

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PASO ROBLES UNIFIED SCHOOL DISTRICT  
AND SAN LUIS OBISPO COUNTY MENTAL  
HEALTH.

OAH CASE NO. 2012060172

DECISION

Administrative Law Judge (ALJ) Stella L. Owens-Murrell, Office of Administrative Hearings (OAH), State of California, heard this matter in Atascadero, California, on December 3-6 and December 20, 2012.

Attorney Patrick Fisher represented Student. Advocate Ann Zachry was also present and assisted Student's attorney at the hearing. Mother was present at the hearing at all times. Student did not attend the hearing.

Attorney Shauna Cunningham represented Paso Robles Unified School District (District). Marcia Murphy, Special Education Director for District, was present for the entire hearing on behalf of District.

Deputy County Counsel Cherie Vallelunga represented San Luis Obispo County Mental Health (CMH).

On June 6, 2012, Student filed a Request for Due Process Hearing (complaint). Student filed an amended complaint on October 2, 2012. OAH granted a continuance on November 1, 2012.

At the hearing, oral and documentary evidence was received. The case was continued to January 10, 2013, at the parties' request, to permit them to file closing written arguments. Closing arguments were timely filed and the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

1) Did District deny Student a free appropriate public education (FAPE), in the individualized educational program (IEP) started on October 4, 2010 and signed on February 11, 2011 (the October 4, 2010 IEP), by failing to develop appropriate goals in the areas of reading comprehension, writing, communication, mathematics, and vocational skills?

2) Did District deny Student a FAPE in the IEP started on September 22, 2011 and signed on March 12, 2012 (the September 22, 2011 IEP) by failing to offer an appropriate transition plan, including appropriate goals and related services designed to support Student's transition to postsecondary education?

3) Did District deny Student a FAPE in the October 4, 2010 and the September 22, 2011 IEPs, by:

- A. failing to offer appropriate academic instruction in the areas of reading comprehension, written expression, and mathematical concepts;

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<sup>1</sup> On December 3, 2012, CMH filed a motion to dismiss on grounds that it was at no time during the two-year statute of limitations responsible for providing Student mental health services, but was and is responsible to District through an interagency contract. The motion was taken under submission pending receipt of evidence and submission of the case for decision. The motion is addressed in the Legal Conclusions below.

- B. failing to provide appropriate mental health supports and services by trained staff and by failing to replace services not provided by CMH due to the absences of CMH staff; and
  - C. failing to provide Student with transportation or reimbursement for mileage expenses incurred for travel to clinic-based therapy sessions provided by CMH?
- 4) Did CMH deny Student a FAPE by failing to provide appropriate mental health services by trained staff during the period of June 1, 2010 to June 2011?
  - 5) Did District deprive Parents of meaningful participation in the development of Student's educational program during the 2011-2012 school year by changing the model of delivery of mental health services from school-based services to clinic-based services by CMH without convening an IEP?

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student was 19 years of age at the time of the hearing. He resided with his mother within the jurisdictional boundaries of the District during all time periods relevant to this case. He has been eligible for special education services since preschool under the disability category of autism.

2. Student was retained in the first grade and was placed in a program for children with emotional needs due to his outbursts and emotional fragility. He moved to California where he began attending the second grade at Robert Downs Elementary School in Pacific Grove, California. There he was placed in a general education classroom with resource program services (RSP) in mathematics and a special circumstances instructional aide (SCIA or one-to-one aide). Student continued to have emotional outbursts in the classroom which resulted in his placement in a special day class

program (SDC) with a one-to-one aide in his third grade year. Shortly after the beginning of third grade, Student was referred to the Monterey County Department of Mental Health for evaluation. He transferred in the second semester of the third grade to Virginia Roca Barton School in Salinas, California where he remained through the first semester of the fifth grade. He enrolled in the District for the second semester of the fifth grade and attended Winifred Pifer Elementary School. He attended Daniel Lewis Middle School (Lewis) in the sixth grade where he received related services in the form of a SCIA, RSP, behavior management services (consultation) and a behavior support plan (BSP).

3. Student reportedly experienced a great deal of difficulty at Lewis when reasonable demands to perform a task were placed on him, this difficulty usually resulted in emotional outbursts or "meltdowns", and oppositional and verbally aggressive behavior. District requested an assessment to determine the nature of Student's behaviors in order to provide information to the IEP team to assist them in developing an appropriate program and services that would meet Student's educational needs. Student attended a general education class with a modified curriculum and two special education classes in Reading and English Language Arts at the time of the evaluation. He was assigned a SCIA to support him throughout the school day. He was prescribed medication to treat his behavioral issues and was a client of Tri-Counties Regional Center (TCRC) and qualified for mental health services under AB 3632<sup>2</sup>. Despite the services and accommodations provided to him, Student continued to have difficulties in the school setting. Student was ultimately referred to the California

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<sup>2</sup> "AB 3632," was the name of the assembly bill that, until recently, mandated CMH provide these services for implementation in IEP's. In contrast, "DIS counseling" refers to services provided by the local educational agency.

Diagnostic Center (CDC) in October 2007 for a comprehensive assessment. Student was 14 years of age and in the eighth grade at the time of the assessment.

4. The CDC assessment confirmed Student's diagnosis of autism spectrum disorder and anxiety. The assessment report established Student academically had significant difficulty with reading comprehension and tested at the fourth grade level, well below grade level. Written language was very difficult for Student and he scored below second grade level. He had deficits in receptive and expressive language. He struggled with mathematics and scored at the middle fourth grade level in mathematical computation and at the second grade level in applied math and math concepts. He lacked cognitive flexibility, was impulsive, had poor social reciprocity, poor insight, and had deficits in listening comprehension and written expression. The assessment report made numerous recommendations to the District IEP team which included the following: (1) consider the best ways to provide continual support to Student for his core subjects, given his difficulties comprehending higher level materials used in the middle school and high school curricula; (2) implement ongoing formal social skills training including instruction in perspective taking and the use of social scripts; (3) schedule regular daily visits with his case manager early in the school day to review Student's daily school schedule to alleviate Student's anxiety.

5. He entered Paso Robles High School (PRHS) in the ninth grade in the 2008-2009 school year. Student was given his triennial assessments in April 2010 in the 2009-2010 school year. He was in the 10th grade and 16 years of age at the time of the assessments. The assessments established that Student was functioning in the well below average range in verbal abilities, and in the low average range of non-verbal abilities. He had deficits in English Language Arts (ELA) in the areas of reading and writing. He also had deficits in mathematics. His overall cognitive ability fell in the low

average range. Adaptive behavior in all domains was well below average for a student his age.

6. The April of 2010 assessments also included a Speech and Language Assessment, which established that Student had impairments in pragmatic language, including perspective-taking. Student was identified as having very poor social skills and difficulty interpreting what people said to him. His language skills impaired his ability to perform certain job tasks.

7. Student continued to be eligible for special education services under the disability category of autism and had been diagnosed with attention deficit hyperactivity disorder (ADHD). His IEP provided for modified classes for 50 percent of the day with speech and language services and consultation with a behavior specialist. He also had a full time SCIA, a BSP, and began receiving mental health services under AB 3632 through CMH starting in June 2010.

8. Student's scores on the California High School Exit Examination (CAHSEE) taken March 1, 2010, show that he passed the ELA Examination with a score of 357. He took the Mathematics Examination on May 11, 2012 and did not pass with a score of 301. Mother questioned the validity of the ELA score because of Student's deficits in reading comprehension and the quality of the work produced at school.

#### OCTOBER 4, 2010 IEP

9. District convened Student's annual IEP on October 4, 2010. Student was entering the 11th grade and on track to graduate with a diploma (diploma track). Mother attended the meeting and Student's Advocate Ann Zachry appeared by telephone. District IEP team members included Marcia Murphy, special education director; Paula Peargin, special education teacher/case manager; Jessica Munoz, district behavior specialist; Susan Zimmer, speech and language pathologist; Rebecca Simmons-Thompson, autism specialist; and Marissa Todd, school psychologist;

10. The IEP identified Student's educational needs in the areas of reading and writing, mathematics, speech and language, receptive and expressive language, gross and fine motor development, social/emotional behavioral, vocational, adaptive/daily living skills, and health. In reading, Student's independent reading selections were narrow in scope. In writing, he was unable to independently write a paragraph. He was able to produce a basic sentence with limited vocabulary. The IEP contained a total of 11 goals which addressed all areas of need. The IEP also contained an Individual Transition Plan (ITP) and a BSP.

11. The IEP team discussed the proposed program. Mother expressed concerns about the transition plan, which identified Student's post-secondary educational goal to attend Cuseta College, a two year local college. She believed that there was not much time to prepare Student for transition to college. The team agreed that Student would begin to formulate a plan now by using the California Career Zone program, which was an on line program designed to determine aptitudes for future employment, to complete specific tasks relating to his transition goals. Workability services were discussed and the team agreed that Student's case manager, Ms. Peargin, would make a referral to the Special Education Local Planning Area (SELPA) for workability services. The team discussed the improvements in Student's social emotional behavior over the last school year. Mother reported no improvement in his behavior at home. The team also reported improvements in Student's vocational development; although, he continued to display poor organizational skills. Mother and Ms. Zachry expressed concerns about Student's safety and community access and requested revisions in the proposed goals in numerous areas including ELA and mathematics. The IEP team agreed to reschedule the meeting to review and revise the goals and address other areas of concern raised at this meeting.

12. The second IEP team meeting was held on November 8, 2010. The IEP team members present included Mother, Ms. Peargin, Ms. Zimmer, Ms. Munoz, Student's school counselor, a general education teacher, a TCRC representative, and a SELPA representative. Ms. Zachry appeared by telephone. The IEP team notes established that the topics covered included the proposed IEP goals, behavior intervention plan (BIP), mental health services, workability, and Student's graduation plan. Student was on track for graduation with a diploma but the algebra 1 requirement for graduation was of concern because of Student's serious deficits in mathematics. The team reviewed and clarified academic goals in reading, writing, and language. The math goal was of concern and the team agreed to follow up with Student's math teacher to determine his progress. Of great concern to Mother was the fact that as of the time of the November 8, 2010 IEP meeting, Student was not receiving mental health services provided in the last agreed-upon IEP. Ray Ford, the CMH therapist working with Student had been on a leave of absence beginning in September 2010 and neither District nor CMH provided an alternate therapist. District informed Mother at the follow up IEP team meeting that it would confer with CMH concerning their plan to provide therapy services to Student in Mr. Ford's absence. The meeting adjourned for the IEP team members to complete their review of the matters discussed and to finalize revisions to the proposed IEP.

13. On December 13, 2010, District proposed one of two options to provide compensatory mental health services. Option one proposed that Mr. Ford would work with Mother to establish a make-up schedule to provide four months of missed services. Option two proposed to provide Mother with three names of licensed individual therapists that could provide compensatory services to address the goal. Mother rejected the proposals and elected to delay individual counseling services until Mr. Ford resumed those services.

14. Between December 7, 2010 and February, 2011, Mother and Ms. Zachry communicated extensively with District concerning their proposed revisions to the draft IEP goals and other aspects of Student's program. District agreed to and incorporated the proposed revisions in the final version of the October 4, 2010 IEP.

15. The IEP offer provided the following: (1) placement in a general education classroom setting 40 percent of the school day; (2) specialized academic instruction 60 percent of the day in Mathematics, ELA, and Science totaling 1020 minutes weekly; (3) related services in the form of (a) SCIA support 1760 minutes weekly; (4) speech and language therapy, individual and group, for 15 minutes one time weekly; (5) vocational assessment, counseling, guidance, and career assessment 340 minutes weekly; (6) college awareness 340 minutes weekly; (7) occupational therapy 30 minutes monthly; (8) ITP; (9) agency services through the TCRC 30 minutes yearly; (10) individual counseling provided by CMH 60 minutes monthly at the provider location; (11) Parent counseling 30 minutes monthly provided by CMH at the provider location; (12) social work services 30 minutes monthly provided by CMH at the provider location; (13) health and nursing-specialized physical health care services 60 minutes annually provided by CMH at the provider location; and a (14) BSP. The IEP did not address nor offer transportation to mental health services appointments and there is no evidence that Mother ever raised it with the IEP team.

16. The IEP also offered additional supports and accommodations including (1) consultation with District program behavior specialist 90 minutes each trimester; (2) consultation with District autism coordinator for program planning and data collection five hours monthly; (3) provision of alternatives to written work as appropriate including option to dictate, record or type answers 1360 minutes weekly; and (4) time to check for understanding of directions and/behavioral expectations and communication with

simple, concrete language to support understanding of verbal information. Mother consented to the revised October 4, 2010 IEP in its entirety on February 11, 2011.

### GOALS IN THE OCTOBER 4, 2010 IEP

17. The revised October 4, 2010 IEP established present levels of performance (PLOPS) and goals in reading comprehension (expository text, inference, and vocabulary), writing, social/emotional/behavioral, communication, math computation, math reasoning, and vocational.

#### Reading Comprehension Goals

18. Goal number one in the October 4, 2010 IEP was reading comprehension (expository text) - the PLOPS established that when given expository text at his independent reading level (Lexile 192; Grade Level 2.5) Student could verify facts with an accuracy of 35 percent as measured by curriculum tests and teacher charted records. The annual goal provided that when given expository text at his independent reading level Student will verify facts with an accuracy of at least 70 percent across five consecutive trials as measured by class tests and teacher charted records. Goal number two was reading comprehension (vocabulary). The PLOPS indicated Student was currently demonstrating understanding of vocabulary at his instructional reading level (Lexile range 250-500; Grade Level 3-3.5) including literal and figurative at a rate of 67 percent as measured by curriculum assessments. The annual goal provided that when given vocabulary at his instructional reading level, Student will score a minimum of 70 percent proficiency on at least three progressive literal and figurative language assessments each trimester as measured by curriculum assessments. Goal number four was reading comprehension (inference). The PLOPS indicated that at Student's instructional level, estimated at 2.5-3.5 grade level or Lexile of 192, Student scored 89 percent on two curriculum assessments which measure inference. The annual goal

provided for Student to demonstrate competence in inference as measured by consistently scoring a minimum of 70 percent on at least three curriculum assessments each trimester at the minimum instructional level of 4.0 or exile 600.

### Writing Goals

19. Goal number three was handwriting. The PLOPS established that at the time, Student had difficulty writing legibly without staff prompting. The annual goal provided for Student to fill out a form independently with legible writing that can be accurately read by an unfamiliar person with 100 percent accuracy three of three consecutive trials as measured by samples. Goal number five was writing. The PLOPS indicated that at the time, Student was achieving a rubric score of two on expository writing with a teacher provided organizer with sentence starters. The annual goal provided that when given a teacher prompt and using an organizer without sentence starters, Student will independently write a paragraph achieving a score of three on a content specific rubric with a one-to-four scale in four or five consecutive trials as measured by work samples.

### Social Emotional/Behavioral Goals

20. Goal number six was social emotional/behavioral. The PLOPS indicated that historically Student demonstrated unexpected and intense emotional reactions to apparently benign requests and situations with extreme behaviors such as screaming and running out of the room during independent work time. These events had reduced in intensity and frequency. The current behavior data showed most events occurring on days in which Student reported feeling tired, hungry, thirsty, and/or worried/cranky. Frequency was reduced over the school year, however, Student often did not report feelings of fatigue, hunger, thirst or worry/irritability until after the emotional outburst occurred. The annual goal provided for Student to employ self-care strategies to

prevent emotional outbursts when he felt tired, hungry, thirsty, or worried/anxious. These strategies included one or more of the following: self-report to staff prior to an emotional outburst, requesting food-drink-rest as needed, and proactive measures of stocking food/drink for use when needed to reduce a significant emotional outburst, as measured by specific data collection across two weeks with zero outbursts. Goal number 10 was social emotional/behavioral and addressed peer interaction. The PLOPS indicated Student had limited skills to manage negative peer interactions. He demonstrated two strategies: walk away/report to an adult and walk away/ignore which he could employ when not agitated and his peers did not try to prolong the negative interaction. However, there was no available data to demonstrate that he could successfully engage in verbal strategies with peers during a negative peer interaction even with staff support/prompts. The annual goal provided that within a therapeutic setting and in a relaxed state, when given a scenario by his therapist involving negative peer interaction such as name calling, student would role play with the therapist to demonstrate use of at least one negative peer interaction strategy on 3 out of 5 consecutive therapy sessions.

#### Communication Goals

21. Goal number seven was communication. The PLOPS established that during an individual assessment in the speech room, when given 10 oral sentences, each with a three-part command using BEFORE or AFTER (e.g. Before you point to the car, point to the hat and the book.), Student listened to the sentence and performed the command with proper sequencing immediately following each sentence correctly in 1 out of 10 trials. When assessed with verbal directions in the classroom, Student followed directions correctly 6 times out of 10 sentences. The annual goal written to address auditory-motor commands provided that when given 10 oral sentences, each with a three-part command using BEFORE and AFTER, Student would listen to the sentence

and perform the command with proper sequencing immediately following each sentence with no more than three errors total on five consecutive trials as measured by teacher charted records.

#### Mathematics

22. Goal number eight was math computation. The PLOPS indicated that when given problems that required the addition, subtraction, multiplication, and division of fractions and mixed numbers, Student could solve and express the answer in simplest terms, with at least 20 percent accuracy as measured by Student work samples/ curriculum assessment across five consecutive trials. The annual goal provided that when given problems which require the addition, subtraction, multiplication, and division of fractions and mixed numbers, Student would independently solve and express the answer in simplest terms, with at least 85 percent accuracy as measured by student work samples/curriculum assessments across 5 consecutive trials. Goal number nine was math reasoning. The PLOPS indicated that when given an applied math or word problem at his independent reading level, Student could determine the functions necessary, then solve the problems with at least 10 percent accuracy as measured by student work samples/curriculum assessment across four out of five consecutive trials. The annual goal provided when given an applied math or word problem at his independent reading level, Student would determine the functions necessary, then solve the problems with at least 80 percent accuracy as measured by student work samples/curriculum assessment across 4 out of 5 consecutive trials.

#### Vocational skills

23. Goal number 11 was in the area of vocational skills. The PLOPS indicated that verbal/physical refusals were present 3 to 5 times a week in all academic settings, when staff provide verbal directions to begin academic work, as determined by data

collection in spring of 2010. As of October 2010, refusals were present in 3 of 5 settings. The annual goal provided that Student would initiate and complete staff-assigned tasks with no more than one verbal or visual one-step direction and no verbal refusals in the special education setting with familiar staff and supports on at least 85 percent of assigned tasks across a two-week period as measured by data collection.

24. Paula Peargin was Student's special education teacher in his junior year and case manager at PRHS. She had a bachelor of arts degree in education and a masters degree in teaching and curriculum. She had teaching credentials in ELA, history, and social studies. She also had credentials to teach children with mild to moderate disabilities and the learning handicapped. She was qualified to teach children with Autism Spectrum Disorder (ASD). She worked with and knew Student well. She was involved in his transition from eighth grade to high school and worked with him as his case manager from ninth grade to his graduation from PRHS. Student was also enrolled in her special education class in the 2010-2011 school year. She was a member of the IEP team and she drafted the reading comprehension, writing, mathematics, and vocational goals in the October 4, 2010 IEP.

25. Ms. Peargin confirmed that the reading comprehension goals one, two, three, and four and writing goals three and five were all developed based upon the PLOPS. Ms. Peargin used the Read 180 Program by Scholastic to develop the reading curriculum which she used for all of her special education Students whose disabilities ranged from specific learning disability, other health impaired and ASD. She used Lexile scores to determine each student's reading level and educational reading comprehension needs. A Lexile or instructional level measures difficulty of a text based upon vocabulary and sentence length. As of the time she drafted goal number one, Student's Lexile was 192 which translated into a grade level ranging from lower to upper second grade (2.0-2.5). Goal number one was to be measured by his accuracy and

success on classroom tests. Student's Lexile for goal number two was 250 to 500, which translated to a grade level ranging from lower to upper third grade (3.0-3.5). Goal number three was measured by curriculum assessments, and success on tests administered from materials taught in class. Regarding goal number four, Student's Lexile score was 192 and translated to a grade level ranging from 2.5-3.5. This goal was also measured through curriculum based assessments and tests. The PLOPS were accurate and the goal was measurable.

26. PLOPS for goal number established Student's inability or difficulty in writing legibly without staff assistance. The annual goal was to be measured by reviewing Student's writing samples for legibility. PLOPS for goal number five established Student was achieving a rubric score of two in handwriting with a teacher provided organizer. The goal was to be measured by reviewing work samples for the number of times Student independently wrote a paragraph achieving a rubric score of 3 without use of sentence starters. The PLOPS were accurate and the goal was measurable.

27. Student's PLOPS in math computation established Student when solving basic mathematical problems in fractions, subtraction and addition could express them in simple terms with 20 percent accuracy. The goal was to be measured by teaching, pre and post testing, review of Student work samples, and curriculum assessments to determine increased accuracy. The PLOPS were accurate and the goal was measurable.

28. The PLOPS in vocational skills established that Student engaged in verbal outbursts and physical tantrums when refusing to perform non-preferred tasks assigned by his teachers. The goal was to be measured by collecting data on the number of occasions Student initiated and completed staff assigned tasks and without verbal/physical refusal. The PLOPS were accurate and the goal was measurable.

29. Ms. Peargin believed that the goals detailed in Factual Findings 17 to 28 above were based upon accurate and timely information and established accurate present levels of academic achievement and functional performance. Furthermore, she believed that the goals were measurable and were designed to meet Student's unique educational needs to enable him to be involved and make progress and were appropriate.

30. The communication goal was drafted by Ms. Susan Zimmer, District's speech and language pathologist. She is a board certified speech and hearing pathologist with more than 25 years of experience. She worked with Student in his junior and senior years but had not worked with him in the freshman and sophomore years because Student refused speech and language services which were provided in the IEP on a pull-out basis. She was told that Student did not want to be viewed as different or stand out from his classmates. The only services she could provide was on a push in consult with Ms. Peargin and Student's SCIA. Consequently, to develop the PLOPS, she had to rely on information gleaned from the prior speech and language assessment, the reports of his teacher and SCIA that Student had difficulty performing on tests, following directions, and using before and after, and Mother's report that Student had problems at home following directions. The goal was to follow a two-part command to learn how to follow directions. She provided the information for the PLOPS and developed the goal. The PLOPS were accurate and the goal was measurable.

#### STUDENT'S PROGRESS AFTER THE OCTOBER 4, 2010 IEP

31. Following the completion of the third trimester of the 2010-2011 school year, Ms. Peargin prepared progress reports of Student's performance against his annual goals in the October 4, 2010, IEP. Student made some progress in reading comprehension, writing, handwriting, and vocational goals. He made remarkable progress on his vocational goals initiating and completing more staff-assigned tasks

with a minimum of refusals. He revised and rewrote a paragraph in ELA class without refusal, and he completed an online application in his transition class. However, Student had not met the mathematics computation goals in fractions and there was no data on how much progress had been made. She added that though he was not meeting this goal he was approximating the goal and thus made some progress. According to Ms. Peargin she consulted with his teachers at the start of the 2011-2012 school year for his progress and she received anecdotal reports from his teacher that showed inconsistent test results meaning he tested well on some days and on other days he did not test well.

32. Ms. Zimmer reported that Student did not meet his communication goal but his SCIA informed her that Student made 6 of 7 out of 10 sentences where he followed directions.

33. Student's ELA instruction consisted of two periods of English Intensive Intervention classes taught by Ms. Peargin and Ms. Rudman. The class had a Read 180 component. The Read 180 program was Ms. Peargin's curriculum of choice during the 2010-2011 school year. Read 180 was a reading intervention program for below grade level readers. The program also had a writing component, with a focus on vocabulary, scaffolded writing, writing activities, expository writing, and computer software. The program additionally had a small group instruction component with opportunities to address a student's individual needs and performance of the student's IEP goals. Student worked daily in a small group, where he was able to work on socialization goals, and communication goals. Ms. Peargrin had a variety of special education students but had no English as second language students in her class that year. Ms. Peargin explained that there were other program alternatives to Read 180 but she chose not to use them. However, she did use other reading materials in addition to Read 180. By the end of the 2010-2011 school year and in the 2011-2012 school year, Student was reading at a sixth

grade level. Ms. Peargin noted that his low Lexile scores were not reflected in the progress he demonstrated in the classroom.

34. Ms. Peargin used scaffolding and sentence starters to provide structure in instruction in written expression. Classroom instruction included use of current events and sentence starters to help Student complete a sentence. Student worked on expository writing as well. The scaffolding and sentence starters were gradually removed by the 2011-2012 school year as Student showed less reluctance to write. He became more willing to rewrite and edit his writing with less assistance. The volume of his writing increased and he became less reluctant to type on the computer.

35. Due to Mother's insistence that Student graduate with a diploma, Student was placed in an Algebra Foundations class for skills needed to pass Algebra beginning in the 2010-2011 school year. The class was part of Student's class schedule for the 2010-2011 school year and had no credit. It was geared to students with difficulties in mathematics. However, Student struggled because of his low grade level scores and inability to master abstract mathematical concepts.

36. Following implementation of the October 4, 2010 IEP both Mother and District agreed to retain Dr. Robert Patterson to assess Student, review his program, and to provide recommendations on the appropriateness of the current program and his program needs for the remainder of the 2010-2011 school year and for the 2011-2012 school year.

37. Dr. Patterson is a Licensed Psychologist, Licensed Educational Psychologist, and Licensed Marriage, Family, and Child Counselor. He has more than 30 years of experience providing psychotherapy and assessments, including conducting special education assessments, counseling and therapy. He is currently in private practice and is a Nonpublic Agency certified by the California Department of Education-Special

Education Division, providing assessments, counseling and behavioral intervention services.

38. Dr. Patterson reviewed Student's entire educational record including the CDC Assessment Report dated October 2007, District's Triennial Psychoeducational Assessment Report dated April 29, 2010 and Speech and Language Assessment Report dated April 12, 2010. Dr. Patterson observed Student in various classes and settings at school on March 23 and March 24, 2011. He interviewed each of Student's teachers, his SCIA, speech and language therapist, autism specialist, school psychologist, Student and Mother. He issued a Program Review Report dated March 25, 2011 and revised on May 7, 2011.

39. Dr. Patterson concluded that Student's educational program provided appropriate accommodations and instruction for Student. He further concluded that the program was meeting Student's educational needs, but not to the degree that it could because of the difficulty Student encountered with algebra and with Mother's perception that Student needed to be on a diploma track program and graduate from the 12th grade. Diploma track required taking and passing Algebra 1 and passing the CAHSEE. Dr. Patterson recommended District and Mother consider the following action and strategies: (1) that Mother and District take a more realistic approach to restructuring Student's program and placing him on a Certificate of Completion track, enabling Student to receive special education and related services up to 22 years of age and to allow more time to develop his areas of weakness, specifically in mathematics, written language and communication because doing so would allow Student to benefit from mobility and workability programs; (2) give Student more coping behavior skills to deal with difficult situations or incidents when they begin to develop and teach Student techniques for self-regulating his behavior to avoid verbal outbursts, and other inappropriate behaviors that disrupted the learning environment for him and other

students; (3) collaboration between District and CMH to provide family counseling and additional collaboration with TCRC to provide applied behavioral analysis (ABA) training and in-home behavioral services. (4) therapy services provided by District to Student and Mother if CMH was unable to provide suitable services; (5) for staff development of organizational skills training for Student using visuals and use of folders with additional reinforcement of those skills in the classroom, and increased District involvement with Mother and Student to develop a program of reinforcers for their use; (6) staff development to assist staff in teaching Student classroom coping and relaxation strategies; and (7) Mother to solicit TCRC for assistance in developing adaptive living skills at home because Mother reported continuing difficulties with Student's adaptive skills in the home setting while Student's conceptual skills had increased, resulting in increased adaptive and social skills in school.

40. Regarding the appropriateness of Student's academic program, Dr. Patterson's Report noted that Mother's insistence on Student's placement in Algebra 1 to meet diploma requirements ignored the fact that he had conceptual difficulties with applied math and with abstract math making it unlikely with even a high degree of modifications and tutoring that he would pass algebra. Dr. Patterson noted Student would benefit from more practical applied math instruction. The Report also noted that written expression was an area of difficulty for Student as well. The recommendation was to remove Student from Algebra 1 and provide him with an in-house applied mathematics program in his special education class or with an outside vendor and a written language program much in the manner suggested by the CDC Assessment Report involving the use of visuals and a variety of other techniques.

41. Significantly, Dr. Patterson's Report noted that Student's listening skills and social skills might have been further developed by this time through District's Speech and Language services however, Student had consistently opted out of Speech

and Language services with Mother's support. As a result, Student continued to have difficulty with general language skills. The Report further noted that Student's low scores on the academic assessments may not be due to a lack of an appropriate academic program but may be attributed to Student's inability to master abstract mathematical concepts and Mother's desire for Student to master higher level academic subjects that exceeded Student's ability, such as Algebra, in order to graduate high school with a diploma.

42. On May 20, 2011 District provided Mother written notice of the addendum IEP team meeting scheduled for June 13, 2011 to discuss Dr. Patterson's Independent Assessment and recommendations.

#### JUNE 13, 2011 ADDENDUM IEP TEAM MEETING

43. District held the addendum IEP team meeting on June 13, 2011. The IEP team members included Mother and Ms. Zachry; Ray Ford, therapist from CMH; Dr. Patterson; Ms. Peargin; Ms. Zimmer; Ms. Murphy; and Ms. Simmons-Thompson. Dr. Patterson presented his report and recommendations. Dr. Patterson addressed his recommendations including use of social scripts, an anxiety notebook, information on how to participate in the Fresno State marching band, and how to enroll in a community college in Fresno that participates with that marching band, status of Student's transition plan and initiation of Student's workability program, organizational skills training, further behavior assessments, and availability of post graduate services at PRHS. The team also discussed Dr. Patterson's recommendation for ongoing mental health services. Mother and Ms. Zachry expressed a concern that CMH did not provide ABA services to children with autism. Ray Ford told the team that CMH did not provide ABA services to Student. He explained that CMH routinely rejected referrals for mental health services for children with a diagnosis of autism. He informed the team that District's referral of Student was based upon a primary diagnosis of anxiety. CMH was

responsible for providing therapy to treat Student's anxiety. Dr. Patterson agreed with Mr. Ford's statement of the scope of CMH's therapeutic services to Student, thus confirming that CMH was not responsible for providing behavioral services for the treatment of autism. District confirmed it was equipped to provide for Student's behavioral needs in the school setting. The team agreed to reconvene on or before August 31, 2011, in preparation for the September, 2011 annual IEP.

44. On or around August 17, 2011, Mother and District developed a new class schedule for Student prior to the next scheduled IEP meeting. First quarter classes included Band, Independent Living 1, Marching Band/Symphony, Government, English Language Learner Transition English Intervention A, and Academic Tutorial. Second quarter classes consisted of Band/Jazz Ensemble, Marching Band/Percussion B, Marching Band/Symphony B, MM Economics, and MM Transitions. The MM designation identified the class as a modified curriculum class tailored to each student's educational needs. Third quarter included Band/Jazz Ensemble, Marching Band/Percussion C, Marching Band/Symphony C, Independent Living 2, and English Transition Intervention C. Fourth quarter Student had only the Band/Jazz Ensemble class.

45. A second addendum IEP team meeting was held on August 25, 2011. The IEP team members included Mother, Ms. Zachry, Ms. Murphy, Ms. Munoz, Ms. Peargin, Ms. Zimmer, a general education teacher, occupational therapist, school psychologist, and Mr. Ford for CMH. The team discussed the development of annual goals and accommodations, the transition plan, class schedule, data collection in preparation for revised BSP, and a revision of the mental health services goal. Mr. Ford presented a proposed mental health goal and list of proposed services which extended the services provided under the October 4, 2010 IEP. Ms. Murphy presented District's agreement to make up the missing mental health therapy sessions which had been incorporated into a

settlement agreement between Student and District. The annual IEP meeting was scheduled for September 22, 2011 and the addendum IEP meeting was adjourned.

#### THE SEPTEMBER 22, 2011 IEP

46. District convened the September 22, 2011, annual review IEP team meeting. Student was now 18 years age and in the 12th grade. Those in attendance included Mother and Ms. Zachry; Mr. Ford from CMH; Ms. Munoz; Ms. Peargin; Ms. Zimmer; Ms. Murphy; Ms. Simmons-Thompson; Craig Stewart, from the SELPA Workability Program; a school psychologist; a representative of TCRC; and a PRHS Assistant Principal. The IEP team reviewed the proposed IEP for the 2011-2012 school year. The IEP team reviewed the PLOPS and noted Student continued to be interested in music and his involvement with Band. The team reviewed progress against goals and reviewed and revised the new proposed goals in Academics, communication, social emotional/behavioral, vocational (writing, budgeting, organization, and planning), consumer mathematics, functional literacy, pragmatic language, behavior. The team discussed the reports that Student made progress in several areas of need. He was able to maintain conversation on topic and had shown improvement in all areas. Most notably, Student's writing had improved to the point that he could write an unsupported simple paragraph with a topic sentence, detail sentences, and concluding sentence. Student showed increasing stability and resilience, especially when dealing with unexpected events. As of the date of the IEP, his social emotional/behavioral functioning had improved. There had been no outbursts and behaviors such as exiting the classroom when Student disagreed with his teacher's actions. The IEP team agreed that a BSP was no longer needed at the present time and agreed to devise a fade plan to fade out Student's SCIA. Student's functional performance in vocational skills had improved slightly except for academic work production which continued to be an area of concern due to poor organizational skills. Overall work production had increased but

independent writing activities such as a resume and cover letter, continued to be a challenge. The team reviewed and discussed Student's ITP and Mother expressed her concern to the team about how Student would achieve educational benefit from his program with only seven months left in the school year. Mother was also concerned about Student's mobility processing and in particular his ability to navigate the streets in his community and his difficulty in processing traffic hazards and dangers. Student's graduation plan was changed from diploma track to a certificate of completion track as recommended by Dr. Patterson.

47. Mr. Stewart from the SELPA workability program had been a special education teacher with the District at PRHS for 30 years. He had Student in his freshman class before he retired. He was the job placement specialist for the SELPA and coordinated student training for employment and assigned jobs to students based upon their needs. He did not write the goal for this IEP but he reviewed the workability program. Student was scheduled to start a job in the second trimester at "Hair of the Dog," a dog grooming shop. Student was scheduled to work two hours a day, eight hours per week for a total of 75 hours for the school year. The program included a mobility component to train Student how to independently ride the bus to and from work. The work site was also within walking distance from his home. Student was scheduled to begin work in December 2011. Mr. Stewart observed that Student transitioned into his routine of reporting to work without incident.

48. The IEP team met again on October 8, 2011, to discuss Student's behavior and mental health services goals. IEP team members included Mother and Ms. Zachry; Ms. Peargin; Ms. Simmons-Thompson; and Mr. Ford who appeared by telephone. Mother requested CMH increase individual counseling for Student from 60 minutes once per month to 50 minutes twice per month. Mr. Ford informed the IEP team Student would receive a minimum 60 minutes twice per month. Mother agreed. The services

again were to be provided, as written in the October 4, 2010 IEP, at the service provider's location. At no time during the September 22, 2011, IEP team meetings did Mother or her advocate express a concern or belief that the location designated for delivery of Student's mental services had changed without her knowledge or consent. Nor did she request mileage reimbursement from District for expenses incurred transporting Student to CMH for mental health services.

49. From September 11, 2011 to March 2012, Mother and Ms. Zachry communicated extensively with District concerning all aspects of the proposed IEP. District agreed to a number of revisions proposed by Mother including Mother's request for an Assistive Technology Assessment for Student.

50. The revised September 22, 2011 IEP, kept in place the aids, program accommodations, modifications/supports, and ITP, provided in the October 4, 2010 IEP. The IEP offered placement in a regular education setting 80 percent of the day and special education setting 20 percent of the day for resource support in English. The IEP offered the following DIS and related services: (1) language and speech therapy, individual and group, 20 minutes weekly; (2) vocational assessment, counseling, guidance, and career assessment 25 minutes monthly; (3) college awareness 25 minutes monthly; (4) individual counseling provided by CMH 60 minutes twice per month at the provider location; (5) social work services 30 minutes monthly provided by CMH at the provider location; (6) health and nursing-specialized physical health care services 60 minutes annually provided by CMH at the provider location; (7) work experience education (workability) 480 minutes weekly; and (14) behavior intervention services, individual, 1500 minutes daily. The Graduation Plan designated Student to graduate with a certificate of completion with a projected graduation date of June 7, 2012.

51. Consent to the IEP was delayed because the AT assessment was not completed and presented to the IEP team until March 12, 2012. Further revisions were

made to the IEP based upon the assessment and Mother consented to the IEP on March 12, 2012.

#### ITP IN SEPTEMBER 22, 2011 IEP

52. The ITP was developed from age-appropriate assessments by the California Career Zone. It identified three post-secondary goals. The ITP identified Student's interests and aptitudes in the area of musical performance and the music field. Jobs in his area of interest and aptitude included musical accompanist, providing musical background for live performances, musical instrument repairer and tuner, film and video direction and scoring. The post-secondary education goal in the ITP identified Student's plan to attend college to pursue music interests. The post-secondary goal was linked to his annual goals. According to Mother, Student wanted to attend Fresno State. However, since Student was not on a diploma track he could not qualify for admission to Fresno State and the focus shifted to attending a two-year college. The transition activities to support the post-secondary goal required Student to complete the application process to Cuesta College in December 2011, complete other assessments and applications by March 2012, and schedule Ability to Benefit testing by March 2012. The community experience connected with the goal was for Student to use public transportation to accompany a group to Career Tech day at Cuesta Junior College in spring 2012. The post-secondary employment goal was for Student to be self-supporting in order to attend the college of his choice. The activities to support the goal called for Student to participate in the workability program beginning in mid-December 2011. Public transportation training would be provided by the workability coordinator. The third post-secondary goal of independent living established Student intended to live independently. The goal was to be coordinated by Mother and TCRC to meet to discuss transitional housing options for independent living. The goal was to be completed by June 1, 2012. All of the transition goals were linked to the annual IEP

goals related to Student's transition services. Mother's input to the ITP resulted in the formulation of the post-secondary goal of attending Cuesta College or a college with a marching band so that Student could realize his dream.

53. As Student's case manager, Ms. Peargin was involved in the development of the ITP. She worked with the California Career Zone to assess Student's needs in an ITP. She also explained that given his deficits Student was not likely to graduate with a diploma, which ruled out attendance at Fresno State College. However, she provided Student and Mother with applications, forms, and information on Cuesta College's disabled student's program that transitioned special education students into the two-year college curriculum. She, along with other staff, insured Student's attendance at Cuesta's career tech day so that he would learn how to access information of its disabled student's program. She also detailed District's efforts to address Student's post-secondary education and independent living objectives by incorporating them into the annual IEP goals. She credibly testified that the ITP was appropriate.

#### SEPTEMBER 22, 2011 IEP ACADEMIC INSTRUCTION

##### Mathematical Concepts

54. As to mathematical concepts, in the 2010-2011 school year, due to Mother's insistence that Student graduate with a diploma, Student was placed in an Algebra Foundations class for teaching skills needed to pass algebra. The class had no credit and was geared to students with difficulties in mathematics. However, Student struggled because of his inability to master abstract mathematical concepts. Once Student's program was changed to a Certificate of Completion program, the emphasis shifted from abstract mathematics to modified curriculum functional math. The class was taught by Duane McRoy, a special education teacher with District for more than 18 years, who taught special education math, modified curriculum math, and pre-algebra

classes. He taught Student in the first trimester of the 2011-2012 school year. The curriculum covered three areas; government, economics, and general social studies. He was familiar with Student's IEP and consulted with Ms. Peargin on a regular basis. The curriculum included a more modified functional mathematics. Class instruction focused on budgeting and government with the use of mock economies to simulate purchase and change making activities. Mr. McRoy described Student as an eager participant in his class whose behavior in class was without incident and who was active in and outside of the class. Student received a modified grade of A-.

55. Once Mother agreed to change Student's program to a certificate of completion program the emphasis on taking Algebra shifted to functional mathematics. Student was enrolled in MM Economics.

#### Written Expression and Reading Comprehension

56. The Read 180 curriculum was taught in the English Intervention Instruction class. Ms. Peargin explained that instruction in written expression included prewriting and rewriting strategies, editing text, and gradual removal of scaffolding. Student continued to progress in the 2011-2012 school year in that Student wrote paragraphs in his own handwriting and without sentence starters or scaffolding, he showed use of transition language and gradually showed less reluctance to write. Though there were aspects of Read 180 that presented a challenge to Student, such as use of computers to obtain Lexile scores, Student progressed to the second level of the program in the 2011-2012 school year and was reading at a sixth grade level.

#### STUDENT'S PROGRESS IN THE 2011-2012 SCHOOL YEAR

57. Ms. Joyce Brunner taught a Strategic English class and an MM English class. She taught Student in his junior and senior years at PRHS. During Student's junior year, in the 2010-2011 school year, she used Read 180 as a reading strategy. Student

transferred out of her class within three days because he was having a difficult time with his behavior. He would wear a hat to class, sit at his desk and pull the hat down over his face. He was not well socialized and argued with other students in class. Ms. Brunner testified at hearing that Read 180 was a three tier, group-structured, program based upon Lexile scores. The first tier involved a timed exercise working on a computer and when the timer rung the participant moved to the next group. The next group was independent reading. Student had difficulty with this segment when he had no para-educator to direct him. He was also enrolled in her class for three trimesters in the 12th grade in the MM Transition class and in MM Academic Tutorial. MM Transition focused on post graduate preparation under the ITP. The class focused on resume writing and pre-college matters. The class went on field trips, including to the Cuesta College Disabled Student's Program where students were given assistance to apply to Cuesta. Cuesta is a "feeder" school to Cal Poly San Luis Obispo. Student worked on resume writing in class and prepared a portfolio with resume, introduction letter and request letter for references. Ms. Brunner communicated with Ms. Peargin about Student almost daily. The class also included materials designed to teach social skills such as accepting criticism, and greeting people. The MM Academic Tutorial was a study hall for students who left class in the afternoon due to their involvement in the athletics program. Student was a teacher assistant to Ms. Brunner in the third trimester and he was always ready to help. Ms. Brunner saw huge growth in Student from junior year to senior year. He progressed from antisocial behavior to interacting with other students. He did non-preferred activities and pushed himself to go to the job he was hired for through the workability program. His social communication improved as well and he demonstrated an ability to respond appropriately. He was also able to take the perspective of other students and he was less anxious in his dealings with staff and others.

58. Scott Sebby, a special education teacher for District, taught Student in his junior year in Life Science. He observed Student progress from an antisocial, non-communicating individual to a calm, social individual in his senior year. Mr. Sebby observed Student's interactions with other Students on campus and on his way home. He saw a noticeable improvement in Student's behavior and social skills.

59. Rebecca Simmons-Thompson testified as a District expert. Ms. Thompson is District's Autism Specialist. She had a bachelor's degree in liberal studies, and a master's degree in special education. She had 30 hours of Treatment and Education of Autistic and Communicated related handicapped Children (TEACCH) training and 900 hours of mentoring by a Board Certified Behavior Analyst (BCBA). At the time of the hearing she was completing her requirements to become a BCBA. She had been employed with District for four years and was experienced in behavior interventions with ASD students. She was familiar with Student and worked with him and his SCIA in the 2010-2011 and 2011-2012 school years. She provided behavior intervention services to Student and trained his SCIA to work with him. Student initially had problems applying what he learned in class to real life situations. He had difficulty taking the perspective of others, and he had problems with social judgment and awareness. She was also involved in his mobility training by giving him explicit instructions in reading the bus schedule. She rode the city bus with Student to his job site. She attended the October 4, 2010 and September 22, 2011 IEP meetings and she developed Student's BSP. She observed Student's behaviors improve in that there were minimal to no outbursts in class when assigned a task. By the time of the September 22, 2011 IEP meeting, he demonstrated the ability to complete assignments and was completing his class work at the rate of 77 percent. She confirmed that the September 22, 2011 IEP team, agreed to discontinue Student's BSP because of improved behavior but to retain the SCIA for data collection. Finally she testified to her role as a specialist in shaping Student's autism-related

behaviors. She distinguished between her role as a behaviorist and that of the school psychologist and CMH mental health therapist who were qualified to assess and provide mental health therapy services for Student's anxiety.

60. Dr. Patterson testified at hearing as District and Student's expert regarding the appropriateness and adequacy of Student's educational program in the October 4, 2010 IEP. He described Student as a unique character who had aberrant behavior and lacked the capacity to understand the effect of his behavior on others. Student did not want to stand out as a special needs student. However, his odd dress and demeanor made him noticeable to others. He did not understand social skills but had improved by the time Dr. Patterson reviewed his program for adequacy. Dr. Patterson spent 12-15 hours reviewing Student's records, including interviewing school staff. He spent four to five hours in classroom observation, including Student working with his SCIA. Based upon those observations and review he made some recommendations to enhance Student's program going forward into his senior year. He opined that the Read 180 Program was a very comprehensive and integrated program; however, he believed that Student needed a different program at a lower level. He believed Read 180 could not work for Student with his writing deficits but might be adequate for his reading; although, it was of limited value to Student because of his reading comprehension deficits. He further opined that Student's mathematical ability was so far below grade level that it was inappropriate to keep him in algebra with the unrealistic expectation of passing and graduating with an academic diploma. Rather he needed to be placed in a more functional mathematics class to learn the basics of using money and making change. He testified consistent with his assessment that Student be placed on a certificate of completion program that would allow him more time to improve his reading, writing, language, and mathematical skills. He also testified to the appropriateness of Student's vocational skills goals. In his opinion, the vocational skills

goals were not measurable because they did not adequately address Student's lack of organizational skills. He also rendered an opinion of the September 2011 IEP and opined that there was nothing in the ITP that assisted with Student's mobility goals and Student was not qualified to attend Cuesta as he was not on a diploma track. Dr. Patterson ultimately found that overall; the October 4, 2010 IEP was appropriate and met Student's educational needs. Dr. Patterson had no further involvement in Student's program and did not attend the September 2011 IEP meeting. Dr. Patterson's only comment about compensatory education was a statement that there was a distinction between "compensatory time and compensatory paid." Other than this comment, he offered no specific cognizable opinion on the need for, the appropriateness of, or the amount of compensatory education necessary for Student.

61. Ms. Peargin disputed Dr. Patterson's assessment of Read 180. She opined that Student derived some benefit from the program. She was more familiar with Student as she had worked Student almost daily during four years at PRHS as his case manager and one year as his special education teacher/case manager. Student had intensive ELA instruction of two periods of ELA, with one period used as a continuation of the other. The first class was whole group instruction. The second hour of class was a rotation of two types of exercises, followed by a wrap up at the end of the period. The instruction also included brainstorming, use of scaffolding in writing, and visual prompts (using pictures to generate thoughts). Instruction strategies were successful and in her opinion, overall, Student made meaningful progress. She took Dr. Patterson's recommendations on bringing together all of Student's writing elements and did so in Student's program. She disagreed with Dr. Patterson's opinion that Read 180 was too high a level for Student because evidence showed Student was able to successfully accomplish several tasks. Moreover, she used other teaching strategies to generate ideas for writing such as use of supplemental newspaper articles and visual media. Ms.

Peargin also disputed Dr. Patterson's opinion concerning Student's progress in District's instructional methods in mathematics. Based upon her knowledge, involvement and teacher report, she concluded that although Student had not met his math goals in the October 4, 2010 IEP, Student was making some progress in performing simple mathematical calculations in fractions, addition, and subtraction. Finally, Ms. Peargin's testimony concerning the development of Student's vocational skills goals established that the goals were measurable and therefore, appropriate. Ms. Peargin's testimony deserves substantial weight on these issues than Dr. Patterson because of her knowledge of Student, her expertise, and years of experience developing Student's academic program.

#### MENTAL HEALTH SERVICES

62. Mr. Ford is a Mental Health Therapist IV with CMH. He has a bachelor of arts degree in sociology and clinical social work. He is a Licensed Clinical Social Worker (LCSW) and has over 35 years of experience in the mental health field including 19 years with San Diego County and 12 years with San Luis Obispo County. He has provided a variety of therapeutic, educational, residential, forensic, crisis, and case management interventions with several client populations, including children with AB 3632 services and educationally related mental health services referrals. His job duties as a therapist with CMH required the assessment, and treatment of children and families. He has had training in cognitive behavioral therapy and has had some training in interventions with children with autism. He was qualified to provide therapeutic mental health services to Student as described in Student's IEP. According to Mr. Ford, ABA was not a service CMH provided because Regional Centers were responsible for providing ABA services to its clients to the extent necessary for non-educational purposes and schools were responsible for the provision of educationally-related ABA services.

63. Mr. Ford testified as CMH's expert and gave a detailed description at hearing of the mental health services he provided to Student. He had been providing therapeutic services to Student since May 7, 2010 after Student was determined qualified for mental health services with a diagnosis of generalized anxiety and a secondary diagnosis of autism on April 26, 2010. The IEP provided for mental health services to Student in the form of individual therapy 60 minutes per month at CMH offices for a minimum of 24 visits. He saw Student for the first four sessions at the school because he thought it would be more appropriate and more comfortable for Student, but it did not work out. Thereafter, Student came to Mr. Ford's office for treatment. Student did not receive mental health services during the period from August 30, 2010 to December 2010 due to Mr. Ford's leave of absence. The leave resulted in a lapse of four hours of individual counseling. Services were resumed on January 3, 2011. Mr. Ford treated Student in approximately 29 sessions and ultimately Student received services in a total of 44 sessions, including four make up sessions, during the period from May 17, 2010 to June 20, 2012.

64. Mr. Ford participated in the September 22, 2011 IEP. CMH offered a proposed mental health goal and assisted in drafting a social/emotional/behavioral goal for that purpose. He was the one responsible for working with Student to meet the goal and had the expertise to do so. In sessions, he talked about learning how to cognitively reframe things, and engaged Student in traditional talk therapy, dependent on what Student could tolerate at any time. He had not seen much progress with Student in the 2010-2011 school year. He began to see progress in the 2011-2012 school year sessions. The sessions addressed Student's anxiety and worked to find calming strategies, and improved self-concept and self-esteem. By the end of the 2011-2012 school year Student was happy, and had become social. He attended prom night and the anti-prom. Mr. Ford concluded that Student received educational benefit because his reactivity to

events in class was substantially reduced and his behaviors more adaptable to the classroom.

65. On June 12, 2012 Student graduated from PRHS with a Certificate of Completion.

66. Ms.Zachry was Student's advocate. She is not a credentialed special education teacher. She represented Student and Mother beginning in spring 2010 during the 2009-2010 school year because Mother complained Student was not making academic progress. Ms. Zachry spent approximately one hour with Student throughout the course of her representation of Student and Mother. She appeared at the October 4, 2010 and September 22, 2011 IEP team meetings and each and every addendum meeting between the annual IEPs. She confirmed her communications with District concerning all aspects of Student's IEPs. She testified at hearing that although the complaint alleges inappropriate vocational skills and communications goals no such concerns were raised at the October 4, 2010 IEP team meetings. She also confirmed that District incorporated Mothers proposed revisions to the September 22, 2011 IEP. Finally she believed the social emotional goals written by Mr. Ford relating to the delivery of mental health services were not well written because they did not speak to treatment specific to autistic children in the form ABA services. She stated that Mother ultimately consented to the disputed IEPs simply because she was tired of fighting with District and desired to get Student's program in place. Ms. Zachry's testimony concerning the inappropriateness of Student's program was not credible for the following reasons: (1) She was not familiar with Student as she admittedly spent only one hour with him; (2) She confirmed that she and Mother fully participated in negotiating the terms of each of the disputed IEPs, many of which terms District incorporated into the IEPs, and she engaged in numerous communications with District on issues raised in each of the disputed IEPs; (3) She testified that a number of the goals as written in each of the IEPs

were inappropriate but also opined the goals in the October 4, 2010 IEP were "technically measurable."

67. Mother testified to her concerns about the adequacy of Student's program. She was an experienced Para-educator. She had a bachelor of arts degree and a master of arts degree in special education. She was employed by District as a Para-Educator for approximately seven years, working with mild to moderately disabled and autistic students. She was concerned about Student's academic progress, his emotional safety, and his preparation for post-secondary independence. She testified that she saw no improvement at home and Student still struggled with reading and math. Ultimately, while she did not believe that Student received educational benefit from his program in the 2010-2011 and 2011-2012 school years, she testified that Student made some progress toward some, if not all, of his goals. She saw some progress in his behavior. Though the complaint alleged that District failed to pay mileage reimbursement for transportation to CMH appointments Mother did not provide evidence of the amount she was claiming or the distance of travel between her home and CMH offices.

68. In August of 2012, Mother moved with Student out of the District boundaries to Fresno, where they continued to live through the time of hearing. Student was not enrolled at Fresno State College but was participating in the Fresno State marching band. Student was also attending Clovis adult education school in the Clovis School District with the hope of obtaining a GED and subsequently working toward a Diploma.

## LEGAL CONCLUSIONS

### ISSUE 1: DENIAL OF FAPE IN THE OCTOBER 4, 2010 IEP

1. Student contends District denied Student a FAPE in the IEP started on October 4, 2010 and signed on February 11, 2011, by failing to develop appropriate

goals in the areas of reading comprehension, writing, communication, mathematics, and vocational skills. District contends that the goals proposed in the IEP were appropriate and provided Student a FAPE. Student's contention fails for the reasons below.

#### Applicable Law

2. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [163 L.Ed.2d 387], the party who filed the request for due process has the burden of persuasion at the due process hearing. In this case, Student filed for a due process hearing and therefore bears the burden of persuasion.

3. A request for a due process hearing "shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (Ed. Code, § 56505, sub. (l).) This time limitation does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: 1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or 2) The withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*P.P. ex rel. Michael P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661, 662.) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

4. A pupil with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA). (20 U.S.C. § 1400 et. seq.) FAPE is defined as special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

5. The term "related services" (designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.) Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code § 56363, subd. (b)(9) and (10).)

6. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be

reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley*, supra, at p. 200.) School districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Rowley*, supra, at p. 201.)

7. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an “education . . . designed according to the parent’s desires”], citing *Rowley*, at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s potential. (*Rowley*, supra, 458 U.S. at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.*, at p. 200.) Hence, if the school district’s program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner’s parents preferred another program, and even if his parents’ preferred program would have resulted in greater educational benefit. (*Gregory K.*, supra, 811 F.2d at p. 1314.)

8. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP

must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum, and when appropriate, benchmarks or short-term objectives, that are based upon the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.)

9. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).)

10. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

11. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C.

§ 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *see W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

#### Analysis of Issue 1

12. Student contends that several goals in the October 4, 2010 IEP lacked accurate baselines and were not objectively measurable, including goals one to five, seven, and 11. In particular Student argued the reading comprehension baselines and goals needed to be stated in grade level scores rather than Lexile scores. As set forth in Factual Findings 9 to 29 above, various witnesses including Ms. Peargin and Ms. Zimmer testified regarding the appropriateness of the IEP goals.

13. First, Student's IEP goals in reading comprehension were appropriate for the following reasons. The reading goals one, two, and four, were for expository text, vocabulary, and inference. The assessments showed Student's Lexile scores were below grade level. The baselines for each of the goals were derived from accurate information obtained from assessments of Student's current levels of functional performance. The goals were measurable and based upon assessment results that identified Student's area of need.

14. Second, the IEP goal in writing was appropriate because the baseline indicated Student was currently achieving a rubric score of two on expository writing with a teacher provided organizer with sentence starters. The annual goal provided that when given a teacher prompt and using an organizer without sentence starters, Student will independently write a paragraph achieving a score of three on a content specific rubric with a one to four scale in four out of five consecutive trials as measured by work samples. The goal was measurable and based upon assessment results that identified Student's area of need.

15. The math goals eight and nine were for math computation and math reasoning. The goals for math computation and math reasoning are fully set forth above

in Factual Finding 22. Further, as set forth above in Factual Finding 29, these math goals were measurable and based upon accurate assessment information that identified Student's areas of need.

16. Similarly, the communications goal and the vocational skills goals were developed from accurate baselines established from current data obtained by assessment and observation. The goals were measurable and identified Student's areas of need.

17. The credible testimony of Ms. Peargin established that the reading, writing, math, and vocational goals were based upon accurate baselines and that the goals were measurable supports a finding the goals were appropriate. Her testimony that Student made progress in these goals with the exception of the vocational goal also meets the legal standard for a FAPE. Similarly, Ms. Zimmer's credible testimony that the communications goal was developed from accurate baselines and the goal was measurable supports a finding the goal was appropriate. She testified that while Student did not fully achieve the goal, he made some progress based upon his SCIA's report. Finally, Mother and Ms. Zachry's testimony concerning their active and full participation in the revision and finalization of these goals establishes that the goals as written neither interfered with parental participation in the IEP process nor resulted in a deprivation of educational benefit or the receipt of a FAPE.

18. In sum, the goals were appropriate at the time they were drafted, such that there was no procedural violation of the IDEA. As of October 4, 2010 the IEP team was well aware that Student was struggling in reading, writing, language, vocational, and math. The goals in all of these areas reflected that Student was not at grade level and aspired for Student to make progress toward grade level. Even though it may not have been realistic for Student to make gains that would bring him to grade level, the goals

cannot be said to have denied Student a FAPE for having too high of an aspiration where they were nonetheless targeted at the correct areas of need and measurable.

19. Alternatively, if Student had demonstrated that the goals were incorrect at the time they were written, Student failed to meet his burden of showing the second element of a procedural violation: that the goals as written either interfered with parental participation in the IEP process or resulted in a deprivation of educational benefit or the receipt of a FAPE. There was no evidence that improper goals interfered with parental participation in the IEP process. As to whether Student was denied a FAPE, a student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (See Legal Conclusions 33 and 34 below, incorporated by reference.) Here, the evidence established that Student made some overall progress in the 2010-2011 school year in all areas of need.

20. In sum, Student failed to demonstrate by a preponderance of the evidence that goals one through five, seven through nine, and 11 in the October 4, 2010 IEP were not appropriate and denied him a FAPE. (Findings of Fact 1 to 30; and Legal Conclusions 2 to 10.)

## ISSUE 2: DENIAL OF FAPE IN THE SEPTEMBER 22, 2011 IEP

21. Student contends that District failed to provide a FAPE in the September 22, 2011 IEP by failing to offer an appropriate transition plan, including appropriate goals and related services designed to support Student's transition to postsecondary education. District contends that it provided Student a FAPE because Student's ITP was properly drafted and implemented pursuant to Student's IEP.

## Applicable Law

22. As stated above in Legal Conclusion 11 above, incorporated by reference, to prove the denial of a FAPE based on a procedural violation, Student must demonstrate that the violation impeded the right of the child to a FAPE, significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child of the parents, or caused a deprivation of educational benefits.

23. The IDEA defines "transition services" as "a coordinated set of activities for a child with a disability that:"

- (A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and
- (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(20 U.S.C. § 1401(34).)

24. Transition services may consist of specially designed instruction or a designated instruction and service. (34 C.F.R. § 300.43(b); Ed. Code, § 56345.1, subd. (b).) Where the transition services are to be provided by outside agencies, the outside

participating agencies should be identified, and invited to any IEP meeting where their funding or provision of those services is involved.

25. A student's IEP must include a statement of measurable goals based on transition assessments and an outline of the services needed to assist the child in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subs. (h) & (i).)

26. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief only upon a showing of a loss of educational opportunity or a denial of a FAPE. (*Bd. of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [despite transition plans being a mandatory component of an IEP, notation in IEP that the transition plan would be "deferred" was procedural violation]; *A.S. v. Madison Metro School Dist.* (D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as procedural violation].)

#### Analysis of Issue 2

27. The ITP in the September 22, 2011 IEP met all of the legal requirements under IDEA. The ITP was developed from age-appropriate assessments by the California Career Zone. It identified three post-secondary goals. The ITP identified Student's interests and aptitudes in the area of musical performance and the music field. Jobs in his area of interest and aptitude included musical accompanist, providing musical background for live performances, musical instrument repairer and tuner, and film and video direction and scoring. The post-secondary education goal in the ITP identified Student's plan to attend college to pursue music interests. The post-secondary goal was linked to his annual goals. According to Mother, Student wanted to attend Fresno State. However, since Student was not on a diploma track, he could not qualify and the focus

shifted to attending a two-year college. The transition activities to support the post-secondary goal required Student to complete the application process to Cuesta Junior College in December 2011, complete other assessments and applications by March 2012, and schedule Ability to Benefit testing by March 2012. The community experience connected with the goal was for Student to use public transportation to accompany a group to Career Tech day at Cuesta in spring 2012. The post-secondary employment goal was for Student to be self-supporting in order to attend the college of his choice. The activities to support the goal called for Student to participate in the workability program beginning in mid-December 2011. Public transportation training would be provided by workability coordinator. The third post-secondary goal of independent living established Student intended to live independently. The goal was to be coordinated by Mother and TCRC to meet to discuss transitional housing options for independent living. The goal was to be completed by June 1, 2012. All of the transition goals were linked to the annual IEP goals related to Student's transition services.

28. As Student's case manager, Ms. Peargin was involved in the development of the ITP. She worked with the California Career Zone to assess Student's needs in an ITP. She also explained that given his deficits Student was not likely to graduate with a diploma, which ruled out attendance at Fresno State College. However, she provided Student and Mother with applications, forms, and information on Cuesta Junior College's disabled student's program that transitioned special education students into the two-year college curriculum. She, along with other staff insured Student's attendance at Cuesta's career tech day so that he would learn how to access information of its disabled student's program. She also detailed District's efforts to address Student's post-secondary education and independent living objectives by incorporating them into the annual IEP goals. She credibly testified that the ITP was appropriate.

29. Student did not demonstrate that the ITP goals were incorrect at the time they were written and accordingly, Student failed to meet his burden of showing District committed a procedural violation in the development of the ITP. Further, Student failed to show that the ITP goals as written either interfered with parental participation in the IEP process or resulted in a deprivation of educational benefit or the receipt of a FAPE. All three goals were developed based upon discussions and deliberations with the IEP team, in particular from Mother. All of the transition goals were linked with specific goals in the annual IEP related to Student's transition services. Student's transition plan educational goal was to attend a college where he could participate in a music curriculum. As to whether the ITP cause a deprivation of educational benefits or interfered with Student's right to a FAPE, a student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. Here, Student was expected to fulfill the post-secondary education goal by attending the program at Cuesta or an equivalent school. Mother, however chose not to follow the ITP and instead moved Student out of District after graduation to facilitate his participation in the Fresno State College marching band not as a student, but as a community participant. Mother chose to place Student at an adult education school in another District. Here, the evidence supports a finding that the transition plan was developed from appropriate assessment data and met all IDEA requirements. The ITP incorporated all of the elements required in Legal Conclusions 23 to 26 above and provided a FAPE.

30. Student failed to demonstrate that the ITP in the September 22, 2011 IEP deprived him of a FAPE. (Findings of Fact 31 to 53; Legal Conclusions 2 to 11 and 22 to 29.)

### ISSUE 3: FAPE IN THE OCTOBER 4, 2010 AND THE SEPTEMBER 22, 2011 IEPs

31. Student contends he was denied a FAPE in his junior (2010-2011) and senior years (2011-2012) because District did not provide appropriate academic instruction in areas in which he had the most deficits. Student specifically contends that District's use of the Read 180 program in both junior and senior year was not effective and was inappropriate because he was below grade level in reading, had language deficits, and had difficulty writing. Student further asserts that academic instruction in Algebra Foundations in his junior year was inappropriate because he was well below grade level in math and had known deficits in abstract thinking. District contends that Student received a FAPE in both is junior and senior year.

#### Applicable Law

32. Legal Conclusions 2 to 10 are incorporated by reference.

33. The factual showing required to establish under *Rowley* that a student has received some educational benefit is not demanding. For a student in a mainstream class, "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress." (*Walczak v. Florida Union Free Sch. Dist* 142 F.3d 119.) A district need not guarantee that a student will make a month's academic progress in a month's instruction; a student may benefit even though his progress is far less than one grade level in one school year. (See, e.g., *Houston Indep. School Dist. v. Bobby R.*, 200 F.3d 341.) A two-month gain in reading in 10 instructional months has been held an adequate showing. (*Delaware Valley School Dist. v. Daniel G.* (Pa. Cmwlth. 2002) 800 A.2d 989, 993-94.)

34. A student may also be considered to have derived educational benefit under *Rowley* when he improves in some areas, even though he fails to improve in others. (See, e.g., *Fort Zumwalt School Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613;

*Carlisle Area School v. Scott P.*, 62 F.3d 520.) He may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. School Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481.) A showing of progress does not require that a D student become a C student and thus rise in relation to his peers. Progress may be found even when a student's scores remain severely depressed in terms of percentile ranking and age equivalence, as long as some progress toward some goals can be shown. (*Coale v. Delaware Dept. of Education*(D.Del. 2001) 162 F.Supp.2d 316, 328.)

35. Whether a student has received more than de minimis benefit must be measured in relation to the student's potential. (*Mrs. B. v. Milford Bd. of Education* (2d Cir. 1997) 103 F.3d 1114, 1121; *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir. 1988) 853 F.2d 171, 185.) As the Supreme Court has said:

It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills.

*Rowley, supra*, 458 U.S. at p. 202.

36. *Rowley* established that, as long as a school district provides an appropriate education, the choice regarding the methodology to be used to implement the IEP is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) Subsequent case law has applied this holding to disputes regarding choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155

F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick School Comm., supra*, 361 F.3d at p. 84.)

37. A failure to implement an IEP may deny a child a FAPE and thereby give rise to a claim under the IDEA. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 815, 822.) Minor implementation failures are not actionable given that special education and related services need only “conform” to the IEP. A school district is not statutorily required to maintain perfect adherence to the IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs “when there is more than a minor discrepancy between the service a school provides to a disabled child and the service required by the child’s IEP.” (*Id.* at pp. 815, 821-822.) *Van Duyn* specifically rejected a “per se” standard whereby any failure to implement the IEP as written gave rise to an automatic IDEA violation. Instead, when implementation failures occur, it requires analysis of the nature, extent and impact of the failure. (*Id.* at pp. 824-825.)

#### ANALYSIS OF ISSUE 3(A) - ACADEMIC INSTRUCTION AND SUPPORTS IN READING COMPREHENSION, WRITTEN EXPRESSION AND MATHEMATICAL CONCEPTS

38. Here, the evidence established that the October 4, 2010 and September 22, 2011 IEPs offered appropriate specialized academic instruction and supports in reading comprehension and written expression. District was instructing Student using the Read 180 program, a peer-reviewed computer program designed to improve reading comprehension with a teaching component managed by a teacher that had proven successful in improving below grade level students’ reading skills. Ms. Pargin

credibly testified that Read 180 was appropriate for Student. The evidence established that contrary to Dr. Patterson's opinion that Read 180 was not appropriate for Student because of his low reading levels, by the end of the 2010-2011 school year and in the 2011-2012 school year Student was reading at a sixth grade level. Ms. Peargin noted that his low Lexile scores were not reflected in the progress he demonstrated in the classroom.

39. Ms. Peargin used scaffolding and sentence starters to provide structure when instructing Student in written expression. Classroom instruction included use of current events and sentence starters to help Student complete a sentence. Student worked on expository writing as well. The scaffolding and sentence starters were gradually removed by the 2011-2012 school year as Student showed less reluctance to write. He became more willing to rewrite and edit his writing with less assistance. The volume of his writing increased and he became less reluctant to type on the computer. As of the September 2011 IEP, he was able to maintain conversation on topic and had shown improvement in all areas. Most notably, Student's writing had improved to the point that he could write an unsupported simple paragraph with a topic sentence, detail sentences, and concluding sentence.

40. As to mathematical concepts, in the 2010-2011 school year, due to Mother's insistence that Student graduate with a diploma, Student was placed in an Algebra Foundations class for teaching skills needed to pass algebra. The class had no credit and was geared to students with difficulties in mathematics. However, Student struggled because of his inability to master abstract mathematical concepts. Once Student's program was changed to a Certificate of Completion program, the emphasis shifted from abstract mathematics to modified curriculum functional math. As set forth in Factual Findings 54 above, the curriculum included a more modified functional mathematics. Class instruction focused on budgeting and government with the use of

mock economies to simulate purchase and change making activities. Student was an eager participant in his class whose behavior in class was without incident and who was active in and outside of the class. Student received a modified grade of A-. The evidence established that the academic instruction provided to Student was appropriate as it met his educational needs and provided a FAPE.

41. Finally, based upon what the IEP team knew at the time of the October 4, 2010 and September 22, 2011 IEPs, it was objectively reasonable for District to believe that continued intervention with specialized academic instruction in reading and modified curriculum in math and would be appropriate and provide Student a FAPE.

42. The evidence establishes that based upon what District knew of Student at the time of the October 4, 2010 and September 22, 2011 IEPs, District provided Student appropriate interventions in the form of the Read 180 program to the extent practicable to meet Student's unique educational needs in Reading and further offered Student a FAPE in the area of written expression.

43. The evidence also shows that although the academic instruction provided to Student in the October 4, 2010 IEP ultimately did not meet Student's educational needs in math, it was reasonable for District to allow Student to attempt algebra, given his stated desire to attend a four year college. District reasonably adjusted the mathematics curriculum in conformance with Dr. Patterson's opinion when Mother consented to a more functional mathematics curriculum. Student has failed to prove by the preponderance of the evidence that District's offers regarding mathematics instruction did not provide him a FAPE. (Factual Findings 1 to 17, and 35-41; Legal Conclusions 32 to 43.)

#### ISSUES 3(B), 3(C) AND ISSUE 4: APPROPRIATE MENTAL HEALTH SERVICES

44. Student raises three related claims regarding mental health services that will be considered together. In Issue 3 (B) Student contends that he was denied a FAPE

when District failed to provide Student an appropriately trained mental health therapist and failed to provide mental health services during the period from August 2010 to January 1, 2011 in the absence of services previously provided by CMH. In Issue 3 (C) Student contends that District failed to provide transportation or reimbursement for mileage expenses incurred for travel to therapy sessions by CMH. In Issue 4 Student contends that CMH failed to provide appropriate mental health services by trained staff during the period from June 1, 2010 to June 2011. District contends that Student was provided a FAPE because mental health services were provided as set forth in the IEP. District further contends that transportation was not a related service required to provide Student a FAPE.

#### Applicable Law

45. Legal Conclusions 2 to 11, are incorporated by reference.
46. Prior to July 1, 2011, mental health services related to a pupil's education were statutorily provided by a local county mental health agency that was jointly responsible with the school district pursuant to Chapter 26.5 of the Government Code. (Gov. Code §7570, et seq., often referred to by its Assembly Bill name, Chapter 26.5.) A pupil who was determined to be an individual with exceptional needs and was suspected of needing mental health services to benefit from his or her education, could, after the pupil's parent had consented, be referred to a community mental health service agency, such as CMHS, in accordance with Government Code section 7576. The pupil had to meet the criteria for referral specified in California Code of Regulations, title 2, section 60040; and the school district, in accordance with specific requirements, had to prepare a referral package and provide it to the community mental health service agency. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 14, § 60040, subd. (a); Gov. Code § 7576 et seq.)

47. On October 8, 2010, former Governor Schwarzenegger vetoed funding for mental health services provided by county mental health agencies. In *California School Boards Association v. Brown* (2011) 192 Cal.App.4th 1507 (*CSA v. Brown*), the court found, following a review of California law on funding of IDEA-required mental health related services, that as of October 8, 2010, the former Governor had the authority to make changes by line item veto, which led to changes in California's delivery of IDEA mental health services. In particular, the court found that the veto suspended the mandate of county mental health agencies to provide mental health services that were required to provide individual students with a FAPE. (*CSA v. Brown, supra*, 192 Cal.App.4th, at p. 1519)

48. Subsequently, on June 30, 2011, the Governor signed into law a budget bill (SB 87) and a trailer bill affecting educational funding (AB 114). Together they made substantial amendments to Chapter 26.5 of the Government Code which is no longer called AB 3632. In particular, the Sections repealed were suspended effective July 1, 2011, and were repealed by operation of law on January 1, 2012, unless amended. The following sections of Chapter 26.5 of the Government Code were repealed: §§ 7572 (c), 7572.5, 7572.55, 7576, 7576.2, 7576.3, 7576.5, 7586.5, 7586.6, 7586.7, and 7588. Of those sections, Government Code section 7576 designated the State Department of Mental Health or a community mental health service as the agency responsible for the provision of mental health services if required in a pupil's IEP, and imposed an obligation on county mental health agencies to receive referrals for AB 3632 assessments, assess, report, add a member to an IEP team, assume case management responsibilities, or make residential placements. The regulations implementing the repealed sections were also rendered ineffective as of July 1, 2011. (See Cal. Reg. Notice Register 2013, No. 1-Z, p. 47 [Repealing Cal. Code of Regs., tit. 2, §§ 60020, 60030, 60040, 60045, 60050, 60055, 60100, 60110, and 60200, as "changes without regulatory effect."].)

49. Thus, the obligation of the State Department of Mental Health, and its county designees, including CMH, to assess and provide related mental health services to special education pupils has been terminated, and the statutory responsibilities have been transferred to the LEAs instead. (See Gov. Code § 7573.) Henceforth, as of July 1, 2011, LEA's have the full responsibility to provide mental health care services that are required to provide a FAPE in a child's IEP.

50. Mental health services is defined as mental health assessments and the following services when delineated on an IEP in accordance with Section 7572(d) of the Government Code: psychotherapy as defined in Section 2903 of the Business and Professions Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management.

51. Psychotherapy within the meaning of the Business and Professions Code means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness, or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive. (See Bus. & Prof. Code, § 2903.)

52. Qualified mental health professional included the following licensed practitioners of the healing arts: a psychiatrist; psychologist; clinical social worker; marriage, family and child counselor; registered nurse, mental health rehabilitation specialist, and others who have been waived under Section 5751.2 of the Welfare and Institutions Code, such individuals may provide mental health services, consistent with their scope of practice. (see former Cal. Code Regs, tit. 2, § 60020, subd. (j).)

#### Analysis of Issue 3(B)

53. Student's claim in Issue 3(B), that he was denied a FAPE by District because his mental health services were not provided by staff who were appropriately trained in

autism, and that District failed to replace the services that were not provided by CMH staff from August 30, 2010 through the end of December 2011, fails for two reasons. First, the mental health services were provided by appropriately trained staff, given that they were limited to counseling and psychotherapy-type services. Further, although there was a four month gap in services, Student did not demonstrate that the District failed to materially implement the services.

54. The credible testimony by Mr. Ford established that he was a qualified to provide therapeutic mental health services to Student in accordance with the goals established in the October 4, 2010 and September 11, 2011 IEPs. Specifically, at all times, despite the repeal of the mental health component of AB 2632, CMH would only have a legal duty to provide "mental health services" such as counseling or psychotherapy needed to provide a FAPE under the IEP. At no time was CMH legally required to provide ABA services addressed to an autistic student's behavior and at all times, the responsibility for such services was District's. Because Mr. Ford was qualified to provide therapeutic mental health services to Student as described in Student's IEP, and had received some training in working with children with autism, he was qualified to provide the counseling and therapy services to Student provided for in his IEP. Mr. Ford was qualified to do so, prior to the repeal of CMH's mandate to provide such services, and after the repeal of the mandate when CMH provided the services not by law, but by interagency agreement with District.

55. As set forth in Factual Findings 62 to 64, during the period from May 17, 2010 to June 20, 2012, Student received appropriate therapeutic services that met his unique educational needs, from which he derived educational benefit and provided him a FAPE.

56. The evidence also established that it was reasonable for District to wait until Mr. Ford's return after December of 2010 to resume mental health counseling

services. District was ready to provide Student with a choice of mental health services providers in Mr. Ford's absence, yet this option was rejected by Mother, who elected to wait for Mr. Ford's return for the resumption of individual counseling provided in the IEP. Thus, Student cannot show a material deviation from his IEP where Parent was unwilling to agree to a different provider, and the services were made up by Mr. Ford, who ultimately provided services in excess of those called for by the IEP.

57. Further, Mr. Ford participated in the September 22, 2011 IEP. CMH offered a proposed mental health goal and assisted in drafting social emotional behavioral goal for that purpose. He was the one responsible for working with Student to meet the goal and had the expertise to do so. In counseling sessions, he talked about learning how to cognitively reframe things, and engaged in traditional talk therapy. The sessions addressed Student's anxiety by working to find calming strategies, and improve self-concept and self-esteem. By the end of the 2011-2012 school year Student was happier, had become social, and was not as resistant to non-preferred activities, demonstrating that ultimately Student benefitted from the services.

58. In sum, Student failed to prove that District denied him a FAPE by not providing mental health services by trained staff and by materially failing to implement the IEP by not providing services between August 30, 2010 and the end of December 2010 (Issue 3(B)). (Factual Findings 1 to 64; Legal Conclusions 2 to 11 and 46 to 57.)

#### Analysis of Issue 3 (C)

59 In Issue 3(C), Student contends that District failed to provide transportation or reimbursement for mileage expenses incurred for travel to therapy sessions by CMH.

60. Legal Conclusions 2 to 11, are incorporated by reference.

61. As a related service, "transportation" means (1) travel to and from school and between schools, (2) travel in and around school buildings, and (3) specialized

equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16)(i)-(iii)(2006).)

62. Generally, the IEP team makes the decision about whether a disabled child requires transportation as a related service. (Ed. Code, § 56342, subd. (a); 71 Fed.Reg. 46576 (Aug. 14, 2006).) The decision is based upon the unique needs of the disabled child. (*McNair v. Oak Hills Local School Dist.* (8th Cir. 1989) 872 F.2d 153, 156.)

63. The evidence establishes that the IEP offer in the October 2010 and September 2011 IEPs did not offer transportation to CMH as a related service. Here, no discussion took place during the IEP team meetings concerning transportation and Mother did not request it during the development of the IEPs. The evidence established that Student was not in need of District provided transportation to CMH. Mother testified she transported Student to CMH for his services. She participated in the IEP meeting where the mental health services goals were developed. Mr. Ford credibly testified that Mother never expressed a concern over the location of services at CMH's offices or the provision of transportation for services. At hearing, Mother did not present evidence of what amount should have been reimbursed for transportation.

64. Although students are entitled to a "free" appropriate public education under the IDEA, here, Parent did not demonstrate that Student was denied a FAPE on this ground. Parent did not demonstrate that Student required the transportation to access the services and did not put on evidence of what, if anything, District should have reimbursed parent for transportation. Accordingly, Mother is not entitled to reimbursement for mileage expenses she may have incurred. (Factual Findings 1 to 68; and Legal Conclusions 2 to 11 and 61 to 63.)

#### Analysis of Issue 4

65. Student's Issue 4 is a similar claim to Issue 3(B); however, it is limited to CMH, not District. Specifically, Student claims that he was denied a FAPE by CMH

because it did not provide appropriate services by trained staff. CMH's motion to dismiss issues will also be considered with this analysis. As discussed below, Student's claim fails for the same reasons as Issue 3(B).

66 CMH raises two arguments in its motion to dismiss. First CMH asserts it should be dismissed because its obligation to provide mental health services was suspended by operation of law on July 1, 2010 (the beginning of the fiscal year during which the mandate to provide mental health services was suspended by the Governor's veto) or October 8, 2010 (the date the Governor's veto effectively suspended the mandate for county mental health departments to provide IDEA services). Second, CMH asserts that Student joined CMH in the complaint on September 28, 2012, such that at most, Student's claim against CMH begins September 28, 2010, and ends by operation of the Governor's veto on October 8, 2010. CMH further argues even if the claim is not barred either in whole or in part by the statute of limitations, CMH was no longer accepting responsibility for mental health services in accordance with its contract with the SELPA signed on December 21, 2010, which obligates CMH to District to provide services under the contract and for which District is responsible.

67. CMH's motion to dismiss is moot, as Student has failed to demonstrate any substantive or procedural denial of a FAPE on the merits that can be attributable to CMH. Regardless of the timing of suspension of the legal mandate for CMH to provide mental health services, or CMH's subsequent provision of those services under interagency agreement with District, the evidence showed that at all times, District, through CMH, provided appropriate mental health counseling services by trained staff, such that Student received a FAPE. Specifically, even when CMH was the mandated provider of mental health services, its role was limited to the counseling services provided by Mr. Ford, whom the evidence showed was qualified based on his LCSW license and prior training regarding working with students with autism. At no time

would CMH have been responsible for other possible types of autism services like behavior modification training.

68. As discussed in relation to Issue 3(B), Student failed to prove that District denied him a FAPE by not providing mental health services by trained staff and by materially failing to implement the IEP by not providing services between August 30, 2010 and the end of December 2010. Thus, as to Issue 4, Student failed to prove that CMH denied him a FAPE by not providing appropriate mental health services by trained staff during the statute of limitations period. (Factual Findings 62 to 64; and Legal Conclusions 2 to 11 and 46 to 58.)

#### ISSUE 5- MEANINGFUL PARTICIPATION IN THE 2011-2012 IEP RE: MENTAL HEALTH SERVICES

69. Student contends District changed the location for delivery of mental health services to Student from school-based, to clinic based, without convening an IEP and by doing so deprived Mother of meaningful participation in the IEP process. District contends the IEP provided for clinic based mental health services only and Student was not denied a FAPE.

#### Applicable Law

70. As stated above in Legal Conclusions 11 above, incorporated by reference, to prove the denial of a FAPE based on a procedural violation, Student must demonstrate that the violation impeded the right of the child to a FAPE, significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child of the parents, or caused a deprivation of educational benefits. Legal Conclusions 2 to 10, above, are also incorporated by reference.

71. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, § 56304.) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.) Violations that impede parental participatory rights "undermine the very essence of the IDEA." (*Id.* at p. 892.)

72. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrmann, supra*, 993 F.2d at p. 1036.) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the child's IEP. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133.)

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

#### Analysis of Issue 5

74. The evidence establishes that Mother and Ms. Zachry fully participated in each IEP team meeting for Student. Specifically, Mother participated in the October 4, 2010, September 22, 2011, and all addendum IEP meetings and was involved in the discussions with Mr. Ford about Student's mental health services in which Mr. Ford discussed the goal and delivery of services at the offices of CMH. The evidence also

shows that Mr. Ford only held the first four of Student's clinic-based services at PRHS to accommodate Student so as not to disrupt his classroom activities and develop a rapport with Student. Mr. Ford resumed Student's services at his offices at CMH. The evidence also established that the IEP offer of services was always designated in Student's operative IEP's as the service provider location, meaning off campus in a clinic setting, and Mother herself testified accordingly.

75. Accordingly, there is no evidence supporting Student's contention that the decision to provide mental health services off-campus was made outside the IEP team meeting process without Mother's full participation. Furthermore, there is no evidence that scheduling Student's mental health services at CMH impeded the right of Student to receive a FAPE, or caused a deprivation of educational benefits.

76. Student has failed to meet his burden of proof by a preponderance of the evidence that District denied him a FAPE in both the October 4, 2010 and September 22, 2011 IEPs by changing the location of mental health services from school to a clinic without parental IEP team participation. (Factual Findings 1 to 68; and Legal Conclusions 2 to 11 and 70 to 75.)

## 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, District prevailed on all issues heard and decided.

## 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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: February 19, 2013

\_\_\_\_\_/s/\_\_\_\_\_  
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STELLA L. OWENS-MURRELL

Administrative Law Judge

Office of Administrative Hearings