein, Mr. Flores, Ms. Bennett, and Mr. Walsh was persuasive that the response to suicidal ideation is an immediate threat assessment under District protocol, and not a classroom behavior assessment.

38. The weight of the evidence established that Student was exhibiting behaviors consistent with his known disabilities, and was making academic and nonacademic progress with the behavioral interventions in place. The District had no reason to reassess Student for alternative disabilities as the cause of his behaviors, when at all times the District was appropriately addressing Student's behavioral challenges.

39. Specifically, the evidence did not demonstrate that autism was a suspected area of disability prior to Student's discharge from UCLA-RNPH. As discussed above, during the fall semester of the 2011-2012 school year, Student's behavior in the classroom and when interacting with peers was consistent with his known diagnoses of ADHD and OCD, and his increased anxiety and inability to control his behaviors at school was reasonably explained by his lack of sleep and extreme anxiety about the problems he and his family were experiencing at home. Student's history of emotionality, as documented in Student's elementary school records and observed by Sierra Vista staff, was reasonably explained by his dual diagnoses. Student interacted well with peers and adults when he was not upset, made good eye contact, sought reactions from teachers, participated in extracurricular activities, and maintained friendships inside and outside of the classroom.

District staff and Ms. Hamilton testified unanimously that Student's diagnosis of autism was unexpected, although they also admitted that they were not qualified to diagnose autism, and recognized that the autism spectrum is very broad. Ms. Amrhein, Mr. Flores, Ms. Bennett, Mr. Pendleton, Ms. Johnson, Mr. Walsh, and Ms. Hamilton had all worked for many years with children with autism, ADHD, and OCD, and persuasively testified that Student's behaviors were typically seen in students with ADHD and OCD, rather than autism. The weight of the evidence established that the District had no reason to suspect that autism, rather than ADHD and OCD, was disability responsible for Student's behaviors, or to assess for autism.

40. The parties do not dispute that Student's behaviors escalated in December 2012, and that further assessment was required to determine Student's need for additional behavioral support. By then, the District was aware of Student's additional diagnoses of autism and anxiety disorder, and offered to conduct a SCIA assessment and make an ERICS referral. Student asserts that the District should have, instead, assessed Student utilizing Parents' preferred methods of assessing behavior, that is, either an FBA or an FAA based on ABA principles. However, Student failed to address whether, let alone establish that, the SCIA assessment and ERICS referral offered would not sufficiently identify Student's behavioral needs and their origins.

41. A SCIA assessment determines whether a student requires the intervention of one-on-one behavior support in the classroom, and an ERICS referral determines whether a student needs more intensive behavioral support at school and in the home. Both of these assessments were appropriate in light of the known stressors affecting Student's home life, regardless of whether or not Student had autism. The District was required to determine Student's educational or related service needs, including improved functional performance, but was not required to use Parents' preferred means, such as an FBA, to meet its obligations. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314).

42. Student failed to meet his burden of establishing by a preponderance of the evidence that the District committed a procedural violation by failing to assess Student in the area of behavior from September 2011 through January 2013.

43. Alternatively, even if Student had demonstrated that the District should have assessed his behavioral needs, Student did not meet his burden of demonstrating that he was denied a FAPE as a result. A denial of a FAPE may only be shown if a procedural violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. Here, Student put on no evidence concerning if, or to what extent, his educational program should have been modified to address his behavioral problems.

44. Student made behavioral progress both before his admission into UCLA-RNPH and after his release. Student was initially placed in a classroom with a positive classroom behavior support plan to support students with emotional and behavioral difficulties. Student responded well to the behavioral interventions in the SDC3 classroom until his Parents pulled him out of school. Later, the SDC7 program was virtually identical in composition and approach to the recommendations made in Dr. Revedoro's letter, and Student made behavioral progress in the SDC7 program. Dr. Hayden, Student's behavior expert, did not offer an opinion on Student's behavioral needs, Student's educational programs in 2011-2012 and 2012-2013, or changes that were warranted to those educational program and services.

45. The District did not impede Parents' opportunity to participate in the decision making process regarding Student's behavioral needs. Parents were active participants in the IEP team meetings throughout the 2011-2012 and 2012-2013 school years, and were present when reports of Student's progress in behavioral functioning were given. The change in Student's placement to the SDC7 classroom, with other high functioning autistic students and a strong social skills component, was made at Parents'

request.

46. Student failed to meet his burden of establishing by a preponderance of the evidence that he was denied a FAPE because the District should have conducted a behavior assessment from September 2011 through January 2013 .

Issue 1(c) – Social Emotional Functioning Assessment

47. Student contends that the District should have assessed Student upon enrollment for social emotional functioning because the April 2011 IEP described a decline in Student’s social emotional functioning in his return from general education to an SDC classroom, and Student’s triennial BASC scores identified Student as “at-risk” in adaptability. The District contends that Student’s social emotional needs were identified and addressed, and that the District had no reason to assess Student for autism rather than ADHD and OCD as the cause of his social emotional functioning deficits.

48. Legal Conclusions 1 through 12 are incorporated herein by reference.

49. The weight of the evidence established that Student’s social emotional needs were identified by the District during the period at issue, and that the District was not required to further assess Student in the area of social emotional functioning.

50. Sulphur Springs conducted a comprehensive psychoeducational assessment of Student for his triennial IEP review a few months before Student entered the District, and the triennial IEP team wrote goals to address Student’s social emotional needs, including (i) calmly and clearly stating why he was upset, and (ii) decreasing inappropriate behaviors to engage peers during an activity that requires social interaction. The April 2011 IEP documented that Student had been removed from general education because Student became “disruptive and extremely emotional when asked to explain concerns voiced by his peers and adult supervisors” and, once he was upset, it was “difficult for him to turn his behaviors around without adult assistance.” This same emotional behavior was exhibited by Student in the SDC3 and SDC7 classrooms, and at Sierra Vista in the Woodshop incident and the incident with Student G. Dr. Revedoro’s letter documented Student’s emotional

fragility and tendency to become easily anxious and overwhelmed, and identified goals virtually identical to those in the April 2011 IEP to address Student's behavior: "expressing feelings appropriately" and "interacting with others (peers and adults) appropriately." Student does not dispute the accuracy of the statements contained in Dr. Revedoro's letter, and as UCLA-RNPH identified the same social emotional needs and means of targeting the resultant behaviors as the District had, the weight of the evidence demonstrated that the April 2011 IEP correctly identified Student's emotional social needs, and no further social emotional functioning assessment was required.

51. As discussed at length above, the District did not have Ms. Ocasio's report with Student's BASC scores, and even if it had, Ms. Yolles testified persuasively that scores of "at-risk" on the BASC do not mean that further assessments or additional interventions were needed. Similarly, as discussed above, prior to Student's discharge from UCLA-RNPH, his social emotional functioning was adequately explained by his ADHD and OCD and the District would have had no reason to suspect that additional assessments were required because Student had autism.

52. Finally, the District timely called an IEP team meeting after Student exhibited increased anxiety, upset and behaviors in the SDC7 classroom, and the individualized DIS counseling and ERICS referral made at the January 2013 IEP were reasonably calculated to reassess Student's social emotional needs.

53. Student failed to meet his burden of establishing by a preponderance of the evidence that the District committed a procedural violation by failing to assess Student in the area of social emotional functioning from September 2011 through January 2013.

54. Again, even if Student had demonstrated that the District had a duty to assess, which Student has not, a denial of FAPE may only be shown if a procedural violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. Here, Student failed to establish if, or to what extent,

his educational program should have been modified to address his social emotional functioning.

55. According to Dr. Revedoro's letter, UCLA-RNPH identified the same fluctuating emotional status and social emotional needs in its assessments of Student that had already been documented in Student's IEP's. The April 2012 IEP team continued Student's social emotional goals from the April 2011 IEP, in light of the UCLA-RNPH recommendation for social emotional targets that were virtually identical to Student's existing goals. As Student had been out of school for almost half of the 2011-2012 school year, it was not surprising that Student had not met his social emotional goals by his next annual IEP team meeting. When Student was in the SDC3 and SDC7 classrooms and working on his social emotional goals, he made behavioral progress.

56. The District did not impede Parents opportunity to participate in the decision making process regarding Student's social emotional needs. Parents were active participants in the IEP team meetings throughout the 2011-2012 and 2012-2013 school years, and present when reports of Student's progress in social emotional functioning were made.

57. Student failed to meet his burden of establishing by a preponderance of the evidence that he was denied a FAPE because the District should have, but did not, conduct a social emotional functioning reassessment from September 2011 through January 2013.

Issue 2 – Denial of a FAPE From Bullying

58. Student contends that he was denied a FAPE from November 8, 2011, through October 3, 2012, because he was repeatedly bullied in the gym, playground, and at lunchtime, but the District offered no supervision to address the bullying that Student was experiencing. The District contends that Student was not bullied, and that the District responded promptly and appropriately to instances of peer conflict.

59. Legal Conclusions 1 through 6, and 12, are incorporated herein by reference.

60. The bullying of a student with a disability that results in that student not

receiving meaningful educational benefit may constitute a denial of a FAPE under the IDEA. (*Dear Colleague Letter*, OSERS (August 20, 2013) 113 LRP 33753 (*Dear Colleague 2013*.) This applies whether or not the bullying is related to the student's disability. (*Id.*, at p. 2.) Therefore, a determination of whether bullying has denied a student a FAPE requires a two-step analysis: (i) whether the bullying occurred, and (ii) whether the bullying resulted in the student not receiving educational benefit within the meaning of *Rowley*.

61. The U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS), defines bullying as follows:

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors.

(*Dear Colleague 2013*, at p. 2.) The inclusion of repetition, or the potential for repetition, in this definition is in keeping with prior guidance from OSERS and the U.S. Department of Education, Office for Civil Rights (OCR), which previously published the following examples of conduct serious enough to adversely affect the student's participation in or ability to benefit from his or her educational program: students "continually" making derogatory remarks about the disabled student in class, "repeatedly" impeding access to the classroom, or "continually" taunting or belittling a student with a disability. (*Dear Colleague Letter* OCR/OSERS (July 25, 2000) 111 LRP 45106, p.2.)

62. In order to ensure that a student who is the target of bullying behavior

continues to receive a FAPE in accordance with his or her IEP, OSERS directs school districts, as part of an appropriate response to the bullying, to convene an IEP team meeting to determine whether, as a result of the effects of bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If a change is warranted, the IEP team must determine to what extent additional or different special education or related services are needed to address the student's individual needs, consistent with the IDEA's provisions regarding parental participation, and revise the IEP accordingly. (*Dear Colleague 2013*, at p. 3.)

63. Implicit in the duty of a school district to respond to acts of bullying is the requirement that the district received notice of those acts. (See *Dear Colleague Letter*, OCR (October 26, 2010) 55 IDELR 174, 110 LRP 62318.) "A school is responsible for addressing harassment incidents about which it knows or reasonably should have known." (*Id.*, at p.2.)

64. Here, Student contends that he was denied a FAPE by various bullying incidents that were not necessarily disability-based. However, regardless of how the conduct is characterized, the evidence failed to show that any bullying of Student occurred. Student was the aggressor, not the target, in two of the four incidents reported. The remaining two incidents, in which various students called Student "baby" and "fat," leapfrogged over him, or threw something at or near him, did not involve continuous or repeated conduct over time. They were isolated acts, which were not repeated by any of the alleged offenders. More importantly, the two acts directed at Student were not characterized by "aggression used within a relationship where the aggressors had more real or perceived power" than Student. Those acts involved the type of peer-on-peer name calling and physical interaction that the United States Supreme Court has found inevitable in the adolescent school environment:

Courts must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults...Indeed, at least

early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children.

(Davis v. Monroe County Bd. of Educ. (1999) 526 U.S. 629, 651 [119 S.Ct. 1661, 1675].)

65. Students A and B were not attempting to exercise power over Student after detention, and apologized to Student during the mediation with Mr. Flores. Student D jumped over Student during a break between classes, and there was no evidence that Student perceived that Student D had any real or perceived power over him, or that the leapfrog incident was an attempt to exercise that power. There was also no evidence that Student perceived Student E as having power over him, or was asserting it, by throwing something near Student, and Student E was promptly disciplined.

66. Mother's testimony that Student was bullied generally while at Sierra Vista, and that Student feared to attend Sierra Vista after December 13, 2013, due to bullying, was vague, unpersuasive, and inconsistent with Mother's conduct at that time. Mother did not report any additional incidents to Sierra Vista or La Mesa staff, despite being in regular contact with Student's teachers and administrators. Student did not report any additional incidents, either, despite freely reporting the two incidents to Mr. Flores and Ms. Bennett at Sierra Vista, and speaking with Mr. Paterson up to twice a week at La Mesa.

67. Student is misguided in his focus on establishing whether or not school staff referred to any of the incidents as acts of "bullying" during their investigation or at the January 29, 2012 IEP team meeting. It is the OCR and OSERS definition of what constitutes bullying, not any one individual's characterization of an incident, that controls the analysis of whether or not Student's classmates engaged in bullying behavior to which the District

had a duty to respond under the IDEA.¹⁰

68. Regardless of whether the reported incidents constituted bullying, no change to Student's educational program was necessary for Student to continue to receive meaningful educational benefit. Student made good progress academically and behaviorally while he was in the SDC3 classroom at the time the alleged bullying occurred. The District responded promptly and appropriately to accusations of bullying by having experienced administrators conduct interviews of the participants and witnesses, review video footage when available, counsel the participants, discipline the participants where warranted, and contact a parent with the outcome. (See, e.g., *Johannesburg-Lewiston Area Sch. Dist.* (OCR 2010) 110 LRP 67492; *Santa Monica-Malibu Unified School District* (OCR 2010) 55 IDELR 208, 110 LRP 58973.) Student presented no evidence that he was dissatisfied with the way in which the matters were handled, or altered his participation in his educational program due to these incidents or their outcomes. At all times, Student continued to receive educational benefit as defined in *Rowley* from his educational program.

69. Student's contention that Student was suffering emotionally and became school phobic due to bullying that had not been reported does not change this result. The District had no duty to respond to allegations of bullying until it knew or had reason to know of such allegations. If and to the extent Parents reported any additional incidents at the January 2012 IEP team meeting, by that time Parents had already informed the District that Student would not return to Sierra Vista, and the District was unable to investigate the new allegations and respond. A school district does not deny a student a FAPE where the parents unilaterally remove the student from school before the district has notice and an opportunity to respond to reported bullying. (See *M.L. v. Federal Way School Dist.* (9th Cir.

¹⁰ Nonetheless, both assistant principals from Sierra Vista, Mr. Flores and Ms. Bennett, defined bullying in accordance with OSERS guidance.

2005) 387 F.3d 1101, 1116-1117 [by removing the student from school after only 5 days, parents failed to give the district a reasonable opportunity to find a way to prevent the other students from teasing him].)

70. Nonetheless, when notified of Parents' concerns regarding bullying at the January 23, 2012 IEP team meeting, the District appropriately addressed those concerns by explaining that all reports had been, and would be, promptly investigated, appropriately and responsibly handled, and a parent notified of the outcome. The team also appropriately considered Parents' refusal to return Student to Sierra Vista pending his admission to UCLA-RNPH, and determined that individualized home study was needed to address Student's needs during that time. The team revised the IEP accordingly, with Parents' consent. Student made academic and behavioral progress in both the SDC3 classroom and home study during the 2011-2012 school year. Finally, Student presented no evidence of bullying between December 13, 2011, and October 3, 2012, that is, from leaving Sierra Vista through his first weeks at La Mesa. The weight of the evidence established that at all times, the District responded appropriately when incidents between Student and other pupils occurred.

71. Student failed to meet his burden of establishing on a preponderance of the evidence that Student been the target of bullying from November 8, 2011, through October 3, 2012, or that Student had not received meaningful educational benefit as the result of such bullying. Accordingly, Student was not denied a FAPE due to bullying.

Issue 3 – Behavior Support Plan from August 2011 through January 2013

72. Student contends that he was denied a FAPE from August of 2011 through January of 2013 because the District did not use "best practices" in designing an individualized BIP, also referred to as a behavior support plan (BSP), for Student. Specifically, Student contends that the District staff did not have the necessary information to consistently and effectively address Student's behavior needs, which resulted in no progress in decreasing Student's inappropriate behaviors. The District responds that

Student has had appropriate behavior supports in place at all times at issue, as the classroom behavior support plans consistently met Student's needs.

73. Legal Conclusions 1 through 6, and 12, are incorporated herein by reference.

74. An IEP team must consider whether a child's behavior impedes his learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).)

75. A school district must develop and implement a BIP if the IEP team finds that the child's behavior impedes his own learning or the learning of others. (34 C.F.R. § 300.324(a)(2)(i)(2006).)

76. Neither Congress, the U.S. Department of Education, nor any statute or regulation has created substantive requirements for the BIP contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)

77. Although failure to develop a BIP where required can deny a FAPE, the lack of a written or formal plan, specifically called a BIP, is not a per se denial of a FAPE. (*Neosho R-V School District v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *E.H. v. Board of Education of Shenendehowa Central School District* (2d Cir. 2009) 361 Fed.Appx. 156, 160 (cert. denied (2010) 559 U.S. 1037, 130 S.Ct. 2064.) Further, a school district is not required to address behavior problems which occur outside of school if the student demonstrates educational progress in the classroom. (*San Rafael Elementary Sch. Dist. v. California Special Educ. Hearing Off.* (N.D.Cal. 2007) 482 F. Supp.2d 1152, 1160-1164).

78. In California, the IEP team must also consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd. (b)(1).) A behavior intervention is "the systematic implementation of

procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

79. The weight of the evidence showed that, from August 2011 through January 2013, the District's IEP teams had considered positive behavioral interventions, and had behavior interventions and supports in place that resulted in lasting positive changes in Student's behavior. Specifically, from August 2011 to December 13, 2011, Student was placed in the SDC3 classroom, which provided a small class size, structure, and a positive behavior point system that rewarded students for completion of class assignments and an increase in appropriate behavior. As reported in the April 12, 2011 IEP, these same types of supports had proven successful in elementary school prior to Student entering the District. Mr. Pendleton had classroom protocols in place to reduce anxiety for Student, increase appropriate behavior and decrease inappropriate behavior. He worked with Student on his social emotional goals, and Student learned to use words to express his needs, such as taking a break, and learned to respond appropriately to redirection. Student made significant and cumulative improvements in his behavior, albeit in spurts with occasional regression. Mr. Pendleton's implementation of the classroom positive behavior system and protocols was behavioral instruction designed to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. As such, it constituted systematic implementation of procedures that result in lasting positive changes in Student's behavior and appropriate behavior intervention.

80. From December 14, 2011, through March 4, 2012, when Student was not unilaterally pulled out of school, on winter break, or sick, he was in home study with Ms. Hoggatt and was well-behaved and completed his assignments on a daily basis. Although Student had emotional episodes that prohibited him from scheduling time with Ms.

Hoggatt, those occurred when Student was interacting with his family at home, and not during home instruction. The evidence did not demonstrate the need for a BIP to be in place during home instruction.

81. From March 5, 2012, through April 27, 2012, Student was unilaterally placed at UCLA-RNPH. The only information provided to the District concerning an individualized positive behavioral support plan purportedly implemented at UCLA-RNPH concerned the goals, which were substantially the same as the social emotional goals in Student's operative IEP. The ABC program described in Dr. Revedoro's letter utilized a token economy as part of its behavioral reinforcement program that closely resembled that of the SDC3 classroom. The evidence established that the behavioral interventions described in Dr. Revedoro's letter were substantially the same interventions already utilized by Mr. Pendleton in the SDC3 program.

82. From April 27, 2012, through the end of the 2011-2012 school year, Student was in home study with Mr. Pendleton and attending La Mesa for the SDC7's YIC period. Student was emotionally stable after his therapeutic program at UCLA-RNPH, and did not exhibit any behavior problems while working with Mr. Pendleton. The SDC7 classroom had the positive behavior support plan recommended by UCLA-RNPH, and utilized a token economy similar to that described in Dr. Revedoro's letter as successful in addressing Student's behaviors. Indeed, Student's behaviors in the YIC class were well within the parameters of those behaviors addressed by the SDC7 classroom behavior plan and the YIC curriculum. The effectiveness of the SDC7's program was reflected in Student's enjoyment of the YIC period and his request to attend more than one period of the SDC7 program for the remainder of the 2011-2012 school year. It was appropriate for the District to plan to slowly transition Student back into school, in conformance with the opinions of Dr. Passaro and Ms. Chun-Ho that a student with anxiety who had been out of school for months should return to school slowly, ideally in preferred classes and with partial days. The evidence established that the classroom positive behavior interventions plan in place

in the SDC7 program and the YIC class was sufficient to address Student's behaviors that otherwise impeded Student's ability to learn.

83. From August 2012 through the winter break in December 2012, Student was making good behavioral progress in Ms. Johnson's class and earned good grades. Student was meeting with school counselor Steve Paterson one to two times a week, as recommended by Dr. Revedoro's letter to reinforce adaptive coping skills. The meetings with Mr. Paterson were also in keeping with Student's express request at the October 3, 2012 IEP team meeting that he meet with Mr. Paterson in lieu of DIS counseling, and consistent with the opinions of Dr. Passaro, Ms. Chun-Ho, Mr. Walsh and Mr. Paterson that it was important to have a student with an anxiety disorder, such as Student, agree to participate in the program offered. Ms. Johnson's implementation of the SDC7 program's classroom positive behavior support plan and token economy was behavioral instruction designed to, and did, produce significant improvement in Student's behavior in compliance with his annual goals and objectives. The SDC7 program modified Student's individual and group instruction and environment, including behavioral instruction, to produce significant improvement in Student's behavior through skill acquisition and the reduction of problematic behavior. Therefore, the SDC7 program, and the meetings with Mr. Paterson that provided Student with additional behavioral and emotional support, constituted systematic implementation of procedures that result in lasting positive changes in Student's behavior, and an appropriate behavior intervention.

84. From Student's return from the 2012 winter break through the IEP of January 29, 2013, Student exhibited behaviors that could not be adequately addressed by the SDC7 classroom behavior support plan and meetings with Mr. Paterson. Ms. Johnson had recognized that fact in December, but the District was unable to schedule an IEP team to address Student's behaviors in December, due to Parents' unavailability. The District cannot be penalized for failing to act any faster than permitted under the laws requiring it to include parents in an IEP team meeting.

85. Parents consented to all IEP's, and did not request that different or additional behavior supports be incorporated into Student's IEP's. Had Parents insisted that Student have an individualized BIP utilizing the ABA methodology that Parents now prefer, the District was not required to adopt those techniques or strategies, or to implement an individualized plan, as the classroom-wide positive behavior intervention plans in place successfully addressed Student's behaviors. Neither was the District required to use "best practices," although the interventions developed by the District for students with behavioral and social interaction issues were virtually identical to the program recommended by UCLA-RNPH, a prestigious institution. All psychologists who testified, for Student and the District alike, agreed that Dr. Revedoro's letter recommended a positive behavior support plan similar to the classroom BIP's the SDC3 and SDC7 programs, and did not recommend or require implementation of an individualized plan. The weight of the evidence established that the systematic classroom-wide positive behavior interventions implemented in the SDC3 and SDC7 programs were sufficient to bring about incremental and cumulative positive changes in Student's behavior.

86. It is worth noting that, had Student established that the District's behavior interventions were insufficient at any point, Student failed to present evidence of the type and level of special education and services needed to compensate Student for the lack of a behavior support plan. Dr. Passaro did not opine on the level of behavioral support required by Student in the past, or as compensatory services. Ms. Bagshaw specifically declined to opine on Student's needs, and Student did not offer opinion from Dr. Hayden in this area. Accordingly, even if Student had prevailed, there was no evidence of what should have been done differently, or to compensate for any loss of educational opportunity.

87. In sum, the weight of the evidence demonstrated that the District implemented appropriate interventions to address the behaviors that impeded Student's learning, and that student made positive and lasting behavioral progress with these

interventions in place. Therefore, Student failed to meet his burden of establishing that the District denied Student a FAPE by failing to implement appropriate behavior interventions.

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed Code, § 56505, subd. (k).)

Dated: December 2, 2013

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings