

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

DESERT SANDS UNIFIED SCHOOL DISTRICT,

v.

STUDENT,

OAH Case No. 2014051076

DESERT SANDS UNIFIED SCHOOL DISTRICT,

v.

STUDENT.

OAH Case No. 2014031057

DECISION

Desert Sands Unified School District filed separate due process hearing requests with the Office of Administrative Hearings on March 27, 2014, and May 16, 2014, naming Parent on behalf of Student. OAH consolidated these matters on June 6, 2014. On August 26, 2014, OAH granted Desert Sands' motion to amend the consolidated matter to solely name Student.

Administrative Law Judge Paul H. Kamoroff heard the hearing for the consolidated matter in La Quinta, California, on September 23, 24, 25, 29 and 30, and October 7, 2014.

Student's mother appeared on behalf of Student. Student attended each day of the hearing. OAH provided Student a reading assistant during each day of hearing.

Jack B. Clarke, Jr., and Dina Harris, Attorneys at Law, appeared on behalf of Desert Sands. William Himelright, Director of Special Education for Desert Sands, attended each day of the hearing.

The record closed on October 29, 2014, upon receipt of written closing briefs from the parties.¹

ISSUES²

1. Whether Desert Sands' individualized education program offer of December 3, 2013, as amended on April 9, 2014, offered Student a free appropriate public education?

2. Whether Desert Sands addendum IEP offer of April 22, 2014, offered Student a FAPE?

3. Whether Deserts Sands is entitled to conduct assessments pursuant to a February 24, 2014 assessment plan, without Student's consent?

¹ At hearing, the parties requested and were granted a continuance to file written closing arguments by October 27, 2014. Desert Sands timely submitted its closing brief. On October 28, 2014, Student requested a short extension to submit his closing brief, which was granted.

Desert Sands' request to supplement evidence to include Lydia Hanley's curriculum vita was granted. Ms. Hanley's curriculum vita has been received as Desert Sands' Exhibit 61.

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

SUMMARY OF DECISION

This case presents a situation where a special education student had not consented to an IEP or to a comprehensive reassessment since 2007. Consequently, Desert Sands seeks to implement IEP's and an assessment plan without Student's consent. Desert Sands asserts that its IEP's offered Student a FAPE and points out that it had the obligation and authority to timely assess Student.

Student avers that the IEP's failed to meet his unique educational needs and that he had the right to unilaterally choose his school placement. Regarding the assessments, Student refused to permit Desert Sands to assess him unless he was allowed to audio record the testing.

For the following reasons, the Decision finds that Desert Sands' IEP of December 3, 2013, as amended on April 9, 2014, failed to offer Student a FAPE because it failed to offer adapted physical education and occupational therapy services. Based upon changed circumstances, Desert Sands revised its IEP offer on April 22, 2014, to offer home-hospital instruction, which constituted a FAPE. The Decision also finds that Desert Sands is entitled to conduct assessments of Student without his consent and without Student audio recording the testing, if Student wishes to receive special education and related services.

FACTUAL FINDINGS

THE STUDENT

1. Student was an 18-year-old male who at all relevant times resided with his mother within the boundaries of Desert Sands. Student has been and continues to be eligible for special education under the eligibility category orthopedic impairment, due to spastic diplegia cerebral palsy. At the time of the hearing, Student was enrolled at

Shadow Hills High School, a Desert Sands school, but had not attended school since March 2014.

2. Student's speed of motor movement, balance and coordination were severely impacted by the effects of his cerebral palsy. Student's disability affected his lower-body muscles and extremities, and to a lesser extent, his upper body. Although it was normal for Student to ambulate without assistance, he occasionally fell and therefore required an individual aide to assist him with traversing his school placement. He required aide assistance with carrying his school supplies and supervision when walking, running, and navigating stairs or uneven surfaces. Student had difficulty manipulating objects with his hands, and was unable to hand-write more than one sentence because his hands tired easily. Student also experienced difficulty with vision and fatigue as a result of his disability.

3. Student's disability, including his dependence on others, frustrated him and impacted his emotional well-being. As a result, Student manifested symptoms of school avoidance, anxiety, depression, and suicidal ideation.

4. Student's disability did not affect his cognitive functioning. Student had average cognitive abilities, and average to advanced skills in verbal communication, knowledge, and comprehension tasks. Consequently, Student had the ability to do well academically and he easily passed state-wide achievement testing. Student had been appropriately placed in general education classrooms throughout his educational career. However, due to fatigue and anxiety, Student frequently missed school which impacted his grades and credit accumulation. As a result of Student's poor attendance, which included 142 absences during the 2013-2014 school year, Student failed every class that school year. At the time of the hearing, although he was a fifth year senior, Student had attained only 50 of 220 credits necessary to receive a regular high school diploma. As a consequence of his severe credit deficiency, Desert Sands sought to place Student in a

general education continuation high school, Amistad High School, where he could more quickly recover credits. Student opposed this change of placement.

5. Since July 2014, Student has held his own educational rights. Neither Mother nor Student had consented to an annual IEP offer since March 23, 2007. Therefore, Desert Sands had solely implemented the March 2007 IEP since that time.

6. Deserts Sands has never completed a comprehensive assessment of Student. Student's last multi-disciplinary assessment occurred in March 2007, and was completed by the Coachella Valley Unified School District. This report, like assessments before it, found Student eligible for special education as a pupil with an orthopedic impairment. Student was 10 years-old and in the fifth grade when this assessment was completed.

CONDUCT LEADING UP TO THE DECEMBER 3, 2013 IEP

7. On February 24, 2011, Desert Sands filed a due process complaint with OAH seeking an order granting it the ability to comprehensively assess Student without parental consent. This matter was assigned OAH Case No. 2011030605.

8. On April 14, 2012, Desert Sands and Mother entered into an agreement to resolve the 2011 complaint. Per the agreement, Mother agreed to permit Desert Sands' to comprehensively assess Student.

The November 13, 2012 IEP

9. Desert Sands held an IEP meeting on November 13, 2012, to review the agreed upon assessments. However, Desert Sands had been unable to complete testing in the areas of academics, social/adaptive/behavioral/emotional, processing, perceptual motor development, cognitive development, or assistive technology. Mother had demanded to audio record the testing, and the various assessors had refused this demand. As a result, Desert Sands could not complete these assessments.

10. Desert Sands did complete assessments for Student in occupational therapy, adapted physical therapy, related service independent assistance, vision, orthopedics, health and development, and an environmental assessment. These reports were reviewed by the IEP team.

THE OCCUPATIONAL THERAPY ASSESSMENT

11. Lydia Hanley conducted an occupational therapy assessment of Student on November 7, 2012. Ms. Hanley was an occupational therapist for the Palm Springs Unified School District, and it was normal for Desert Sands to utilize Palm Springs occupational therapists to conduct its school based assessments.

12. Ms. Hanley utilized standardized testing to assess Student in the area of fine motor skills. Student was below average, at the third percentile, in the areas of fine motor precision and fine motor integration. Student was identified with serious delays, with scores at the first percentile, in the areas of manual dexterity and upper limb coordination. Student had fine motor impairments that impacted his ability to write and to complete assignments. Student also had strabismus, a muscular disorder, which caused one eye to veer outward (exotropia), impacting his vision. Student had to bring his head extremely close to the table during all fine motor tasks and to read. Notwithstanding her testing, Ms. Hanley did not recommend occupational therapy for Student. The IEP team adopted her recommendation.

13. At hearing, Ms. Hanley characterized Student's areas of occupational therapy deficit as mild. For this reason, she did not recommend intervention. However, when pointed out that her testing found that Student had serious delays, she reported that Student's motor abilities were too delayed to benefit from occupational therapy. Given his cerebral palsy and age, Ms. Hanley did not believe that Student could benefit from occupational therapy. In fact, she testified that she would never recommend occupational therapy for a 16-year-old with cerebral palsy. Rather than attempting to

ameliorate Student's fine motor difficulties, she believed that Student's deficits could be accommodated through assistive technology and an individual aide, each of which had been provided to Student.

14. Ms. Hanley's testimony was problematic for several reasons. First, she had a limited familiarity with Student. She had met him once, during her assessment that lasted less than an hour, and had never observed Student in the classroom. She had not observed whether assistive technology and his aide had been effective in addressing Student's deficits. She was unfamiliar with Student's educational history and had not reviewed his prior assessments; she did not know whether he had been previously assessed in the area of occupational therapy or if he had ever received occupational therapy services. She therefore was unable to comment regarding what effect direct services may have had on improving Student's fine motor skills, and therefore his ability to write independently. Additionally, her testimony regarding her testing was inconsistent. She initially described Student's deficits as "mild," and stated he wrote well without assistance. Yet, she later described Student as seriously delayed, and unable to hold a pencil for more than one sentence. She recommended that Student should rely upon his aide to hand-write for him. Finally, Ms. Hanley's statement that she would never recommend occupational therapy services for a 16 year old with cerebral palsy meant that she had predetermined her therapy recommendation. It did not matter what her testing results yielded as she would not recommend occupational therapy for Student. For these reasons, Ms. Hanley's testimony that Student did not require occupational therapy was not persuasive.

THE ENVIRONMENTAL ASSESSMENT

15. Ana Miranda was a licensed physical therapist who, along with the school's inclusion specialist Stan Purden, conducted an environmental assessment for Student in October and November 2012. The purpose of the assessment was to determine whether

Student could physically access Shadow Hills. The environmental assessment primarily focused on whether Shadow Hills was American with Disabilities Act compliant and did not include formal testing. The assessment spanned six hours over several days and included one and a half hours of direct observation of Student at school.

16. Student could ambulate throughout the Shadow Hills campus with the assistance of his individual aide. Although infrequent, Student fell on occasion and had to be caught, or lifted up, by his aide. The individual aide had to be present at all times, including during class, between classes, and lunch. The aide needed to be with Student for safety reasons. Each teacher had incorporated substantial accommodations in the classroom, where Student was provided a large path to his desk, preferential seating, and a chair with wheels. Given these accommodations and his aide, Student could navigate Shadow Hills.

17. Ms. Miranda has provided physical therapy to hundreds of students with cerebral palsy. She identified Student as falling on the higher end of physical functioning, given his ability to ambulate without needing a wheel-chair. As a physical therapist, Ms. Miranda was concerned that Student's gross motor skills should be developed, not just accommodated or assisted, to improve his independent living skills. Given Student's skills and needs, Student was a good candidate for therapy which targeted his gross motor delays. Ms. Miranda believed that these skills could be improved, thereby increasing Student's independence, through adapted physical education services.

THE RELATED SERVICES INDEPENDENT ASSISTANCE ASSESSMENT

18. Aaron Wiltrout was a resource specialist program teacher and Student's case carrier, and responsible for Student's related services independent assistance assessment. This assessment was designed to determine whether Student required an individual aide. For similar reasons found in the environmental assessment, the related

services assessment found that Student required an aide for safety during the entire school day. The IEP team adopted the assessment's recommendation and the IEP offered Student a full-time individual aide. However, in regard to this assessment, the IEP reported that "Creating more independence is being highly recommended by [IEP] team."

THE ADAPTED PHYSICAL EDUCATION EVALUATION

19. Victor Jimenez conducted an adapted physical education assessment of Student. Mr. Jimenez assessed Student over six days during September, October, and November 2012. Mr. Jimenez had six years' experience in assessing and providing services to students in the area of adaptive physical education. Since September 2009, he had provided Student adapted physical education services twice weekly, 30 minutes per session. Mr. Jimenez's assessment included observations in class and during therapy, and standardized testing.

20. Student was delayed in the areas of upper limb coordination and bilateral coordination, and seriously delayed in the areas of balance, running and agility. Student was delayed in his ability to stand and balance, and seriously delayed in his ability to kick, run, and skip. Student had serious delays in the area of locomotor skills. Mr. Jimenez recommended that Student continue to receive the same duration and frequency of adaptive physical education services. The IEP team adopted his recommendation.

21. The November 2012 IEP team also reviewed Student's progress towards his prior adaptive physical education goal. The goal was for Student to increase his ability to utilize his hands and included Student catching a thrown tennis ball. Student had made significant progress on this goal. Mr. Jimenez recommended a new adaptive physical education goal in the area of locomotor skills, which was for Student to demonstrate an ability to travel, combining a variety of patterns, such as lateral

movement, changing speed and directions in response to visual or verbal cues, in five of six trials. The IEP team adopted Mr. Jimenez's recommendation for the locomotor goal.

22. Mother did not participate in or consent to the November 13, 2012 IEP. As a result, the locomotor goal was not implemented. However, Student continued to receive adaptive physical education twice weekly, per his last agreed upon IEP.

23. As a result of Mother's non-attendance at the November 2012 IEP meeting, Desert Sands made several attempts by mail and telephone to reconvene an IEP meeting with her attendance. Mother declined to participate in any IEP meeting during the remainder of the 2012-2013 school year.

24. On August 23 and September 18, 2013, Desert Sands sent Mother proposed assessment plans, which included areas of testing which the school had been unable to complete. Desert Sands pointed out that it was required to provide Student triennial reassessments. Mother refused to consent to the assessment plans.

25. On September 18, 2013, Desert Sands sent Mother an IEP meeting notice for a September 27, 2013 meeting. Desert Sands canceled the IEP meeting when Mother failed to attend.

26. In October 2013, Desert Sands retained Dr. Carol Bartz, a retired special education administrator, as an educational consultant, in an effort to work more cooperatively with Mother. Dr. Bartz's role was to help facilitate communication, assessments, and the development of Student's IEP. Dr. Bartz communicated with Mother by email and telephone several times during the month of October.

27. On October 11, 2013, Desert Sands sent Mother an IEP meeting notice for an October 25, 2013 meeting. Mother declined to attend this meeting and requested alternative dates after November 13, 2013. Desert Sands, through Dr. Bartz, offered to hold the IEP meeting on November 19, 21, or 22, 2013. Mother declined these dates,

and requested that the IEP meeting be held on December 3, 2013. Dr. Bartz agreed to that date and confirmed the IEP meeting in an IEP meeting notice.

28. On October 30, 2013, Mother sent an email to Dr. Bartz requesting that the IEP meeting be held from 1:30 p.m. to 3:30 p.m. Dr. Bartz agreed to this request. On November 22, 2013, Dr. Bartz again confirmed with Mother via a telephone conversation that she would attend the IEP meeting.

29. Mother failed to attend the December 3 IEP meeting, and the meeting went ahead as scheduled, without Student's mother.

THE DECEMBER 3, 2013 IEP

30. Desert Sands convened Student's triennial IEP meeting on December 3, 2013. Student was 17 years-old and in the 12th grade at Shadow Hills. The following people attended the IEP meeting: Dr. Bartz; Denise Magee, Desert Sands' Director of Special Education; the high school principal and vice principal; Mr. Purden, inclusion specialist; Mr. Wiltrout; the school nurse; Kevin Campbell, Student's English teacher; Mr. Jimenez; Clifford Smith, the school's academic counselor; and, Hector Barraza, who served as Student's individual aide. Neither Student nor Mother attended the IEP meeting.

31. Desert Sands continued to find Student eligible for special education and related services under the primary category of orthopedic impairment. Student's disability interfered with his ability to access the general education curriculum without specialized supports.

32. The IEP team appropriately reviewed Student's present levels of educational and functional performance in the areas of academics, motor skills, social, emotional and health. The team next reviewed progress pertaining to his previous IEP goals, which stemmed from the October 2007 IEP. Student had met four goals and partially met one prior goal. The IEP team developed two new measurable goals. The

first goal addressed work completion and was for Student to collaborate with his teachers to turn in 90 percent of all assignments within seven days following the due date for each assignment. The second goal was in the area of college and career development, and was for Student to research and report to his English teacher or his resource specialist program case carrier at least three different colleges and careers that matched his interests as recorded on his individual transition.

33. The IEP also included an individual transition plan because Student was over 16. The plan was based upon a Student interview conducted on October 23, 2013. Student's plan for his future was to attain a career in the music industry. The individual transition plan included two goals, the first goal was designed to assist Student attend college, the second goal designed to assist him in reaching his career goal.

34. The IEP reflected that Student had obtained passing scores on the California High School Exit Exam in every area assessed, which included math and English. Student passed these exams while in the 10th grade, on his first try and without modification to the material. However, due to Student's poor attendance, he failed to pass any classes during the first semester of the 2013-2014 school year, or to attain any credits for that school year. The basis of this failure was Student's poor school attendance. For the first semester of the 2013-2013 school year, Student had been absent 46 times.

35. The IEP included various accommodations including: (1) Student would be allowed to dictate answers to his individual aide; (2) reduced work; (3) enlarged graph paper upon Student's request; (4) extra time for assignments; (5) lap-top computer with headphones and voice recognition software; (6) audio text-books; (7) preferential seating; and (8) an alternative test site, upon Student's request, to permit him to

converse with his individual aide during testing. Student's individual aide would also be permitted to hand-write for Student.³

36. The December 2013 IEP offered Student the following special education services: (1) resource specialist program consultation, at 40 minutes per week; (2) individual aide support for the entire school day; and (3) curbside transportation. Although Ms. Hanley did not attend the IEP meeting, Desert Sands adopted her recommendation from the November 2012 IEP to not offer Student occupational therapy. The IEP did not include an offer for adaptive physical education services.

37. The parties do not dispute that Student required adaptive physical education to receive a FAPE as of the November 2012 IEP. The dispute regarding adaptive physical education stems from the December 2013 IEP team's decision to discontinue this service.

38. Mr. Jimenez testified that adaptive physical education had been effective in increasing Student's gross motor abilities. He also believed that, as of the December 3, 2013 IEP meeting, the locomotor goal was still an appropriate goal for Student. Overall, Student had benefited from prior adaptive physical education services and he would continue to benefit from these services. However, during the December 2013 meeting, Desert Sands' staff focused primarily upon Student's need to recover school credits. Student was in his senior year of high school and seriously credit deficient. To help address this particular concern, Desert Sands' staff, including Mr. Jimenez, agreed to terminate all non-academic components of Student's school day, which included terminating the adaptive physical education services. Mother did not agree to this change and therefore Desert Sands continued providing this service.

³ Student's individual aide was also intermittently referred to as a one-to-one paraprofessional or "scribe" in the IEP.

39. Mr. Jimenez presented credible testimony pertaining to his report and first hand observations. Student presented with severe gross motor delays and adaptive physical education had helped ameliorate, to some extent, those delays. However, Student's credit deficiency stemmed from his poor school attendance. Desert Sands' witnesses, including Ms. Bartz, Mr. Wiltrout, Mr. Campbell, Mr. Smith, and Mr. Himelright, unanimously testified that the primary reason for Student's credit deficiency and difficulty passing classes was his poor school attendance. There was no evidence provided that showed a causal link between Student receiving adaptive physical education services and his lack of credits. Consequently, Mr. Jimenez's recommendation to terminate Student's adaptive physical education was not well reasoned or as persuasive as Ms. Miranda's testimony that the IEP should include adaptive physical education to assist Student in remediating his deficits, rather than just accommodate his disability.

40. The December IEP offered Student a referral to Desert Sands' mental health services. Desert Sands had first made a mental health referral at an IEP meeting held on February 27, 2013, which Mother had refused. Mother wanted Student's emotional and mental health needs to be addressed solely by his private therapists. Mother also refused to release information from Student's private therapists, and refused Desert Sands' requests to assess Student in the areas of social, emotional or mental health.

41. Finally, the IEP team discussed Student's educational placement. Student's counselor Mr. Smith reported that a typical high school senior with only 50 credits would be transferred to a continuation high school.⁴ Dr. Bartz, Mr. Purden, and Mr. Wiltrout agreed that Student required a placement that was designed to assist him in

⁴ Mr. Smith was an academic, not psychological, counselor.

recovering lost credits. The Desert Sands' IEP team discussed placing Student at Amistad, which was a newly redesigned and ADA compliant district continuation school. The curriculum at Amistad was designed for quicker credit accumulation than could occur at a comprehensive high school like Shadow Hills. The team also considered that the general education class sizes at Amistad were smaller, and permitted greater access to small group and individualized teaching. The school day at Amistad was shorter, the campus smaller and easier to navigate than Shadow Hills, and the school week just four days. The District team members weighed these considerations in determining that Amistad was better suited to Student's needs given the effects of his disability, such as fatigue, his age, and need to recoup school credits. Given these factors, Amistad was an appropriate placement for Student at that time. Accordingly, the IEP offer included transferring Student from Shadow Hills to Amistad.

42. Desert Sands mailed Mother a copy of the IEP immediately following the meeting. As of the hearing, neither Mother nor Student had consented to the December 3, 2013 IEP offer.

CONDUCT FOLLOWING THE DECEMBER 2013 IEP

43. On February 5, 2014, Mother provided Desert Sands letters from Student's independent therapists Dr. W.R. Walayat, psychiatrist, and Dr. Daniel L. Watson, psychologist. Dr. Walayat's letter was dated April 30, 2013, and Dr. Watson's letter was dated May 5, 2013. Dr. Walayat reported that Student had been diagnosed with major depression disorder and severe post-traumatic stress disorder. He found that Student was experiencing paranoia and suicidal ideation as a result of feeling frustrated with school. He recommended that, if Student's condition worsened, he should receive in-patient hospital care for observation and safety.

44. Dr. Watson found that Student was feeling overwhelmed and frustrated by school. Student felt overly dependent on school aides and assistive technology, which

he believed were inadequate to assist him at school. These feelings of over-dependence led Student to feel suicidal and paranoid of school staff. As a result of the school based anxiety, Student experienced frequent emotional break-downs.

45. Although Dr. Walayat's and Dr. Watson's letters were dated April and May 2013 respectively, Desert Sands had not had an opportunity to review these letters prior to February 2014.

46. As a result of Dr. Walayat's and Dr. Watson's letters, Desert Sands had a heightened concern regarding Student's social and emotional functioning. Desert Sands' staff were particularly concerned regarding these areas given Student's lack of school attendance, and because Desert Sands had been unable to complete social and emotional testing.

THE FEBRUARY 2014 ASSESSMENT PLAN

47. On February 24, 2014, Desert Sands sent Mother an assessment plan for a triennial reassessment, which proposed testing in the following areas: academics; social/adaptive/behavioral/emotional; processing; motor development; cognitive development; health; post-secondary transition; vocational; orientation/mobility; mental health; neuropsychological; assistive technology, and; vision. The assessment plan was accompanied by a prior written notice letter, which detailed that the foregoing assessments were required for Student's triennial reassessment. As of February 2014, Student had not received completed school assessments in the areas of academics, cognitive development, or social and emotional development since March 2007.

48. Throughout February and March 2014, Dr. Bartz made frequent attempts to meet with Mother to review the assessment plan and to discuss the importance of Desert Sands conducting updated evaluations for Student. Dr. Bartz offered Mother an IEP meeting, or informal meetings with Desert Sands' staff, on February 11, 24, 28, March 5, and March 12, 2014. Mother refused to attend any meeting with Desert Sands.

As of the hearing, neither Mother nor Student had consented to the February 2014 assessment plan.

49. On March 19, 2014, Desert Sands offered two additional dates to convene an IEP meeting, April 2 and April 9, 2014. Mother refused to meet on these dates as well. Notwithstanding Mother's refusal to attend an IEP meeting, Desert Sands convened an IEP meeting on April 9, 2014.

THE APRIL 9, 2014 IEP

50. Desert Sands convened an addendum IEP team meeting for Student on April 9, 2014. All necessary Desert Sands' staff attended the meeting. Mother and Student did not attend the meeting. The purpose of the IEP meeting was to review the letters and recommendations of Dr. Walayat and Dr. Watson. As a result of these letters, Desert Sands added an annual social/emotional goal to address school anxiety. To achieve this goal, Desert Sands added individual counseling service, twice weekly at 30 minutes per session, to the IEP offer. The team also added extended school year classes for Student at Amistad. No other changes were made to the last IEP offer of December 3, 2013. Mother did not consent to the April 9, 2014 IEP.

CONDUCT FOLLOWING THE APRIL 9 MEETING

51. On April 18, 2014, Mother provided Desert Sands another letter from Dr. Walayat, dated April 8, 2014. Dr. Walayat reported that Student suffered from school-based anxiety and stress and that his emotional state had grown worse. Dr. Walayat prescribed as medically necessary that Student receive home-hospital instruction through the end of the school year, June 11, 2014, and for Student to be evaluated then to determine future placement.

THE APRIL 22, 2014 IEP

52. On April 22, 2013, Desert Sands convened an addendum IEP team meeting. All necessary Desert Sands staff attended the IEP meeting, including the following: Dr. Bartz; Mr. Himmelright; Jacqui Olmos, program specialist; Michaelleen Prest, school nurse; Kris Kuchner, school psychologist; Mr. Campbell; Mr. Wilttrout; and Mr. Smith. Mother attended the IEP meeting. The purpose of the meeting was to consider Dr. Walayat's recommendation that Desert Sands provide Student home-hospital instruction.

53. The IEP team appropriately adopted Dr. Walayat's recommendation. Desert Sands offered Student five hours per week of HHI, from April 22, 2014, through the end of the school year. The IEP team would review the home instruction program within 45 days of implementation to determine whether it should be continued.

54. Placement in the home is one of the most restrictive placement options for a special education student. Special education provided in the home or hospital is limited to eligible students for whom the IEP team recommends such instruction. When recommending placement for home instruction, the IEP team shall have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the student from attending a less restrictive placement. The report shall include a projected calendar date for the student's return to school. The IEP team shall meet to reconsider the IEP prior to the projected calendar date for the student's return to school.

55. Student's emotional deficits, severe depression, and school anxiety prevented him from being able to be placed in a regular education class. Student was absent 142 days during the 2013-2014 school year, and failed every class as a result of

his absences. Student required academic instruction in a home or hospital to be able to access the curriculum.

56. The homebound program was therapeutically and educationally appropriate in view of Student's severe anxiety and school avoidance. Student's independent psychiatrist Dr. Walayat reported that a homebound program was required in light of Student's depression, suicidal ideation, anxiety and school avoidance. Similarly, Student's independent psychologist Dr. Watson found that Student suffered from suicidal ideation, anxiety and school avoidance. The homebound program was also supported by evidence that Student had failed to progress at Shadow Hills, a comprehensive campus, despite related services, accommodations, and his cognitive ability to succeed in the general education curriculum. Student's failure to progress was predicated almost solely upon his anxiety and depression, which manifested into school avoidance; and which was the primary cause for his failing grades and inability to earn sufficient credits to graduate from high school. For these reasons, Desert Sands appropriately offered Student home-hospital instruction.

57. Although the home instruction program was based upon Student's private therapist's recommendation, Mother and Student have refused to consent to the April 22 IEP. Consequently, Desert Sands could not provide Student home-hospital instruction, or to review whether it was appropriate to continue providing Student home-hospital instruction following the end of the school year.

PLACEMENT AT AMISTAD

58. Amistad was a general education continuation high school located in Indio and operated by Desert Sands. It had 439 students and 17 teachers with class sizes ranging from individual instruction to 15 students. Amistad utilized the APEX curriculum, which permitted students to study at their own pace. Unlike a comprehensive high school, credits at Amistad were not dependent on time of attendance in class, which

permitted pupils to earn credits more quickly and without semester based limitations. In great part, Amistad was designed to assist students who were severely credit deficit obtain missing credits, to obtain a regular high school diploma. The student population ranged from 16 to 22 years of age. It was normal for Desert Sands to recommend placing a 16 year-old or older pupil who was credit deficient to attend Amistad. Student would interact daily with regular education peers at both Shadow Hills and Amistad. However, it would be inappropriate for Student to continue attending Shadow Hills as an adult, as a fifth, sixth and seventh year senior, with pupils as young as 14 years old. Unlike Amistad, Shadow Hills was not designed to accommodate an adult student population.

59. As of the December 3, 2013 IEP, Student was a 17 year old senior who was severely credit deficient, having earned only 50 of the requisite 220 credits required to obtain a regular high school diploma. Although an IEP student, he was not on an alternative, or certificate of completion, track, due to his average cognitive abilities. As a result, absent intervention, Student would not graduate from high school with a diploma due to a lack of credits. As of December 2013, transferring Student to Amistad was the direct intervention which Student needed to graduate high school with a regular diploma. Each of the school witnesses appeared genuine in their concern for Student's needs, and their desire to see Student earn a regular high school diploma was a legitimate consideration.

60. School witnesses, including Dr. Bartz, Mr. Campbell, Mr. Wiltrout, Mr. Jimenez, Mr. Purden, and Mr. Smith, testified in support of immediately placing Student at Amistad, and foregoing placing Student in the home-hospital instruction program. Desert Sands pointed out that the home instruction program was offered through June 11, 2014, which had expired. However, Desert Sands failed to consider that Student had yet to receive the home bound program offered in the April 22, 2014 IEP. Also, Desert

Sands failed to understand that the IEP team is required to meet to reconsider the home-hospital instruction program prior to Student's return to school, which had not occurred as of the hearing. Without the convening of such an IEP team meeting, Desert Sands was recommending a placement at Amistad with no information regarding his emotional ability to attend.

PLACEMENT IN HOME-HOSPITAL

61. William Himelright was Desert Sands' Director of Special Education from August 2013, through the hearing. Mr. Himelright was a competent and experienced special education director, with over 30 years of experience as a school administrator. Mr. Himelright had observed Student at Shadow Hills and had carefully reviewed Student's educational records.

62. Mr. Himelright was concerned that Student had not been comprehensively assessed in the areas of cognition and processing. He also had significant reservations that Student had not been assessed by a school district chosen assessor in the areas of social and emotional development. As a result, it was difficult for Mr. Himelright to ascertain what an appropriate FAPE offer for Student should include. In light of Dr. Walayat's diagnoses of depression , anxiety, and suicidal ideation, and prescription that Student be assigned home-hospital instruction, Mr. Himelright believed that the responsible FAPE offer for Student would be home-hospital instruction until further assessments could be completed. At the time of the hearing, home-hospital instruction had not been implemented, and its effect on Student's emotional difficulty had not been reviewed. Consequently, Mr. Himelright's testimony that Student should be placed in home-hospital instruction, rather than at Amistad, pending further assessments and review of the assessments, was well reasoned and persuasive.

ASSESSMENT RECORDING

63. Amy Hertz had been a school psychologist for Desert Sands since 2006, and was the school psychologist at Shadow Hills since August 2012. She received her bachelor of science in psychology in 1994, and her masters' of science in counseling, school psychology, in 1999. She persuasively testified for Desert Sands in regard to testing procedures.

64. As a school psychologist, Ms. Hertz was concerned that audio recording an assessment would invalidate the results of the testing. Although testing protocols may be provided to parents, tape recording should not be allowed. Protocols did not include the complete test questions and allowing parents to audio record the assessment not only invalidates the test for future use with the pupil, but for all other students. For these reasons, Ms. Hertz, along with Dr. Jose Fuentes and Mr. Wiltrout, had denied Student's request to audio record past assessments, or the triennial reassessments proposed in the February 24, 2014 assessment plan.

STUDENT'S TESTIMONY

65. Student reached the age of majority in July 2014, and holds his own educational rights. Student testified at the hearing. He was articulate and deliberative in his testimony.

66. Student had a deep mistrust of Desert Sands' staff. He complained that staff frequently failed to provide him agreed upon assistive technology devices, related software, or an appropriate aide. Student's individual aide was unable to assist him in certain classes, such as Spanish or higher level math classes, as the aide did not speak Spanish and Student's academic abilities surpassed that of the aide. Student's dependency on his aide and assistive technology, and his belief that these tools were

frequently ineffective, caused him to become anxious and frustrated with school. This frustration sometimes led to Student avoiding school altogether.

67. Student persuasively testified that occupational therapy would assist him in the area of handwriting, thereby decreasing his aide dependency and to prepare him for independent living. Regarding adaptive physical education, Student persuasively reported that this service had assisted him in the past, and would continue to assist him develop gross motor skills, thereby increasing his independence from others.

68. Student's mistrust of school staff was most evident in his refusal to be assessed unless he could audio record the testing. Student believed that school assessors had altered his answers during past assessments, and that audio recording the testing would prevent the assessor from misrepresenting his test answers.

69. Finally, Student objected to placement at Amistad because it was a continuation school. He primarily complained that Amistad was inappropriate because he had not chosen the placement. Student had the mistaken belief that he had the right to select his school placement, and he wished to attend Shadow Hills. However, Student did not present any evidence which showed that Amistad was inappropriate. Student's preference for Shadow Hills was not as persuasive as the evidence provided by Desert Sands which showed that, as of December 2013, Amistad was appropriate to meet his unique disability needs and to effectuate credit recovery.

70. Student's private therapist Dr. Walayat was the primary supporter for Student receiving home-hospital instruction. Nonetheless, Student failed to explain why he or Mother had refused to consent to the April 22, 2014 IEP, which offered home instruction in accord with Dr. Walayat's recommendation. Therefore, Student's testimony regarding placement was not as persuasive as Dr. Walayat's recommendation and Mr. Himelright's testimony, which showed that Student required home-hospital instruction at the time of the April 22, 2014 team meeting.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.;⁶ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) In general, an IEP is a

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ References to the Code of Federal Regulations are to the 2006 version unless otherwise indicated.

written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs and academic and functional goals related to those needs. It contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining goals, making progress in the general education curriculum, and participating in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 (*Schaffer*) [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is a preponderance of the evidence].) In this case, Desert Sands is the petitioning party and therefore had the burden of persuasion.

4. There are two principal considerations in claims brought pursuant to the IDEA: substantive denial of FAPE and procedural denial of FAPE. Unlike substantive failures, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation

of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; *M.L., et al., v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 653.)

5. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200, 203- 204, 206-207 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).)

THE IEP

6. 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, and a statement of measurable annual goals designed to meet the child's needs that result from his disability. The IEP must also include a description a statement of the special education and related services to be provided to the child, a statement of the program modifications that will be provided for the child, and a statement of individual accommodations for the child. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

7. 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. § 300.324(a).)

8. 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 Ed.*, (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

AMENDMENT OF AN IEP

9. A school district must also amend an existing IEP in order to make a change in educational placement for a special needs child. A district can amend an IEP either through agreement with the child's parents or by the IEP team at an IEP meeting. (20 U.S.C. § 1414(d)(3)(F); 34 C.F.R. § 300.324(a)(6)(2006); Ed. Code, § 56380.1, subds. (a), (b).)

PROCESS FOR LACK OF CONSENT

10. When the parents of a special needs pupil refuse to consent to all of the services offered by a school district in an IEP, and the parents have consented to such services in the past, then the district must file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) Upon the filing of a request for a due process hearing, the school district must maintain the child in his or her current educational placement. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a)(2006); Ed. Code, § 56346, subd. (f).)

HOME AND HOSPITAL INSTRUCTION

11. Placement in the home is one of the most restrictive placement options for a special education student. Special education provided in the home or hospital is limited to eligible students for whom the IEP team recommends such instruction. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) When recommending placement for home instruction, the IEP team shall have in the assessment information a medical report from the attending physician or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the

student from attending a less restrictive placement. The report shall include a projected calendar date for the student's return to school. The IEP team shall meet to reconsider the IEP prior to the projected calendar date for the student's return to school. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

12. In light of a preference for the least restrictive environment, and to determine whether a child can be placed in a general education setting, the Ninth Circuit Court of Appeals, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403 (*Rachel H.*), adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student.

SPECIAL EDUCATION REASSESSMENTS

13. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

14. Reassessments require parental consent or, if the Student is the age of majority, Student's consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321,

subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

15. When a parent imposes unreasonable conditions upon the assessment process, their consent is effectively withheld. (*G.J. v. Muscogee County School Dist.* (11th Cir. 2012) 668 F.3d 1258, 1262-64.) A parent cannot withhold consent and still receive special education and related services for his or her child. "Every court to consider the [Individuals with Disabilities Act's] reevaluation requirements has concluded that "'if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student'" (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160, quoting *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178-179.) The Ninth Circuit held in *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, that "if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing."

16. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (34 C.F.R. § 300.300(a)(3)(i), (c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

ISSUE ONE: THE DECEMBER 3, 2013, AND APRIL 9, 2014 IEP OFFERS

17. In the December 3, 2013 IEP, as amended by the April 9, 2014 IEP, Desert Sands failed to offer Student a FAPE due to its failure to offer adapted physical education and occupational therapy services.

18. An examination of the December 3, 2013 IEP shows that, with the exception of adapted physical education and occupational therapy services, Desert Sands met the procedural requirements provided under the IDEA for a FAPE offer.

Mother's Failure to Attend the IEP Meetings

19. All required IEP team members were present at the IEP meetings, with the exception of Student's mother. Parents of the child with a disability are critical members of the IEP team. California law requires that the parents be given notice of the meeting early enough to ensure an opportunity to attend. (Ed. Code, § 56341.5, subd. (b).) The law also requires the IEP team meeting to be scheduled at a mutually agreed-upon time and place. (Ed. Code, § 56341.5 (c).)

20. A district may hold an IEP meeting without a parent in attendance if the district is unable to convince the parent that he or she should attend. (Ed. Code, § 56341.5, subd. (h).) However, if a district holds a meeting without the parent in attendance, it must "maintain a record of its attempts to arrange a mutually agreed-upon time and place" such as detailed records of telephone calls made or attempted, or copies of correspondence sent to the parent. (*Ibid.*)

21. In the instant case, Desert Sands made many attempts to hold the December 2013 IEP team meeting with Mother in attendance. Desert Sands attempted to hold the meeting in September 2013, October 2013, and November 2013. In each case, Mother either failed to respond to the IEP team meeting notice or requested that the meeting be postponed. After Mother requested that the November 2013 meeting be postponed, Desert Sands rescheduled the meeting for a date and time suggested by Mother. Despite the fact that Mother had confirmed that she would attend the December 2013 meeting, she failed to do so and provided no explanation for her lack of attendance.

22. Following the December 2013 IEP meeting, throughout February and March 2014, Desert Sands made frequent attempts schedule an IEP meeting around Mother's schedule. Desert Sands attempted to hold the meeting in February 2014, March 2014,

and on various dates in early April 2014. Mother refused to attend an IEP meeting on any of these dates.

23. Consequently, Desert Sands showed that it took reasonable steps to include Mother's participation in the December 3, 2013, and the April 9, 2013 IEP meetings.

The IEP Discussion and Placement Offer

24. The IEP team discussed Student's area of eligibility and how Student's disability interfered with his ability to access the general education curriculum and need for special education. The IEP team reviewed Student's present levels of educational and functional performance in the areas of academics, motor skills, social, emotional and health. The team reviewed progress towards prior goals and developed two new measurable, annual goals. Due to Student's age, the IEP included an appropriate individual transition plan which was based upon a Student interview. The individualized transition plan included two goals which were designed to assist Student attend college and work towards a career. The IEP reflected Student's ability to pass the California High School Exit Exam, and focused on his need to pass classes and recover school credits.

25. In reviewing the school placement, the December 2013 IEP team discussed Student's unique needs and special factors, including his age, propensity to become easily fatigued, difficulty traversing large campuses, need for an ADA compliant campus, and need to recover school credits. Amistad was ADA compliant, permitted quicker credit accumulation than a comprehensive high school, had smaller class sizes and a smaller campus, a shorter school week, and peers who were Student's age. Given these factors, Amistad was an appropriate placement for Student at that time.

26. Student primarily complained that Amistad was not appropriate because he had not selected it as he wanted to remain at Shadow Hills. However, an IEP need not conform to a parent or, in this case, Student's wishes to be sufficient or appropriate.

(*Shaw v. Distr. 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, supra*, 458 U.S. at p. 207.) Here, the December 3, 2013 IEP appropriately included transferring Student from Shadow Hills to Amistad.

ADAPTED PHYSICAL EDUCATION

27. In November 2012, Desert Sands assessed Student and found that he required adaptive physical education to receive a FAPE. In accord with this testing, the November 2012 IEP offered Student adaptive physical education. There was no further testing in this area by Deserts Sands or Student when the next IEP meeting occurred in December 2013. Desert Sands failed to demonstrate that Student's needs had changed from November 2012 to December 2013 to such an extent that he no longer required adaptive physical education. Rather, evidence showed that Student would still benefit from the locomotor goal and adaptive physical education services to achieve that goal. Evidence also showed that Student required adaptive physical education to develop his independent living skills. Given this data, the December 2013 IEP team should have offered Student continued adaptive physical education.

28. Desert Sands argues that Students' gross motor delays were addressed through classroom accommodations and his individual aide. In sum, Desert Sands focused on accommodations rather than providing an IEP whereby Student could attain the level of self-sufficiency and independence that would otherwise be expected in view of his disability. Contrary to Deserts Sands' argument, the IDEA supports fostering education skills to assist the disabled pupil in developing independence and responsibility. (*Amanda J. v. Clark City School District* (9th Cir. 2001) 267 F.3d 877.) Mr. Jimenez stated both in his assessment and through testimony at hearing that Student had made progress, particularly in the gross motor skills that he specifically treated. Ms. Miranda, who comprehensively observed Student, also believed that Student could

benefit from motor based therapy. It is therefore fairly apparent, and the ALJ finds, that Student had at least some further ability to improve his muscle tone and strength. For these reasons, Desert Sands' failure to offer Student adapted physical education at the December 3, 2013 IEP denied him a FAPE.

OCCUPATIONAL THERAPY

29. Deserts Sands also failed to meet its burden of showing the December 3, 2013 IEP offered a FAPE based upon the school district's failure to offer Student occupational therapy. While Ms. Hanley concluded that Student's neuromuscular development could not be enhanced by occupational therapy, this conclusion was contradicted by Student's ability to improve muscle tone and strength in areas where services had been provided.

30. Ms. Hanley's testimony was not persuasive for several reasons. She was generally unfamiliar with Student and had never observed him in the classroom. Ms. Hanley was therefore unable to confirm what effect the classroom accommodations and individual aide had in addressing Student's severe fine motor deficits. Additionally, she provided inconsistent testimony. She initially described Student's deficits as "mild," yet later described Student as seriously delayed. Lastly, Ms. Hanley's statement that she would never recommend occupational therapy services for a 16 year old with cerebral palsy meant that she had predetermined her therapy recommendation. It did not matter what her testing results yielded, she would not recommend occupational therapy for Student.

31. In contrast, Ms. Miranda and Student persuasively testified that Student could benefit from motor based therapy. Mr. Jimenez had proven that Student could improve muscle tone and ability, including in the area of hand manipulation, based upon Student's ability to meet a goal which required him to catch a tennis ball. Finally, Desert Sands' argument that IEP accommodations and individual aide were sufficient to

meet Student's needs without the provision of related services fails for the same reasons described above; Desert Sands focused solely on accommodation rather than providing an IEP with related services designed to meet Student's unique needs and prepare him for independent living. As such, the ALJ finds that Student had at least some ability to improve his strength in the area of handwriting, an area which falls under the province of occupational therapy. For these reasons, Desert Sands' failure to offer Student occupational therapy at the December 3, 2013 IEP denied him a FAPE.

32. On April 9, 2014, Desert Sands amended the December 2013 IEP offer to include individual counseling services. No further changes were made to the IEP offer. Consequently, Student's IEP continued to deny him a FAPE due to its failure to offer adapted physical education and occupational therapy services.

ISSUE TWO: THE APRIL 22, 2014 IEP OFFER

33. In the April 22, 2014 IEP, Desert Sands offered Student a FAPE.

34. On April 22, 2014, Desert Sands convened an addendum IEP meeting to consider Dr. Walayat's prescription for home-hospital instruction. All necessary IEP team members, including Mother, were present. Desert Sands appropriately agreed to Dr. Walayat's recommendation and offered Student home-hospital instruction for five hours per week. The IEP team agreed to review the home instruction program within 45 days of implementation to determine whether it should be continued.

35. In examining the appropriateness of placement in a home bound program the *Rachel H.* factors must be examined to determine whether such a placement would be in the least restrictive environment. Such an examination indicates that home-hospital instruction was appropriate.

36. Here, Student's emotional deficits, severe depression, and school anxiety prevented him from being able to be placed in a regular education class. Student was absent 142 days during the 2013-2014 school year, and failed every class as a result of

his absences. Student required academic instruction in a home or hospital to be able to access the curriculum.

37. The homebound program was therapeutically and educationally appropriate in view of Student's severe anxiety and school avoidance. Student's independent psychiatrist Dr. Walayat reported that a homebound program was required in light of Student's depression, suicidal ideation, anxiety and school avoidance. Similarly, Student's independent psychologist Dr. Watson found that Student suffered from suicidal ideation, anxiety and school avoidance. Mr. Himmelright persuasively testified that, given the information available to the IEP team as of April 22, 2014, home-hospital instruction was the only responsible placement option available to Student until further information regarding his emotional difficulty could be ascertained through updated assessments. The homebound program was also supported by evidence that Student had failed to progress at Shadow Hills, a comprehensive campus, despite related services, accommodations, and the cognitive ability to succeed in the general education curriculum. Student's failure to progress was predicated almost solely upon his anxiety and depression, which manifested into school avoidance; and which was the primary cause for his failing grades and inability to earn sufficient credits to graduate from high school.

38. For the foregoing reasons, Desert Sands' April 22, 2014 IEP offer for home-hospital instruction for Student constituted a FAPE.

ISSUE THREE: DESERT SANDS FEBRUARY 2014 ASSESSMENT PLAN

39. Desert Sands has met its burden of showing that it may lawfully assess Student without his consent.

40. The right to a FAPE arises only after a pupil is assessed and determined to be eligible for special education. (Ed. Code, § 56320.) Here, Student has already been

assessed and determined eligible for special education. As such, Desert Sands' request pertains to a reassessment of Student.

41. Desert Sands provided proper notice to Student and Mother of the proposed February 24, 2014 reassessment plan for Student's triennial assessments.

42. To date, neither Mother nor Student has consented to the assessment plan. In addition, Mother and Student have imposed conditions upon the assessments that were the equivalent to not providing consent. Mother and Student did not return the February 2014 assessment plan. Student described that he would not consent to the reassessments unless his demand to audio record the testing was met.

43. The evidence did not support Student's requirement that he audio record the reassessment to corroborate the validity of the test results. Other than Student's testimony, he failed to provide any law or evidence which established a basis for audio recording the testing.

44. In contrast, Ms. Hertz persuasively testified that audio recording the testing would invalidate the assessment results and invalidate the testing for future use. Professional standards prohibit the audio recording of assessments because doing so would jeopardize the validity of the assessment tool by disclosing test questions that assessors are required to maintain confidential. While federal and state laws support giving protocols to parents, there is no support for Student's contention that audio recording the testing process is permissible or necessary. Protocols do not include the test questions. Evidence presented at hearing sufficiently established that, unlike the disclosure of testing protocols, audio recording the test questions invalidates the test for future use with the student, and all other students. Consequently, Student's demand to audio record the testing was unreasonable and acted as a prohibition on the reassessments.

45. The reassessments Desert Sands proposed were in compliance with the three-year time frame provided for by law. Student's last comprehensive assessments were in 2007, and Desert Sands is correct to assert that reevaluation is necessary. Moreover, Student's last IEP appropriately recommended home-hospital instruction, with review of the home program within 45 days, neither which had yet been performed. This corresponds with the fact that Student had not attended a school placement since March 2014. As a result, there is a dearth of current information which is required for Desert Sands to effectively meet its obligation to offer Student a FAPE. Absent current information, it is not possible for Desert Sands to determine Student's present levels of performance, current baselines for goals, the appropriateness of related services, or whether home-hospital instruction should be continued. Thus, Desert Sands has established the need for a comprehensive triennial reassessment.

46. In conclusion, Desert Sands has prevailed in establishing its need and legal entitlement to reassess Student. If Student continues to withhold consent and/or does not comply with the orders set forth below, the IDEA provides that Student may not continue to receive special education and related services.

ORDER

1. Desert Sands' IEP offer of December 3, 2013, as amended on April 9, 2014, denied Student a FAPE.
2. Desert Sands' IEP offer of April 22, 2014, constituted a FAPE.
3. Desert Sands may immediately implement the home-hospital instruction in accord with the April 22, 2014 IEP.
4. Desert Sands may reassess Student pursuant to its February 24, 2014, triennial reassessment plan without Student's consent.
5. Student shall not audio record the assessments.

6. Desert Sands shall give Student 14 days' written notice of the date, time, and place of each assessment required by the February 2014, triennial reassessment plan.

7. If Student fails to cooperate with the triennial reassessment process as required by this Order, Desert Sands may, upon prior written notice to Student and without further order of an ALJ, terminate its delivery of special education and related services to Student.

PREVAILING PARTY

Pursuant to 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. In accordance with that section the following finding is made: Student prevailed on Issue One. Desert Sands prevailed on Issues Two and Three.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56506, subd. (h).). Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code § 56505, subd. (k).)

Dated: November 17, 2014

_____/s/_____
PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings