

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014080713

DECISION

Student's parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 19, 2014, naming the Temecula Valley Unified School District. The matter was continued for good cause on September 26, 2014.

Administrative Law Judge Susan Ruff heard this matter in Temecula, California, on February 3, 4, 5, 10, 11, 12, and 17, 2015.

Wendy Housman, Attorney at Law, represented Student. Theresa Sester assisted Ms. Housman during most of the hearing, except for the final day of hearing. Student's mother attended the hearing on behalf of Student. Student's father was also in attendance for much of the hearing. Student did not attend.

Peter Sansom, Attorney at Law, represented Temecula Valley Unified School District. Breck Smith and Ami Paradise attended the hearing at various times on behalf of Temecula.

On February 17, 2015, the last day of hearing, the parties requested and received time to file written closing argument. On March 19, 2015, the record was closed and the matter was submitted for decision.

ISSUES¹

- a) Did Temecula violate its child find obligations for Student during the 2012-2013 school year?
- b) Did Temecula deny Student a free and appropriate public education from August 19, 2012, to August 19, 2014, by failing to timely and appropriately assess Student in the areas of: (i) behavior; (ii) occupational therapy; (iii) assistive technology; and (iv) vision?²
- c) Did Temecula deny Student a FAPE in the September 13, 2013 individualized education program, as amended through January 2014, because the IEP was not reasonably calculated to provide Student with meaningful educational benefit in the areas of (i) occupational therapy; (ii) Student's academic anxieties; (iii) behaviors; and (iv) prevention of harassment by peers?
- d) Did Temecula deny Student a FAPE in the September 13, 2013 IEP, as amended through August 18, 2014, not including the 2014 extended school year period, because the IEP was not reasonably calculated to provide Student

¹ The issues have been rephrased 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.)

² The Federal Code uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning for purposes of this case. They will be used interchangeably throughout this Decision.

- with educational benefit in that it failed to properly address Student's academic regression?
- e) Did Temecula deny Student a FAPE by failing to appropriately implement the February 19, 2014 IEP amendment?

SUMMARY OF DECISION

This case involves a child who has exhibited behavioral and academic problems since he started school in Temecula. The parties dispute whether Student should have been found eligible for special education during his kindergarten year and also dispute at what point Student's mother first made a request for a special education assessment. This Decision finds that Student's mother first made a written request for special education assessment on January 28, 2013, but Temecula failed to act upon that request. That failure to act delayed Student's receipt of special education services and denied Student a FAPE.

The parties also dispute whether Temecula properly assessed Student in specific areas, whether Temecula offered an IEP that met Student's needs, and whether Temecula failed to implement a particular methodology required by Student's IEP. This Decision finds that Temecula failed to implement the methodology called for in the IEP, thereby denying Student a FAPE.

As a remedy for the denial of FAPE, Temecula is ordered to reimburse Student's parents for certain expenses they incurred in providing private services to Student.

FACTUAL FINDINGS

JURISDICTION

1. Student is an eight-year-old boy who is eligible for special education under the eligibility category of other health impairment. Temecula's initial IEP finding

Student eligible for special education was signed on October 3, 2013. Student's family resided within the jurisdiction of Temecula during the times relevant to this case.

CHILD FIND OBLIGATION

2. Student began kindergarten in August 2012 in a general education kindergarten classroom at an elementary school run by Temecula. He had never been found eligible for special education prior to entering kindergarten. Student had a family history of autism. Prior to his kindergarten year, he had exhibited behavioral problems at a Temecula-run preschool. The parties dispute when and if Temecula should have assessed Student for special education eligibility during kindergarten.

3. Student's behavioral problems continued during his kindergarten year. At times, Student had difficulty maintaining his "personal space." He was sometimes defiant and disrespectful, particularly with the classroom aides or volunteers who worked with Student in a small group setting. Student could be inattentive at times, would not do his work and would refuse to follow class rules. Upon occasion, Student exhibited aggressive behavior, such as hitting another child, knocking a ball out of another child's hand, or throwing a pencil at an adult who came to assist in the classroom.

4. A parent volunteer who assisted in Student's kindergarten classroom saw Student engage in behaviors such as hiding under his desk, crying, whining, throwing crayons, refusing to do work, and getting out of his chair. In her opinion, Student's behavior deteriorated over the course of the school year.

5. During the first semester, Student's kindergarten teacher utilized general education behavioral interventions with Student, such as a classroom behavior system based on color-coded cards (using colors such as blue for good behavior and red for bad behavior). She also collaborated with Student's mother on a behavior intervention using a "star chart" in which Student would receive stars for good behavior during

various times of the day. On at least two occasions near the beginning of the school year, Student was sent to a neighboring teacher's room as a "time-out" after bad behavior. These interventions had mixed results – sometimes they worked well and other times they were ineffective.

6. During the hearing, Student's mother raised concerns about the methods the kindergarten teacher used to address Student's behavior. She testified that the kindergarten teacher criticized Student's behavior publicly in front of other pupils or their parents. Student was constantly in the "red" category of behavior cards in the class. Student told his mother that the teacher did not like him and was mean to him. Student's mother was particularly concerned about an incident in which the kindergarten class was asked by the teacher to "vote" on whether the behavior of each child in the class was good or bad.

7. Student's mother was a classroom volunteer, and she observed Student's behavior grow worse over time. She believed that the kindergarten teacher was bullying Student and that the teacher's conduct was damaging to Student. She felt that Student developed anxiety about school due to what happened in kindergarten. As time progressed, she watched Student grow anxious and even have nightmares about the teacher.

8. In addition to behavioral problems, Student also had difficulties with academics during his kindergarten year. Between approximately October 2012 and December 2012, Student received academic tutoring as part of his general education program. Student's kindergarten teacher attempted to send extra work home with Student to help him practice his skills, but Student's mother reported that the extra work was causing Student stress at home.

9. By the time the first semester report cards came out in approximately December 2012, Student was struggling in several academic areas, particularly in the

areas of writing and math. However, Temecula did not consider Student an “at risk” learner, because he met the language arts standards in all but one category.

10. No evidence was introduced that anyone, including Student’s parents or school personnel, formally requested that Student be assessed for special education prior to January 2013. During the hearing, Student’s mother explained that she raised concerns about Student to the school staff, but did not use the words “special education testing.”

11. Student’s kindergarten teacher had 18 years of experience teaching in Temecula, including three years teaching kindergarten. She holds a bachelor’s degree with an emphasis in education and a master’s degree in elementary curriculum and instruction. In her opinion, Student’s behavior at the beginning of the kindergarten year did not warrant an assessment for special education. She explained that the beginning of kindergarten can be challenging for some children if they had not previously been in a classroom setting or had not been away from their parents a lot. Likewise, the mere fact that, as of December 2012, Student was below grade level on his kindergarten skills, such as writing, would not warrant a referral for special education because kindergarten is very developmental year for children. Children develop kindergarten skills at their own pace. Even if a child is identified as an “at risk” learner, it does not automatically mean that the child should be referred for special education. It was not until approximately the end of January when the kindergarten teacher began to wonder if Student should be referred for an assessment.

12. The opinions of the kindergarten teacher were supported by the testimony of Temecula school psychologist Jill Toth, Temecula’s expert witness. Ms. Toth is a credentialed school psychologist with a certificate in behavior intervention who has conducted special education and behavioral assessments of children. Prior to her work as a school psychologist, Ms. Toth worked as a special education teacher and autism

service provider. She holds a bachelor's degree in social work and a master's degree in school psychology. She has worked as a school psychologist for Temecula since 2003. Although she did not work directly with Student or personally assess Student, she reviewed Student's records. In her opinion, nothing in those records required a referral for special education assessment during that time.

13. The evidence supports Temecula's position with respect to this issue. While Student exhibited behavioral and academic problems during the early part of his kindergarten year, Student brought in no expert testimony to show that those problems were serious enough to make the Temecula staff suspect that Student was a child with a disability who might need special education. The witnesses for Temecula, on the other hand, were persuasive in their testimony that kindergarten is a developmental year in which children progress at an individual rate. Therefore, just because a child is below his peers at the beginning of the year does not automatically require a special education assessment, without further information indicating a need for assessment.

THE JANUARY 28, 2013 MEETING AND THE FIRST REQUEST FOR AN ASSESSMENT

14. By January 2013, Student's mother was very concerned about Student's behavior and academic problems. On January 28, 2013, Student's mother met with Denise Dugger, a Temecula special education teacher. Student's sibling was in Ms. Dugger's class, and Student's mother trusted Ms. Dugger. Student's mother told Ms. Dugger about her concerns, and Ms. Dugger suggested language that Student's mother could use to request a special education assessment for Student.

15. Based on her conversation with Ms. Dugger, Student's mother prepared a handwritten note on a page of the appointment calendar that she always carried with her when going to meetings with school personnel. Student's mother signed the note and dated it January 28, 2013. The note stated:

To whom it may concern,

Based on family history please accept my request for formal special education testing in all areas of suspected disability including behavior. Based on [Student's] recent loss of skills and chronic behavior I request assessment to rule out disability.

16. Student's mother then met with Student's kindergarten teacher on January 28, 2013. The parties dispute whether Student's mother gave the note to the kindergarten teacher during that meeting.

17. Student's mother testified that she handed the note to the teacher during the meeting, but the teacher gave it back to her and said it was not yet the right time to assess Student for special education. The teacher told her that Student was not far enough behind to warrant a special education assessment and that they should pursue the student study team process first. Based on that conversation, Student's mother did not submit any further paperwork requesting a special education assessment at that time.

18. The teacher, on the other hand, testified that she first saw the handwritten note when the lawyer for Temecula showed it to her. She did not remember ever receiving a written request for a special education assessment from Student's mother at any time prior to the end of April 2013. The teacher could not recall if Student's mother had verbally asked for an assessment during the January 28 meeting, but she did recall that Student's mother had discussed Student's family history.

19. There were several pieces of evidence presented during the hearing to support Student's mother's claim that she handed the assessment request to the teacher. First, the parties do not dispute that Student's mother and the kindergarten teacher discussed Student's behavior and possible disabilities during their meeting. The teacher acknowledged this in a note she wrote the following day on a behavior report,

in which she stated that they “conferenced” about Student’s “homework behavior at home [and] possible processing problems.”

20. The second piece of supporting evidence was the handwritten assessment request that Student’s mother prepared. Student’s mother had written notations on the margins of that document to memorialize what had happened during the meeting with the teacher. Those notations corresponded to her testimony.

21. The third was an email sent by the teacher on January 29, 2013, to Ms. Dugger and Lynn Breen, the kindergarten grade-level head. In the email, the teacher discussed the meeting with Student’s mother and talked about Student’s behavioral and academic challenges. The email concluded with the following question:

Is it (because of the family history) possible for Mom to write a letter asking for [Student] to be tested in all areas of disability now? Thanks for your advice....

22. Student’s kindergarten teacher denied that she sent the email because Student’s mother had requested an assessment. Instead, she explained that her purpose in writing the email was to express her concerns about Student and ask what the next step should be. She testified that neither Ms. Dugger nor Ms. Breen recommended a special education assessment of Student at that time. Ms. Breen told her that they should wait for the student study team interventions.

23. The testimony of the kindergarten teacher also indirectly supported Student’s contention. The teacher testified about a protocol Temecula had in place regarding assessment of children for special education. The teacher described the protocol as follows: if there were concerns about a child, the child would first receive general education supports. If no progress was made, the student study team process began. Interventions recommended by the student study team would be implemented

for six to eight weeks, and then the student study team would meet again to discuss the effectiveness of those interventions. If no progress was made, then the child could be referred for special education. According to the teacher, she was told to follow that protocol.

24. Given the testimony of other Temecula witnesses, it is doubtful that a mandatory protocol was required on each occasion before a special education assessment could occur. However, it is significant that the kindergarten teacher *believed* she had to follow that protocol. That could explain why she handed the handwritten assessment request back to Student's mother instead of taking action to start the assessment process. The kindergarten teacher indicated during the hearing that, if not for the protocol, she would have referred Student for an assessment at that time.

25. In support of its position that Student's mother did not make a written request for assessment on January 28, 2013, Temecula relies upon the conduct of Student's mother after that date. In particular, Temecula points out that Student's mother did not request a special education assessment of Student during the student study team meeting in March 2013, and did not ask why Temecula had not agreed to assess Student in response to her January note.

26. Speech-language pathologist Suzanne Juhl testified that, during a meeting with Student's mother prior to the March 2013 student study team meeting, she told Student's mother that she could ask for an assessment. Student's mother did not ask for an assessment at that time, nor did she tell Ms. Juhl that she had previously requested such an assessment. Likewise, the school assistant principal, who met with Student's mother in June 2013, testified that Student's mother never mentioned a January request for an assessment.

27. While Temecula does raise significant concerns, the more persuasive evidence supports the position of Student's mother. Student's mother was a highly

credible witness and her testimony was supported by both the documentation and the actions of the kindergarten teacher. The kindergarten teacher was also a credible witness, but she did not have the specific recollection of events that Student's mother had.

28. Apparently the Temecula staff also believed Student's mother on this issue. When an IEP was later drafted for Student, the IEP document listed the date of the initial referral for special education as January 28, 2013. The first draft of the IEP document had listed May 7, 2013, as the date of the initial referral for special education, but the IEP team agreed to change it to January 28, 2013, at the request of Student's mother. Ms. Dugger explained that the team agreed to change the date based on the statement of Student's mother that she had documentation to show the request had been made in January.

29. In addition, as will be discussed below, when Student's mother later submitted a second request for assessment by email in May 2013, the Temecula staff failed to take action upon that email. It was not until Student's mother happened to mention that email to the assistant principal on June 10, 2013, that the assessment process finally began.

30. All these factors – the credible testimony of Student's mother, the kindergarten teacher's email the following day which discussed assessment, the teacher's belief that she had to follow the student study team protocol, the contemporaneous notation written by Student's mother on the assessment request, and the inaction of Temecula in May 2013 when the second request for assessment was made – support a finding that Student's mother did indeed present a written request for a special education assessment to the kindergarten teacher on January 28, 2013.

31. Temecula did not assess Student pursuant to that January 28, 2013 request. No assessment plan was provided to Student's mother until June 2013. Had

Temecula assessed earlier, Student would have been found eligible for special education during kindergarten. Temecula's failure to assess prevented Student from receiving special education and related services until first grade.

EVENTS BETWEEN THE JANUARY 28, 2013 MEETING AND JUNE 2013

32. By February 2013, both Student's mother and his kindergarten teacher were concerned about Student losing skills that he had previously acquired. Student's kindergarten teacher noted that by February 2013, Student did not seem as eager about school as he had before. If not for the kindergarten teacher's belief about the requirement to follow the student study team protocol, the teacher would have referred student for special education assessment at that time.

33. The student study team for Student met in March 2013. The student study team referred Student to a social skills group and recommended continuation of general education tutoring for Student.

34. In approximately March 2013, Student participated in a weekly social skills group run by Ms. Juhl. The group was designed to address a child's pragmatic skills and ability to respond socially. It was not intended to work on other behavioral concerns besides social skills. According to Ms. Juhl, the purpose of having Student attend the group was to see if he had any problems in that area.

35. Student attended only three of the weekly sessions. Based on what Ms. Juhl saw during those three sessions, she did not believe Student needed to keep attending. She found him to have excellent vocabulary and good social skills. She described him as being very verbal, engaged, and familiar with the rules of the game he was playing. Based on what she saw during those three sessions, she had no concerns about Student in the area of language or social skills.

36. Despite the student study team interventions, Student continued to have both behavioral and academic difficulties during the second semester of his

kindergarten year. In addition, Student's mother continued to have concerns about the kindergarten teacher's treatment of Student.

37. On approximately May 10, 2013, based on parental concerns and with Student's mother's consent, Student was removed from his general education kindergarten class and placed in Ms. Dugger's special education class. Student was not a special education student at the time, and his participation in Ms. Dugger's class was as a typical peer, not a child with an IEP.

38. On May 7, 2013, Student's mother made a formal written request for a special education assessment by email to the school principal. Temecula did not act upon that request, and no proposed assessment plan was sent to Student's parents at that time.

39. By June 2013, Student's mother was concerned that he would be retained in kindergarten. On June 10, 2013, Student's mother met with the assistant principal at Student's elementary school. During the meeting, Student's mother explained that she had sent an email requesting a special education assessment in May. When the assistant principal questioned her about it, she showed the assistant principal the email, a copy of which was still on her cell phone. The assistant principal was very concerned that nothing had been done in response to that request.

40. Temecula immediately prepared an assessment plan. Student's mother signed her consent to that plan on June 11, 2013. Because it was so near the end of the school year, the school staff asked her if she wanted to wait until the following school year for the assessment. She said she wanted it to begin right away.

41. By the end of Student's kindergarten year, he had regressed both behaviorally and academically. Even Temecula's assessor Brenda Morgan acknowledged that regression during her testimony.

THE 2013 SPECIAL EDUCATION ASSESSMENT

42. School psychologist Brenda Morgan conducted the assessment on behalf of Temecula, assisted by Ms. Dugger. Ms. Morgan has been a credentialed school psychologist since 1995 and a behavior intervention case manager since 1996. Prior to becoming a school psychologist, she worked as a classroom teacher. She has conducted numerous assessments of children over the years. She is also a licensed educational psychologist, although she explained during her testimony that that license may have lapsed.

43. Ms. Morgan first attempted to conduct testing of Student on June 11, 2013. At the time, Student was noncompliant, impulsive, and distractible. He worked with Ms. Morgan for about 20 minutes and then sat back in his chair and said, "I don't have to do anything with you." Because compliance is necessary for best test results, Ms. Morgan ended the testing for that day. At the time, school had already ended for the summer, so Ms. Morgan waited until the new school year to try to test Student again.

44. On August 9, 2013, Ms. Morgan attempted to conduct testing with Student once again. Ms. Dugger was also in attendance at the testing session. When Student refused to answer questions asked by Ms. Morgan, Ms. Dugger asked the questions instead. During the testing, Student once again exhibited distractibility and impulsivity. He became frustrated with the questions rather easily. Therefore, only select tests were given and the more lengthy subtests were not administered.

45. The tests administered to Student included the Wechsler Intelligence Scale for Children-Fourth Edition, the Reynolds Intellectual Assessment Scales (the non-verbal subtests), and the Beery-Bukentica Developmental Test of Visual-Motor Integration. Ms. Morgan attempted to administer the visual discrimination subtest of the Test of Visual-Perceptual Skills, but Student was observably distracted and could not keep his eyes on the visual prompts, so Ms. Morgan discontinued the test. Ms. Morgan also

attempted to administer the Autism Diagnostic Observation Schedule to Student, but he refused to respond to the test items, so Ms. Morgan was unable to complete that test.

46. In addition to the testing, Ms. Morgan conducted observations of Student as part of the assessment process. She observed Student in his general education classroom and the motor lab, a room which contained equipment, such as a trampoline, to help relax children who have sensory needs, difficulty sitting, or difficulty paying attention.

47. Student's mother filled out a Developmental, Health, Behavioral, and School History form and Ms. Morgan administered the Behavior Assessment System for Children to Student's mother. The Behavior Assessment System for Children is a rating scale filled out by individuals who know the child.

48. Ms. Morgan did not administer the Behavior Assessment System for Children to any of Student's teachers. Because school had just started, Student's first grade general education teacher did not know him well enough to fill out the form. Ms. Morgan did not ask Student's kindergarten teacher to fill out the form, because of the hostility of Student's parents toward the kindergarten teacher. She did not wish to irritate Student's parents by bringing the kindergarten teacher into the assessment process. Ms. Morgan testified that she did not administer the test to Ms. Dugger, in part, because Ms. Dugger had not known Student long, and in part, because she felt that Ms. Dugger would not have a balanced view because she was just looking at Student's problem behaviors. Instead, Ms. Morgan reviewed Student's records to learn his background and conducted the observations described above.

49. In August, Ms. Dugger administered the academic testing portion of the assessment. Ms. Dugger has been a credentialed teacher for approximately 30 years. She holds a master's degree in special education and has received specialized training in methodologies such as discrete trial training. She has worked as both a general

education teacher and a special education teacher, and has also served as a University of Southern California master teacher.

50. Ms. Dugger gave Student the Kaufman Test of Educational Achievement. Because Student's mother reported that Student was anxious about being in school, Ms. Dugger offered Student's parents the choice of having Student assessed at school or at home. Student's mother chose her home, and Ms. Dugger administered the test there.

51. Student did not sustain attention during the testing and left the testing table multiple times during the session. Student refused to perform the written expression portion of the test, and engaged in task avoidance behaviors. He also left the testing area in the middle of the math test. Ms. Dugger felt that the IEP team had to view the results of the testing with caution because of Student's behavior during the testing. She believed that Student's behavior at the end of his kindergarten year was far better than the behavior she observed at home during the testing. At the end of his kindergarten year, he could sit and work through a task for 15 minutes at a time. He was unable to do that during her testing at his house and was distracted by items in the room.

52. Student's scores on the academic testing came out average for letter and word recognition and phonological awareness, below average in math concepts and math computation, and in the lower extreme in written expression.

53. School nurse Karen Dillon conducted a health evaluation of Student. Nurse Dillon has a bachelor's degree in nursing, a public health nurse certificate, a registered nurse license, and a master's degree in education. She has worked as a registered nurse in public schools for more than 30 years. Her testing of Student was done as part of the student study team process in Student's kindergarten year, but her findings were still

valid at the time of the psychoeducational assessment and were incorporated into that assessment.

54. As part of the health evaluation, Nurse Dillon administered vision testing to Student. She assessed Student's far point vision, muscle balance, and tracking convergence. Student passed those tests.

55. Nurse Dillon did not conduct an evaluation of Student's near point vision or assess Student for color blindness, because Student was only six years old at the time of the assessment. Most children are farsighted until approximately age eight, so it was not appropriate to conduct a near point test of Student. Schools typically do not screen for color blindness until the child is in second grade. Nurse Dillon noted that Student's parents had reported no issues with Student's vision or hearing.

STUDENT'S FIRST GRADE YEAR

IEP Meetings Through October 3, 2013

56. Student began his first grade year in August 2013. At the beginning of his first grade year, prior to his first IEP, Student still exhibited behavioral difficulties in class and academic problems. Student told his first grade teacher that he did not want to be in school and would not learn. He engaged in behaviors such as crying and hiding under furniture.

57. Student's IEP team met on September 13, 2013, to review the Temecula assessment. The team met again on September 26, 2013, and September 30, 2013. Student's parents attended the meetings along with their advocate Ms. Sester. The team determined that Student was eligible for special education under the category of other health impairment.

58. The IEP contained goals for Student in the areas of phonological awareness, phonics and word recognition, fluency, writing, counting, numbers and

operations in base 10, writing conventions, independent work skills, emotional needs (requesting a break when feeling frustrated or overwhelmed), and paying attention.

59. The IEP called for Student to receive specialized academic instruction five times a week for 90 minutes per session in a separate classroom, to consist of 30 minutes of reading, 30 minutes of writing, and 30 minutes of math. The supplementary aids and services called for in the IEP included preferential seating, breaking instructions into short steps, dividing work into 10 minute mini-assignments, using visual cues along with auditory information, repeating information, and additional classroom aide support for three hours per day. In Ms. Dugger's opinion, the specialized academic instruction in the IEP was sufficient to meet Student's needs.

60. The IEP noted that Student required assistive technology devices or services, in particular a triangular pencil and paper with colored lines for writing, access to fidgets, adapted seating, and use of the motor lab.

61. The IEP also noted that Student's behavior impeded his learning or the learning of others because he was out of his seat during whole group and independent work and had difficulty remaining within his personal space while in the classroom and in line. To address the behaviors, the IEP included two behavior goals and behavioral strategies and supports, including "token economy, motor lab breaks, break tickets, and bathroom ticket."

62. The IEP called for accommodations for testing, including extra time, supervised breaks, testing in a small group setting, and math questions read aloud to student, among other things.

63. On October 3, 2013, Student's parents signed their consent to the IEP, but attached "exceptions" to their consent. Their exceptions included, but were not limited to, requests to rewrite some of the goals, to clarify the IEP language regarding assistive

technology, and to add additional services to the IEP, including intensive behavior services, occupational therapy and counseling services.

64. After the IEP was signed, Student began to receive specialized academic instruction as called for in his IEP. He started receiving his specialized academic instruction from Ms. Dugger, but around Thanksgiving he began receiving his special education in the resource room from Ms. Dean.

Behavioral Assessment

65. Student contends that Temecula failed to timely and appropriately assess Student in the area of behavior. Ms. Morgan testified that her assessment was appropriate and that no further behavioral assessment was necessary for Student at that time. Student brought in no expert to directly refute that testimony.

66. Student is correct that there were problems with Ms. Morgan's assessment. Temecula knew that behavior was an area of particular concern to Student's parents. Despite Student's history of behavior problems and the obvious behavior problems during the psychoeducational testing, Ms. Morgan's assessment contained very little formal testing related to Student's behavior. Ms. Morgan did not administer the Behavioral Assessment System for Children rating scale to any of Student's teachers. Temecula's expert Ms. Toth testified that the Behavior Assessment System for Children should generally be administered to a child's teacher(s) as well as a parent.

67. There were also gaps in the behavioral records review that Ms. Morgan conducted. For example, Ms. Morgan did not speak with Student's kindergarten teacher as part of the assessment, so she did not know that the kindergarten teacher kept a behavior log regarding Student.

68. However, to the extent that there may have been gaps in Ms. Morgan's assessment, Temecula remedied that situation by funding an independent educational evaluation. On September 16, 2013, Student's advocate sent a letter to Temecula

formally requesting an independent educational evaluation in all areas of suspected disability, including a functional behavior assessment and independent assessments in the areas of occupational therapy and speech-language.

69. On October 2, 2013, Temecula responded to the request for the independent educational evaluations. Temecula agreed to fund an independent psychoeducational assessment.³ Temecula denied the request for an independent functional behavior assessment and occupational therapy assessment on the basis that those were not areas of suspected disability for Student. The letter denied the request for an independent speech-language assessment, but agreed to conduct such an assessment using Temecula staff.⁴

70. On February 27, 2014, Temecula offered to conduct a functional behavior assessment. Student contends that Temecula should have offered a functional behavior assessment of Student prior to February 27, 2014. However, the evidence did not support Student's contention.

71. Ms. Morgan did not believe that Temecula should have conducted a functional behavior assessment at the time of her assessment. Instead she felt that it was important to use the IEP process to put behavioral interventions in place first to see if they worked.

72. Ms. Dugger also testified that a functional behavior assessment was not necessary at the beginning of Student's first grade year because the IEP team needed

³ As will be discussed in more detail below, that independent educational evaluation began in November 2013 and was discussed at an IEP meeting in February 2014.

⁴ Issues regarding the occupational therapy assessment will be discussed in greater detail below. The speech-language assessment is not at issue in this case.

time to see how Student would respond to the first grade teacher, and to the services and supports provided in the new IEP.

73. Ms. Dugger opined that, by the end of November 2013 when Student continued to exhibit behavioral problems despite the IEP interventions, a functional behavioral assessment should have been conducted. However, Ms. Dugger's testimony was based on what she had heard about Student's behavior in his general education classroom, not in her own classroom. She did not observe Student's behavior in the general education classroom at that time, but based her opinion on what the general education teacher told her. The general education teacher testified that, once Student began to receive aide support as result of his IEP, his behavior began to change for the better. He started completing assignments and acting more like his typical peers.

74. Breanna Dean, who took over for Ms. Dugger as Student's special education teacher around Thanksgiving, did not believe a functional behavior assessment was necessary based on Student's behavior in her class. In general, she found that Student completed his work and was on task.

75. Jason Romero, a Temecula school psychologist, conducted the functional behavior assessment in May 2014. He observed Student in multiple locations, including the general education classroom, the special education classroom, the computer lab, and the soccer field. He found that Student had mild avoidance behavior when it came to writing tasks, but nothing that required a formal behavior support plan.

76. Student's parents disagreed with Mr. Romero's assessment and requested an independent assessment. Temecula agreed to fund an independent assessment through the Center for Autism and Related Disorders. That independent functional behavior assessment was conducted in September through November 2014 during Student's second grade year, after the time period at issue in this case.

77. Student brought in no expert testimony to criticize Mr. Romero's functional behavior assessment or to show that it was inadequate. Aside from Ms. Dugger's testimony, there was no other expert testimony stating that Temecula should have conducted the functional behavior assessment sooner. In light of the general education teacher's testimony that Student's behavior improved after the October 2013 IEP went into effect, Ms. Dugger's opinion is not enough to show a failure to assess by Temecula.

78. As will be discussed in more detail below, Student made both academic and behavioral progress during his first grade year.

Independent Psychoeducational Assessment

79. Mitchel Perlman, Ph.D., conducted the independent psychoeducational evaluation of Student in November 2013. Dr. Perlman reviewed Student's records, including the Temecula assessment, performed testing, conducted observations of Student, and spoke with Student's mother and Temecula staff.

80. Dr. Perlman recommended, among other things, that a developmental optometrist assess Student to rule out optometric issues that might contribute to his deficits. He also suggested that implementation of an educational program called "RAVE-O" could address Student's reading problems.⁵ According to Dr. Perlman's report, RAVE-O is a "research-based fluency program, developed specifically to address core components of reading...."

81. Dr. Perlman did not believe that Student could be successfully educated in a general education classroom with accommodations, but at the same time cautioned that Student should not be placed in a classroom where the majority of pupils had

⁵ In the exhibits in this case, the RAVE-O methodology was spelled in different ways. For consistency, this Decision adopts the spelling used in Dr. Perlman's report.

autism or emotional disturbance. He was concerned about the widening academic gap between Student and same-age peers. In his opinion, that widening gap did not constitute meaningful educational benefit. Unless Temecula had a program that would “predictably confer meaningful levels of academic benefit” to Student, Dr. Perlman recommended that Student be placed in a nonpublic school.

82. Student’s first semester report card indicated that Student was below grade level or at risk in almost every category.

83. Student’s IEP team met on February 19, 2014, to review Dr. Perlman’s independent educational evaluation. Both of Student’s parents attended the meeting along with Student’s advocate. Dr. Perlman also participated in the meeting. The parties discussed possible amendments to the IEP. Student’s parents wanted the IEP team to follow Dr. Perlman’s recommendation for the RAVE-O program.

84. The IEP team proposed the following modification to the IEP:

Team agreed to the implementation of the Rave-O curriculum. Per neuropsychologist request and program suggestions, this program will be done in a small group to increase engagement, 5x weekly for 30 minutes and additional 30 minutes in the afternoon 4x weekly. The curriculum should be in place by 3/8/14.

85. Student’s mother signed her consent to the modification on February 28, 2014, and sent it to the Temecula staff on March 5, 2014. Temecula received the RAVE-O program materials on March 7, 2014.

86. The RAVE-O program was supposed to be implemented by Student’s special education teacher Ms. Dean. Ms. Dean has a degree in psychology and had worked as an instructional assistant for Temecula for approximately nine years. At the

time she began instructing Student, she was working as a special education resource teacher through an internship program that would lead to her credential. Her mentor teacher was Christine Check. Ms. Dean did not attend a formal training to learn how to use RAVE-O. Instead, she read the manual. In her opinion, reading the manual was sufficient to explain what was necessary to implement the program.

87. The RAVE-O services did not begin on March 8, 2014, as called for in the IEP. Ms. Dean did not begin using RAVE-O with Student until approximately April, after the school staff returned from Spring break. Even after that time, Temecula never provided Student with the full RAVE-O services required by his IEP.

88. Ms. Dean did not believe the RAVE-O program was appropriate for Student. She felt that Student needed a more systematic approach to reading that would help Student with his missing phonics sounds. For about the first week and a half, Ms. Dean provided Student with RAVE-O instruction daily in the mornings. After that, until the end of the school year, she used the RAVE-O program with Student only two days a week. Instead, she split the morning reading instruction between RAVE-O, systematic phonics and sight words. Ms. Dean never provided Student with the afternoon RAVE-O services called for in the IEP. Ms. Dean opined that, despite her failure to fully implement the RAVE-O program, Student gained educational benefit during the second half of his first grade year. The evidence supported her opinion that Student made progress during that time.

89. During an IEP team meeting in May 2014, Student's mother asked about Student's progress with the RAVE-O program. Ms. Dean told the IEP team that RAVE-O was not the correct program to remediate Student's reading deficits. However, Student's parents did not consent to the removal of RAVE-O from Student's IEP.

90. Temecula did not implement the RAVE-O program during the first week of Student's second grade year, up to the date of filing the instant case on August 19, 2014.⁶

Occupational Therapy Assessment

91. Student contends that Temecula denied Student a FAPE because Temecula did not properly assess Student's occupational therapy needs during kindergarten and the beginning of his first grade year. Temecula contends that no occupational therapy assessment was necessary until it was offered on February 7, 2014.

92. On February 7, 2014, Temecula prepared an assessment plan in the area of occupational therapy. Student's parents agreed to the assessment on February 8, 2014. Occupational therapist Lindsey Gump assessed Student pursuant to that assessment plan. Ms. Gump graduated from the University of Southern California, Los Angeles, magna cum laude, in 2004, with a bachelor of science degree in occupational therapy and a bachelor of arts in psychology. She has worked as an occupational therapist since that time. She has conducted numerous occupational therapy assessments of pupils.

93. As part of Ms. Gump's assessment she reviewed records, conducted testing and interviewed Student's mother and teachers. Student did not contest the appropriateness of Ms. Gump's assessment.

94. Ms. Gump found that Student had deficits in writing, including problems with spacing between words, poor orientation to baseline and poor letter formation, difficulty copying words accurately, reversal of letters and numbers, as well as needs in

⁶ Whether the RAVE-O program was properly implemented after August 19, 2014, is not at issue in this case, and no findings are made herein in that regard.

sensory processing. As a result of her assessment, she recommended that Student be provided with occupational therapy services.

95. Student's IEP team proposed to add five 30-minute sessions of occupational therapy until Student's next annual IEP, and recommended 30-minute sessions 25 times a year thereafter. On May 20, 2014, Student's mother signed her consent to the addition of the occupational therapy services.

96. Student contends that the same writing deficits that led Ms. Gump to recommend that Student receive occupational therapy services during her assessment in April 2014 also existed during Student's kindergarten year. Student believes that these deficits should have led Temecula to assess Student for occupational therapy much earlier.

97. Student brought in no expert testimony to support this contention. Ms. Gump did not testify that Temecula should have assessed Student during his kindergarten year. She testified that she was not familiar with Student's situation in his kindergarten year. None of Student's other witnesses, including the two witnesses from Big Springs who testified on Student's behalf, was an occupational therapist.

98. Temecula's expert witness Alyson White supported its position that no occupational therapy assessment was necessary during Student's kindergarten year. Ms. White has a bachelor's degree in occupational therapy and has worked as an occupational therapist for approximately 17 years. She began providing occupational therapy services to Student after his IEP team added those services. She acknowledged that Student had deficits in writing, but she explained that writing is a skill learned in kindergarten. In her opinion, it was not necessary for Temecula to assess Student for occupational therapy during his kindergarten year. She felt that, if a kindergarten pupil had problems with writing, the first step would be to make the child eligible for special education to see if the special education supports would assist the child.

99. The evidence supports Temecula on this issue. Just because certain deficits led a school district to assess a child in the second semester of first grade does not mean that the same deficits would have warranted an assessment in kindergarten, particularly since kindergarten is such a developmental year. Certainly Student exhibited deficits in writing and task avoidance related to writing, but without an occupational therapist or other qualified expert, Student has not demonstrated that those deficits should have led Temecula to suspect that Student had a disability that would require occupational therapy services during his kindergarten year.

100. Student also failed to bring in expert testimony to show that he required an occupational therapy assessment at the start of his first grade year. Ms. Morgan testified that Student's low-average score on the visual-motor integration test during his psychoeducational assessment did not demonstrate a need for an occupational therapy assessment at that time.

101. Ms. White, Ms. Morgan and Ms. Dugger all opined that, once an IEP was in place in October 2013, the special education teacher should be given time to see if Student's writing deficits could be addressed through specialized academic instruction with the additional support the IEP provided before further occupational therapy assessment should be considered. In Ms. White's opinion, the special education teacher needed at least four to six weeks to see if the IEP interventions would help Student make progress on his writing goals with the additional supports.

102. Because Student's IEP was signed at the beginning of October 2013, the four to six week trial period would have ended in approximately November or December 2013. The parties dispute what, if anything, Temecula should have done between that time and February 7, 2014, when the occupational therapy assessment was offered. Student's mother believed that Temecula should have assessed Student in the

area of occupational therapy much earlier and explained that occupational therapy concerns had been part of the IEP process for Student from the beginning.

103. Student relies on Ms. White's testimony to argue that an assessment should have been offered sooner. Student is correct that, at one point, Ms. White testified that Temecula should have assessed Student prior to February 2014. However, Ms. White quickly backed away from that testimony. She subsequently testified that, if Student was making progress after the IEP went into effect, an occupational therapy assessment would not be necessary after that four to six week trial period.

104. Temecula brought in evidence to show that Student made progress in writing during that time period. Ms. Dean testified that Student made progress in writing during his first grade year and that it was not necessary to refer him for an occupational therapy assessment. A progress report on Student's IEP goals supported Ms. Dean's testimony. It showed that, as of January 16, 2014, Student had made progress on his writing goals. Student did not bring in sufficient evidence to counter Ms. Dean's opinion regarding Student's progress.

105. In addition to Ms. White's ambiguous testimony, Student contends that Temecula should have been on notice that Student required an occupational therapy assessment based on Student's ongoing writing difficulties and the fact that Student's parents requested an independent occupational therapy assessment. Student's parents also requested occupational therapy services for Student in the "exceptions" they filed to the initial IEP. Student is correct that Student had and continued to have difficulties with writing. At no time during his first grade year was he ever at grade level in writing.

106. However, Student was making progress in writing after his IEP was put in place, so it made sense that Temecula would wait before assessing him. The evidence on this issue is very close, particularly in light of Ms. White's ambiguous testimony and Student's ongoing difficulties with writing, but the weight of the evidence supports

Temecula's position that it did not have reason to suspect that Student might need an occupational therapy assessment in addition to the psychoeducational assessment. The specialized academic instruction in writing called for in the IEP was working and Student had started progressing in writing. Temecula had already agreed to fund an independent educational evaluation by Dr. Perlman. As soon as that evaluation was finished, Temecula offered an occupational therapy assessment.

VISION ASSESSMENT

107. As set forth in the Factual Findings above, Dr. Pearlman's report found that Student had deficits which could be related to vision issues and recommended further assessment by a developmental optometrist. Student's parents then requested a developmental vision assessment. On February 27, 2014, Temecula prepared an assessment plan for a developmental vision assessment of Student. Student's mother signed her consent to that plan the following day. Student contends that Temecula should have assessed him sooner in the area of vision. The evidence did not support Student's contention.

108. Prior to Dr. Pearlman's independent evaluation, Temecula did not have sufficient information to suspect that Student had deficits related to vision that required further assessment. Student passed the vision screening tests conducted by Nurse Dillon, and Student's parents had never alerted Temecula to possible vision issues for Student. On the Developmental, Health, Behavioral and School History form that Student's parents completed on June 11, 2013, they reported that Student had no vision problems. In the "exceptions" that Student's parents wrote to the IEP, they stated, "parents are not aware of vision being an area needing assessed at this time [sic]. Please advise."

109. When Ms. Morgan conducted her psychoeducational assessment, she determined that Student's low average score on the visual-motor integration test

indicated that Student might have some difficulty with that area, although his score was within the acceptable range. During the hearing, she explained that she attributed the low score to Student's problems with distractibility, because that was what she saw during her assessment. Based on her assessment, she believed there was no need to refer Student for further vision assessment at that time.

110. Christina Danley, O.D., conducted the visual information processing evaluation of Student in June 2014. Dr. Danley found that Student had deficits in several areas related to vision. She recommended modifications to his learning environment and opined that optometric vision therapy would help Student to overcome these deficits. In Student's due process hearing request, Student did not take issue with either Dr. Danley's assessment or any vision therapy Student may have received. Dr. Danley did not testify at the hearing, nor did Student call any other expert in the area of vision to testify that Temecula should have assessed Student earlier. Student did not bring in sufficient evidence to support his contention that Temecula failed to timely assess his vision.

ASSISTIVE TECHNOLOGY ASSESSMENT

111. Student contends that Temecula denied Student a FAPE by failing to assess Student in the area of assistive technology during the times at issue in this case. However, Student provided no evidence to show that an assistive technology assessment was necessary for Student at any of the times in dispute herein. Christine Check, a teacher on special assignment with Temecula, testified unequivocally that Student did not need a formal assistive technology assessment. Ms. Check has been a teacher in Temecula for over 20 years, with 15 years as a special education teacher. She has received training in assistive technology through various classes and has experience determining if an assistive technology evaluation should be made.

112. Ms. Check described Student as a fairly typical learning disabled child. She explained that many assistive technology supports were embedded in his classrooms. His IEP offered him assistive technology supports, such as the use of the triangular pencil to assist with his writing.

113. In December 2014, when Student was in the second grade, Ms. White conducted an observation of Student's handwriting skills versus his keyboarding skills. That report was generated after the time in dispute in the instant case so it is not directly relevant to what Temecula knew during Student's kindergarten and first grade years, but even if the report was relevant, there was nothing in that report or Ms. White's testimony to indicate that Student required an assistive technology assessment prior to August 19, 2014.

114. Student brought in no expert testimony to refute the opinions of Ms. Check or Ms. White. Student failed to bring in sufficient evidence to show that Temecula should have assessed Student's assistive technology needs beyond the assessments that were done as part of Student's initial psychoeducational assessment, Dr. Perlman's independent evaluation, and the informal assessments done in the classroom.

115. Further, Student did not bring in evidence to show that Student's parents made a formal, written request for an assistive technology assessment during the times at issue in this case. In Student's written closing argument, Student relies upon a comment made by Student's parents in their "exceptions" to the IEP, in which they asked for clarification of the IEP language regarding assistive technology. The comment did not request an assistive technology assessment, but instead objected to the use of language such as "he may, or he would benefit" and requested specificity of language so Student's parents would have a clear understanding of Student's needs regarding assistive technology and what services would be provided. The notes to the February 7, 2014 IEP meeting indicate that the IEP team addressed Student's parents' concern by

changing the wording in the assistive technology portion of the IEP from “may benefit” to “benefits from.”

116. Student also relies on a cryptic series of emails that were entered into evidence on the last day of the hearing, after the witnesses were done testifying. The emails talk about an assistive technology assessment, among other things. In Student’s written closing argument, Student contends that these emails prove that an assistive technology assessment was agreed to by Student’s parents but never performed by Temecula. However, the email chain is confusing and does not correspond to the facts presented in the case. The emails discuss an educationally related mental health assessment and request “not to have a specific School Psychologist perform the assessment.” Neither of these topics appears to apply to Student. Without testimony to explain the meaning and context of the email messages, it is not possible to make any sort of finding regarding their significance. For example, the email chain might relate, in whole or in part, to one of Student’s siblings.

117. Student had the burden to show that Temecula should have performed a formal assistive technology assessment of Student in addition to the psychoeducational assessment and independent educational evaluation. Student failed to meet that burden.

STUDENT’S SECOND GRADE YEAR – THE 2014-2015 SCHOOL YEAR

118. Student’s second grade school year began on August 13, 2014. Student was still in second grade at the time of the due process hearing in February 2015.

119. On August 14, 2014, Student’s parents gave written notice to Temecula that they were placing Student in Big Springs Educational Therapy Center and School for two hours a day, five days a week (40 hours a month), along with 10 hours monthly of design and planning supervision. Student’s program would be a blended program, in which Student attended public school until 1:00 p.m. each day and would then be

transported to Big Springs where Student would receive “educationally based, intensive behavior intervention.” Student’s parents requested that Temecula pay for the Big Springs services.

120. On August 15, 2014, Temecula sent Student’s parents a letter denying their request that Temecula fund the Big Springs services.

121. On August 19, 2014, Student filed the instant case, alleging that Temecula denied Student a FAPE.⁷

IEP AND AMENDMENTS AND STUDENT’S UNIQUE NEEDS

122. Student contends that Student’s IEP and its various amendments failed to address Student’s academic regression, occupational therapy needs, behavior, academic anxieties, and harassment by peers. However, Student failed to bring in sufficient evidence to show that the IEP and its amendments did not adequately address each of these areas.

Academic Regression

123. Student’s mother expressed concern because the IEP team did not discuss how to remediate Student’s academic regression during the meetings. However, Temecula’s witnesses consistently testified that the goals, specialized academic instruction and services contained in the initial IEP and the later amendments were intended to address Student’s academic regression. Student presented no expert testimony to counter their opinions or to show that the instruction and services in the

⁷ Events which occurred after the date of filing are relevant to this case only insofar as they relate to Student’s proposed remedies. Factual Findings will be made regarding those events in the remedies section below.

IEP and amendments were not reasonably calculated to enable Student to gain meaningful educational benefit.

124. After the initial IEP was signed in October 2013, Student began to make slow but steady progress throughout first grade. For example, by the end of first grade, he made a year's worth of growth in reading. He started first grade at below the Diagnostic Reading Assessment (DRA) level one and rose to approximately DRA level six by the end of the year, which constitutes a year's worth of growth. He also made progress in math and writing.

125. Student contends that he regressed between the end of his first grade year and the start of his second grade year, because he had slipped back to DRA level four by the time summer vacation ended. Student also tested lower in certain aspects of reading at the start of his second grade year than he did in the latter part of his first grade year (such as consonant blends with short sounds, r-controlled vowels, and inflection endings). Student also relies upon testing done by Big Springs near the start of Student's second grade year that found that Student did not exhibit some of the skills he had acquired the previous year.

126. However, these facts do not prove either that Student regressed or that his IEP and amendments were not reasonably calculated to address regression. Student's first and second grade teachers described a phenomenon called the "summer slide" in which pupils test slightly lower after a long summer break from school. This "summer slide" is common among pupils after the summer vacation. Student began to make progress once school started in second grade and has continued to progress since then.

127. Student also relied on writing samples to argue that Student had not progressed in writing. There was a dispute among the witnesses regarding one of these samples – a very nicely written paper from Student's second grade year. Temecula's witnesses stated that Student was capable of that quality of work, while Student's

mother and the Big Springs witnesses believed that the teacher had written the sample, not Student.

128. The more persuasive evidence supports Temecula. The Big Springs witnesses were not as familiar with Student's writing ability as Temecula's teachers. Big Springs avoided working on writing tasks with Student, because the staff believed that writing was a behavioral trigger for him. For that reason, their testimony about his writing ability is of less persuasive value than the Temecula teachers who worked with him on writing every day.

129. More importantly, even if Student is correct that one particular writing sample was not a realistic example of Student's current writing ability, it does not prove Student made no progress in writing during his first grade year. Temecula did not rely on that second grade writing sample to prove its case, but instead relied on the testimony of Student's teachers that Student made progress in writing in the first grade.⁸ Ms. White, the occupational therapist, also testified to the progress Student made. A comparison of Student's kindergarten writing samples and his second grade writing samples (even the ones that Student conceded he wrote) shows an improvement in his writing.

130. The evidence showed that Student's initial IEP was reasonably calculated to address his kindergarten regression through specialized academic instruction and goals. Student began to make slow but steady progress after that IEP went into effect. By the end of Student's first grade year, he had gained an entire grade level in reading and his other skills had improved. Student presented no persuasive evidence that he

⁸ In fact, it was Student, not Temecula, who produced that particular second grade writing sample at hearing.

regressed academically after the start of his first grade year, except the typical regression during the “summer slide” between his first and second grade years.

131. In Student’s written closing argument, Student makes one additional argument as to why the IEPs did not properly address regression. Student contends that Temecula’s failure to “timely revise the IEP upon determining that the [RAVE-O] program was not appropriate for [Student] constituted a denial of FAPE....” However, the evidence at hearing showed that the Temecula IEP team members attempted to remove the RAVE-O program from the IEP after they determined it was inappropriate, but Student’s mother would not agree to remove it from the IEP. Student, not Temecula, was responsible for the continued use of that methodology.

Occupational Therapy Needs

132. Student also failed to bring in expert testimony to show that Temecula denied Student a FAPE by failing to provide occupational therapy services to Student prior to Ms. Gump’s assessment.

133. At the time Student’s initial IEP was signed in October 2013, it was objectively reasonable for Temecula to believe that the specialized academic instruction would be sufficient to address Student’s needs in the area of writing and would assist with his behaviors that caused him to avoid writing. Student’s IEP contained goals related to writing, and 30 minutes per day of Student’s specialized academic instruction was specifically dedicated to writing. Student brought in no expert testimony or other persuasive evidence to show that the various IEP offers and amendments were inadequate to address Student’s needs.

134. After Student’s parents agreed to Student’s initial IEP, Student began to make progress on his writing goals. The Big Springs witnesses contested whether Student had made as much progress in writing as Temecula contended, but it was clear that he made meaningful progress.

Student's Behavior

135. Student contends that Temecula's initial IEP and amendments were not reasonably calculated to provide Student with educational benefit in the area of behavior. The evidence did not support Student's contention.

136. The supports and services put into the initial IEP to address Student's behavior included extra adult support through a classroom aide, having Student seated closer to the teacher, utilizing break and bathroom tickets, and a token economy (in which Student received either intrinsic or tangible rewards for appropriate behavior). To address Student's inattentiveness, the IEP also included a sensory lab. The IEP contained goals in the area of behavior, including goals related to staying on task and dealing with frustration.

137. In Ms. Morgan's opinion, those supports were appropriate to address Student's behavioral needs. She believed the IEP team members understood the reason for Student's behaviors – his difficulty with writing tasks – and she wanted to see how the IEP interventions were working before conducting a functional behavior assessment. Ms. Dugger also opined that the various behavioral supports in the IEP were appropriate to address Student's needs. Student's first grade teacher confirmed that the IEP supports, including the classroom aide, were sufficient to enable her to manage Student's behaviors in his general education classroom, so there was no need to add additional IEP supports or services to address behavior.

138. Student's first grade general education teacher and Ms. Dean both established that Student's behavior improved over the course of his first grade year. Nothing in Mr. Romero's functional behavior assessment or his testimony indicated that Student's IEP services and supports in his first grade year were inadequate to address his behavior. To the contrary, Mr. Romero found only mild behavior issues and saw no need for a formal behavior support plan for Student.

139. While Student's behavior at the beginning of the first grade year included hiding under his desk and crying, by the time of Mr. Romero's functional behavior assessment in May 2014, Student's problem behaviors mostly consisted of things such as getting out of his seat, inattentiveness, and task avoidance. Student's first grade teacher reported that, as the year progressed, Student began to maintain focus and stay on task more, to follow directions more, and to enjoy school.

140. Student relies upon his mother and two witnesses – Jennifer O'Malley and Amberlyn Frey – to challenge the appropriateness of the IEP behavioral supports and services.

141. Student's mother did not believe the supports and services in the IEP were sufficient to address Student's behavior. She felt that Student's anxiety continued into first grade, particularly after he saw his kindergarten teacher again. Student's mother was concerned that the behavioral interventions conducted by the different Temecula staff members were inconsistent. She also believed that the teachers and staff were not holding Student to task. She felt that Student engaged in task avoidance and delaying tactics so he would not have to complete non-preferred activities.

142. Student's first expert regarding behavior was Jennifer O'Malley, a licensed educational psychologist at Big Springs. She received her bachelor's degree in psychology from Concordia University in 2006, her master's degree in educational psychology from Azusa Pacific University in 2010, and was licensed by the state as an educational psychologist in 2012. She has worked for Big Springs in various capacities since approximately 2008 and is the daughter of Leslie Huscher, the owner and director of Big Springs. Big Springs began providing behavioral therapy to Student in August 2014.

143. On April 24, 2014, Ms. O'Malley conducted an observation of Student in his first grade program at the public school. Based, in part, on that observation, she was

critical of Temecula's program for Student. She did not believe Temecula was holding Student to task. She opined that, once Student is held to task, his behaviors escalate and he requires individual, intensive behavioral therapy to address those problem behaviors. Big Springs has been providing that type of therapy to Student since August 2014, at the start of his second grade year. In Ms. O'Malley's opinion, without that behavioral therapy, Student's behaviors may regress.

144. Ms. Frey, Student's second behavioral expert, is a Clinical Manager for the Center for Autism and Related Disorders, a company that provides autism assessment and services for children. Ms. Frey holds a bachelor's degree in psychology and a master's degree in human behavior, and is a Board Certified Behavior Analyst. She has performed behavioral assessments and prepared hundreds of behavior intervention plans.

145. Ms. Frey was contracted by Temecula to perform the independent functional behavior assessment of Student in approximately October 2014, during Student's second grade year. As a result of that assessment, Ms. Frey criticized Temecula for being inconsistent with its behavioral interventions. She felt that positive behavior interventions were not being reinforced consistently across all of Student's school activities. In her opinion, Temecula was not appropriately addressing Student's behaviors. She believes that Student needs to continue with behavioral therapy from Big Springs or his behaviors may get worse.

146. Neither the testimony of Ms. O'Malley nor Ms. Frey was sufficient to show that Temecula's IEP failed to properly address Student's behavioral needs. To the contrary, both of their observations demonstrated the ongoing improvement in Student's behavior.

147. Ms. O'Malley reported very few behavioral problems during her public school observation. She noted that when Student was off task or out of his seat, he was

easily prompted back to task. She found that he needed a lot of attention and liked one-to-one support, but she did not report any crying, tantrums, hiding under his desk or the other behaviors Student had exhibited during kindergarten and the start of first grade.

148. Likewise, during Ms. Frey's observation of Student during his second grade year, she observed occasions in which Student called to gain the teacher's attention without raising his hand, a few times when he was out of his seat and had to be directed back, some non-compliant behavior (such as running when an aide told him to walk) and inappropriate horseplay with another pupil in which Student put his hands around the other pupil's neck. Once again, this was much better than the serious behavior Student exhibited in kindergarten and at the start of his first grade year.

149. Ms. O'Malley's opinion that Student requires ongoing behavioral therapy appears to be based, at least in part, on the serious behaviors Student has exhibited during his therapy at Big Springs, including threatening aggression toward staff, self-injurious behavior, hitting his head, crying, threatening to elope, and name calling. Ms. O'Malley believes that this behavior began at Big Springs when the staff there began holding him to task. She testified that Big Springs is willing to hold Student to a task, even if it takes the entire two-hour therapy session to obtain compliance.

150. Ms. O'Malley did not see any of those severe behaviors by Student during her observation at the public school. In her opinion, if Student was not exhibiting the same severe behaviors at school, it would indicate to her that he is not being held to task at the public school.

151. Her opinion in this regard was contradicted by both the Temecula teachers and the progress Student made in first grade. The Temecula teachers were skillfully and swiftly able to redirect Student back to task on most occasions. They used a variety of techniques, including a classroom reward systems, breaks, and aide support, to obtain

behavioral compliance. Student made an entire year's worth of progress in reading during first grade. Even Ms. Huscher, the owner and director of Big Springs, who is a credentialed teacher, acknowledged that a year's worth of growth would be meaningful progress for Student. When Ms. Frey observed Student in public school during his second grade year, she did not witness any extreme behaviors, even when Student was held to task by school district personnel.

152. Ms. Frey's testimony failed to show that Temecula denied Student a FAPE. In the first place, her assessment was conducted during Student's second grade year so her report was not available to the IEP team at the times at issue in the instant case. Secondly, her opinion was based on extinguishing Student's remaining problem behaviors, not whether he needed the behavioral services to access his education and make progress. She felt he needed to continue the behavioral therapy even if he was making progress in his public school setting.

153. Ms. Frey is correct that the various instructors in Student's second grade year use different types of behavioral incentives (such as stars or stamps). It also appears that different behavioral incentives may have been used during his first grade year. However, that alone did not make Student's IEP services improper. Student's teachers' testimony indicated that he responded well to those incentives. The Big Springs witnesses testified that Student requires tangible reinforcement, but in his current public school special education class, his reinforcement relies upon on intrinsic motivators.

154. Student failed to bring in sufficient evidence to show that Student required intensive behavioral therapy as part of his IEP. The Temecula witnesses were persuasive that Student's IEP was reasonably calculated to address Student's behavioral needs. The behavioral interventions in Student's IEP and amendments were successful for him and his behavior gradually improved over his first grade year, so it was not

necessary for the IEP team to add behavioral therapy or similar services to Student's educational program.

Academic Anxiety

155. Student did not call any expert witnesses to confirm that Student suffered from academic anxiety that required mental health counseling as part of Student's IEP. Student's mother testified to the severe anxiety Student exhibited during his kindergarten year, but that anxiety appeared to focus around the kindergarten teacher more than academics in general. Temecula addressed her concerns by moving Student to Ms. Dugger's classroom.

156. The Temecula witnesses acknowledged that Student exhibited resistance to writing, but they did not see the level of anxiety reported by Student's mother. Even Ms. Huscher described Student's task avoidance as based more on resistance than anxiety. In her opinion, the more severe behaviors Student exhibited at Big Springs, such as melt-downs and self-injurious behaviors, occurred when he wanted attention, was corrected, or was seeking to get off task from a non-preferred activity. Ms. O'Malley testified that Student had anxiety, but she indicated that his significant behaviors at Big Springs happened when they held him to task.

157. Student's IEP addressed any anxiety Student might have by providing specialized academic instruction, aide support, and goals to assist Student with writing tasks. For example, Steve Israel, a program specialist for Temecula who attended two of Student's September 2013 IEP team meetings, opined that one of the ways the IEP addressed possible anxiety was by providing instruction in a small group setting. Ms. Dugger, who worked with Student in both his kindergarten and first grade years, did not believe that Student's behaviors or anxiety were at the level that would require counseling.

158. After the initial IEP supports were put in place, Student's behaviors began to improve, so there was no need to amend the IEP to add counseling services. Student's first grade teacher testified that Student gradually started feeling good about himself, starting becoming successful, and began to enjoy school. He still did not enjoy writing tasks, but he did them anyway. Dr. Perlman's report acknowledged that Student's first grade year was better for him from an emotional point of view than kindergarten. Once the IEP services were in place, his behavior began to improve, so there was no need for the IEP team to modify his IEP to add additional services related to anxiety.

159. Student did not bring in sufficient evidence to show that Student needed mental health counseling or other services to address anxiety beyond those offered in his IEP and amendments. Student's mother was a sincere and credible witness. There is no question that Student's parents care deeply about their son and were very concerned about his emotional well-being during his time in kindergarten. They even obtained private mental health therapy services for Student as a result of his kindergarten experience. However, Student's mother is not a psychologist or psychiatrist, and her testimony is not sufficient to show that the IEP services were inappropriate.

Prevention of Harassment by Peers

160. The parties dispute whether Student suffered any harassment by his peers. Student contends that he suffered harassment and that his IEP did not properly address that harassment. Temecula denies Student suffered harassment and contends that Student had no problems with social skills at school.

161. The main evidence regarding peer harassment came from the testimony of Student's mother. She reported that the children in Student's kindergarten class would call Student names such as "crazy" or "uncool," and Student would act out based on that. According to Student's mother, the other children would refuse to let Student play

with them, and Student was not invited to birthday parties or play dates with his peers. Student's mother testified that, throughout Student's kindergarten year, she witnessed incidents where other pupils made fun of Student.

162. Student's parents eventually sought professional help for Student outside of the school environment. Student saw a psychiatrist who diagnosed him with acute anxiety and post-traumatic stress disorder-like symptoms due to his kindergarten experience.

163. Student's mother believed that Student's feelings of academic inadequacy and lack of friends continued into his first grade year. She did not believe his IEP contained sufficient services to address those things. She reported that by first grade Student did not know how to relate to his peers any more – he was either too aggressive or he would be intolerant and the peers would be aggressive towards him. At first, his parents felt that his problems were just a carry-over from kindergarten, but gradually they realized that Student had real social deficits.

164. Aside from the testimony of Student's mother, the only other testimony regarding peer harassment came second-hand, based on things told to others by Student or his mother. For example, Ms. Huscher and Ms. O'Malley testified regarding peer bullying based on what Student told people, not based on any first-hand knowledge or observation. Neither Ms. O'Malley nor Ms. Frey noted any harassment of Student by his peers during their public school observations. When Temecula later investigated allegations of peer harassment, the investigator found no evidence of harassment of Student by his peers.

165. According to Temecula's witnesses, the main concerns reported by Student's mother were about bullying by the kindergarten teacher, not by peers. None of Student's teachers observed peer harassment or bullying. To the contrary, they all described Student as a boy who got along well with his peers. When Student was in the

social skills group, Ms. Juhl determined that Student had no social skills problems and did not need to continue attending the group. Student's first grade general education teacher stated that the other children in the class wanted to work with Student, and Student had friends he played with at recess. Student's current special education teacher described him as having friends at school. She reported that, when given free choice, peers ask to play with him.

166. Student brought in no persuasive expert testimony to show that Temecula's IEP and IEP amendments failed to contain proper services to address peer harassment. Ms. Huscher testified that Student was egocentric and in need of social skills. However, her opinion was based on Student's time at Big Springs. Big Springs is a school which serves high functioning autistic pupils, so Student is not playing with typical peers in that environment. For example, Ms. Huscher testified that it was difficult for Student to engage in reciprocal play, because he is on the autism spectrum, but Student exhibited no problems with reciprocal play during his first or second grade years at public school with typical children. When Ms. Frey observed Student at school, she saw him playing with a typical peer. Although she felt that Student was very directive with his peer, she did not opine that he was unable to engage in reciprocal play.

167. Nothing in the testimony of Ms. Frey or the Big Springs witnesses was sufficient to show that Temecula denied Student a FAPE by failing to properly address harassment by peers in Student's IEP. Instead, the Temecula witnesses were persuasive in their testimony that Student was a social child who played with his typical peers. There was no denial of FAPE in this regard.

REMEDIES

168. Big Springs has a nonpublic school that is certified by the State of California. Student's parents attempted to enroll Student in that nonpublic school

program. However, after assessing Student, Big Springs determined that Student was not behaviorally or academically ready to attend Big Springs nonpublic school, and recommended intensive behavior intervention services instead.

169. Student began receiving intensive behavior therapy from Big Springs in approximately August 2014, near the start of his second grade year. Big Springs is not state certified as a nonpublic agency to provide those behavior services, and Student's parents have been paying privately for the services.

170. At first, Student left his second grade, public school program at 1:00 p.m. each day to attend Big Springs. He received 10 hours a week of intensive, one-to-one therapy, which included behavioral training and academic instruction. At a certain point during his second grade year, Student began to attend a full day of school and to participate in the Big Springs program after school.

171. Big Springs now believes that Student is capable of attending the Big Springs nonpublic school. As a remedy in the instant case, Student's parents have requested that Student be placed at the Big Springs nonpublic school. If that remedy is not awarded, they would like Student to continue with his after school therapy services through Big Springs. Both the Big Springs witnesses and Ms. Frey testified that Student needs to continue his behavioral services at Big Springs.

172. The Big Springs nonpublic school consists of one classroom with up to 12 pupils. The pupils are all on the autism spectrum; Student would have no typical peers in the class. If Student were to attend that school, there would only be one other second-grader in his class.

173. Student's second grade general education teacher does not believe that Big Springs would be a good placement for Student. She testified to the substantial progress that Student has made since he began the second grade. Student's second grade teacher is highly experienced, with more than 20 years teaching for Temecula.

174. When Student started in the second grade, he was at DRA level four. By the time of the hearing in February 2014, he had advanced to level 12, with an instructional level of 14. Second grade DRA levels go from 18 to 28, so Student is gradually catching up to his grade level. At the start of the year, Student would shut down and refuse to read when he came to a reading passage that was difficult for him. By the time of the hearing, he was starting to use his knowledge of phonics and other strategies to decode words more independently. He was also showing more writing ability and willingness to write, and improving in his math skills.

175. Student has also made progress in behavior. Student's second grade general education teacher has observed Student having off-task behavior and inattention, but she has never seen him climb under a desk. She did observe instances of refusal behavior, but they were near the beginning of the school year as he adjusted to the new class. She described Student as smart, articulate, kind, and very eager to learn.

176. Student's current special education teacher reported similar improvements in his academics, willingness to comply and behaviors. She recalled only two incidents since the beginning of the year when Student was resistant to redirection and one time where he crawled under a desk near the beginning of the year. She described him as generally compliant, not distracting to his peers, and making progress in her class. Since the beginning of the school year, he has been able to work more independently and to follow directions.

177. Student's second grade general education teacher opined that Student does not need intensive behavior services at the present time. She felt that Student is showing significant progress with the behavioral systems in place. She explained that Ms. Frey recommended that Student get more frequent rewards, but the teacher thought that was a bad idea. Because Student was cooperative with only minimal

rewards, giving him frequent rewards would be taking a step backwards. She reported that Student had close friends in her class, and benefitted from his time with typical peers. He was able to model the behavior of his typical peers, took part in class discussions and enjoyed his social interactions with his peers. The teacher described strategies she uses to address those occasions on which Student exhibits task avoidance. For example, she has found that offering Student a choice within the framework of the task has worked well.

178. Big Springs charges \$3,000 a month for Student's behavioral therapy services and supervision. Big Springs began billing Student's parents for those services in August 2014. As of the time of the hearing, Student's parents had paid \$9,000 for those services out of the \$21,000 that they owe. Although Student's parents have not yet paid the full amount, they will be required to pay the full amount.

179. In addition, Student's parents seek \$1,165.25 for their mileage driving Student to and from Big Springs. That amount is based on two round trips a day, at 6.12 miles one-way and 56 cents per mile. Student's home is just over six miles from the Big Springs school he attends.

180. Student's parents also paid \$528 to Big Springs for the initial Big Springs assessment.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁹

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to

⁹ Unless otherwise indicated, the legal citations in this introduction are incorporated by reference into the analysis of each issue decided below.

implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq. (2006); Ed. Code, § 56000, et seq.; and 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 to 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); 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 (2006).) "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 (2006); Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, and which sets forth the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access

to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "'meaningful' educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents or local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; 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).) Subject to limited exceptions, a request for a due process hearing must 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. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, sub. (l).) At the hearing,

the party filing the complaint, in this case Student, has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

CHILD FIND OBLIGATIONS

5. The parties dispute whether Temecula should have suspected that Student was a child with a disability prior to January 28, 2013. Student contends that Temecula should have suspected that Student was a child with a disability based on Student's problems with behavior in his preschool class and in kindergarten, his academic deficits, his family history of autism, and his deteriorating emotional issues. Student believes that Temecula denied Student a FAPE because Temecula did not assess Student at that time to see if he was eligible for special education.

6. Temecula, on the other hand, contends that there was insufficient information during Student's kindergarten year to lead the school staff to suspect that Student was a child with a disability. Temecula relied on the expert opinions of Student's kindergarten teacher and school psychologist Jill Toth to support its position.

7. A school district is required to "actively and systematically" seek out all children with exceptional needs who reside within the district. (Ed. Code, § 56300.) All children with disabilities who are in need of special education and related services shall be "identified, located, and assessed...." (Ed. Code, § 56301, subd. (a).) A district is also responsible for "the planning of an instructional program to meet the assessed needs." (Ed. Code, § 56302.) These duties are often described as a district's "child find" obligations.

8. A pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) A pupil shall not "be determined to be

an individual with exceptional needs” if the pupil does not otherwise meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2)(D).)

9. However, if a parent submits a written request for an assessment to see if his or her child qualifies for special education, California law requires a school district to conduct that assessment. (Cal. Code Regs., tit. 5, § 3021.) The school district must provide the child’s parent with a proposed assessment plan within 15 days of the referral for assessment, not counting days such as school vacations. (Ed. Code, § 56321, subd. (a).) Once the parent signs his or her consent to the assessment, the school district is required to complete the assessment and hold an IEP meeting to review the assessment within 60 days of receiving parental consent. (Ed. Code, § 56302.1, subd. (a).)

10. In the instant case, both parties discussed the case of *Department of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190 (*Cari Rae*) which addresses the standard for when a school district has reason to assess a child. That case sets a fairly low threshold for when an assessment should occur. Under that holding, the child-find duty is triggered when the school district “has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.” (*Id.* at p. 1194.)¹⁰

11. Temecula argues that OAH should disregard the holding of *Cari Rae* and instead look to the child-find thresholds set by the courts in other circuits. There is no need to do so. Even using the standard of *Cari Rae*, Student failed to meet his burden to show that Temecula should have suspected that Student was a child with a disability

¹⁰ In a footnote in an unpublished decision, the Ninth Circuit Court of Appeals recently noted that it has not yet articulated a test for determining when the child find obligation is triggered. (*G.M. ex. rel. G.M. v. Saddleback Valley Unified Sch. Dist.* (9th Cir. 2014) 583 Fed.Appx. 702, 703, fn. 1.)

who might need special education prior to January 28, 2013. Temecula's witnesses persuasively testified that the beginning of kindergarten is a developmental time for children, in which pupils develop at their own pace. Temecula had no reason to suspect that Student had a disability at that time. Student brought in no expert testimony to dispute their opinions.

12. For the time period on and after January 28, 2013, Temecula had a duty to assess based on the written assessment request made by Student's mother. For this reason, there is no need to consider whether Temecula would have had a concurrent duty to assess under the *Cari Rae* standard. Temecula violated its child find duty when it did not act upon the assessment request in a timely manner. That violation continued until Temecula finally provided Student's mother with a proposed assessment plan in June 2013, near the end of Student's kindergarten school year.

13. Temecula's failure to timely assess Student is a procedural violation of special education law, requiring analysis of the factors of Education Code section 56505, subdivision (f)(2), to see if that procedural violation resulted in a substantive denial of FAPE.

14. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (a) Impeded the child's right to a free appropriate public education;
- (b) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (c) Caused a deprivation of educational benefits.

15. In the instant case, because of Temecula's failure to assess, Student did not receive special education supports until his first grade year. The evidence showed that Student had regressed by the end of kindergarten, both behaviorally and academically. After he began to receive his IEP specialized academic instruction, supports and services in first grade, he began to make progress again. However, it took him the rest of his first grade year to get back to where he should have been by the end of kindergarten. The delay of his special education services clearly caused him a deprivation of academic benefits. In addition, because no IEP meetings were held during Student's kindergarten year, the child-find violation also significantly impeded the opportunity of Student's parents to participate in the decision-making process regarding Student's education.

16. Student met his burden to show that Temecula's procedural violation resulted in a substantive denial of FAPE. Temecula denied him a FAPE between January 28, 2013, and June 10, 2013. Student's remedy for that denial of FAPE will be discussed below.

ASSESSMENTS

17. Student asserts that Temecula failed to timely and appropriately assess Student in the areas of behavior, occupational therapy, vision and assistive technology. Temecula contends that it timely assessed based on parental requests and the information available to it.

18. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) The request for an initial assessment to see if a child qualifies for special education and related services may be made by a parent of the child or by a state or local educational agency. (20 U.S.C. § 1414(a)(1)(B).) After the initial assessment, a school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. §

1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) There are numerous statutory requirements for the manner in which a District must conduct an assessment. (See, e.g., Ed. Code, §§ 56320, 56322 & 56324.)

19. In the instant case, Temecula assessed Student during the summer of 2013, and ultimately found him eligible for special education. Although Ms. Morgan's psychoeducational assessment had some problems, particularly with respect to her assessment of Student's behavior, Temecula remedied any problems by funding an independent educational evaluation through Dr. Perlman. Based on the findings in Dr. Perlman's evaluation, Temecula then offered further assessments in occupational therapy, vision and behavior.

20. Student did not bring in sufficient persuasive evidence to show that Temecula should have conducted the occupational therapy, vision, and assistive technology assessments sooner than it did. With respect to vision therapy and assistive technology, Student brought in no expert testimony or other persuasive evidence to establish that further testing was required beyond that conducted as part of the initial psychoeducational assessment. No one, including Student's parents, suspected that Student had vision problems prior to Dr. Perlman's assessment, and no one requested an assistive technology assessment. The evidence showed that Temecula properly considered Student's assistive technology needs during its psychoeducational assessment and during the IEP meeting. (Ed. Code, § 56341.1, subd. (b)(5).)

21. With respect to occupational therapy, the evidence is closer, because Student's parents specifically requested an independent occupational therapy assessment of Student and because of Student's ongoing difficulties with handwriting. However, Temecula's witnesses persuasively testified that the specialized academic instruction in Student's October 2013 IEP was intended to address his handwriting issues so no occupational therapy assessment was necessary at that time. Student

brought in no persuasive evidence to counter their opinions or to show that Temecula should have offered an occupational therapy assessment sooner than it did. Neither of the Big Springs witnesses was an occupational therapist, nor did either of them have complete knowledge of Student's writing ability – they admitted that Big Springs avoided working with Student on writing because the staff believed it triggered Student's behavioral problems.

22. To support his contention that an occupational therapy assessment should have been done sooner, Student relied upon an opinion offered by Temecula's expert Ms. White that an occupational therapy assessment should have been offered sooner than February 2014. However, her testimony was ambiguous, at best. Ms. White never named a specific point in time when the assessment should have been offered. Instead, she backpedaled from her testimony and acknowledged that no assessment would be necessary if Student was making progress. The weight of the evidence showed that Student was indeed making progress in writing during his first grade year. Student brought in no persuasive evidence to the contrary. Student did not meet his burden to show that Temecula failed to timely and appropriately assess Student in the area of occupational therapy.

23. The issue regarding the adequacy of the behavior assessment is also a close one because of the gaps in Ms. Morgan's psychoeducational assessment.¹¹ Although behavior had been one of the primary concerns for Student right from the beginning, Ms. Morgan failed to administer the Behavior Assessment System for

¹¹ Any failure by Temecula to assess in the area of behavior prior to June 2013 is already addressed above in the Legal Conclusions regarding Temecula's child find obligations. The discussion in this section involves the time period during and after the psychoeducational assessment.

Children to any of Student's teachers or to conduct other testing related to behavior. Temecula was well aware that Student had behavior problems. Those problems even manifested during the assessment process, requiring some of the test results to be viewed with caution.

24. There was no valid reason for Ms. Morgan's failure to give that rating scale to at least one of Student's teachers. At the very least, Ms. Dugger, who had taught Student during kindergarten and was part of the assessment process, should have completed the rating scale. It is unclear why Ms. Morgan believed that Ms. Dugger would not have a balanced view of Student's behaviors. Ms. Dugger was an experienced special education teacher who had a good working relationship with Student.

25. The input of one of Student's classroom teachers on the rating scale would have been valuable to the assessment process and the IEP team. Without that, Ms. Morgan was forced to rely upon her records review, behavioral observations, and the input provided by Student's mother to gain information about Student's behaviors.

26. However, any problems with Ms. Morgan's assessment were remedied when Temecula agreed to fund Dr. Perlman's independent evaluation. Shortly after Dr. Perlman's evaluation, Temecula offered to perform a functional behavior assessment.

27. Further, even if Temecula did not fully assess Student for behavior, that procedural violation did not result in a substantive denial of FAPE. Student did not suffer a deprivation of educational benefits or a denial of FAPE during his first grade year as a result of the failure to conduct a functional behavior assessment. To the contrary, his behavior improved once his IEP supports were in place. By the time of Temecula's functional behavior assessment, Student no longer exhibited the problem behaviors of his kindergarten year. Student also made academic progress during that time, and Student's parents were able to participate in all aspects of the IEP process.

28. Student failed to meet his burden to show a denial of FAPE based on any failure to assess in the areas of behavior, occupational therapy, assistive technology or vision.

THE RELATED SERVICES IN STUDENT'S IEP

29. Student contends that Temecula denied Student a FAPE because Student's IEP's were not reasonably calculated to provide Student with meaningful educational benefit in the areas of occupational therapy, academic anxiety, behavior, and prevention of harassment by peers.

30. Special education includes instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the pupil to benefit from instruction. (Ed. Code, §§ 56031, 56363.) Related services may include services such as occupational therapy and counseling. (See Ed. Code, § 56363.)

31. Education Code section 56341.1, subdivision (b)(1), provides, in part, that when developing a pupil's IEP, the team shall, "[i]n the case of a pupil whose behavior impedes his or her learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."

32. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

33. Student failed to bring in sufficient evidence to show that Student needed additional related services in order to benefit from his special education, beyond those contained in his October 3, 2013 IEP and amendments. The Temecula staff members were consistent in their opinions that the specialized academic instruction, goals, classroom aide support, and other supports and services in Student's IEP were sufficient to meet all of his occupational therapy, behavioral, social skills and mental health needs. The Temecula witnesses were experienced educators who knew Student well, and their opinions in this regard were persuasive based on the evidence presented.

34. While Ms. Frey and the Big Springs witnesses believed that Student required ongoing intensive therapy to address anxiety, social skills, academic and behavior issues, the evidence did not support their opinions. Student's academics and behavior improved over the course of his first grade year without the need for such intensive services. By the time Student began the Big Springs therapy at the start of his second grade year, his behavior had already improved considerably and he had made progress in his academic subjects.

35. Student offered very little persuasive evidence that Student had social skills problems or suffered any harassment after his kindergarten year. The bullying that Student's mother discussed with the school staff at the time of the events in this case primarily involved Student's kindergarten teacher, rather than Student's peers. Temecula addressed the concerns of Student's mother by placing Student with a different teacher at the end of his kindergarten year and during first grade. While Student's mother witnessed other children calling Student names during his kindergarten year, his teachers since then described him as playing with peers and having friends. There was no evidence of peer harassment of Student noted in either Ms. Frey's or Ms. O'Malley's observations.

36. The Big Springs witnesses reported that Student exhibited serious problems during Student's second grade year, such as self-injurious behaviors, threats, and tantrums, but those behaviors occurred at Big Springs, not in the public school. At the public school, Student's general and special education first and second grade teachers were able to hold Student to task and assist his progress without triggering serious behaviors.

37. The weight of the evidence supported the opinions of the Temecula witnesses that Student's IEP was reasonably calculated to meet Student's needs at the time it was initially offered and it remained so as more services were added through the amendments to the IEP. There was no denial of FAPE.

STUDENT'S IEP AND AMENDMENTS PROPERLY ADDRESSED ACADEMIC REGRESSION

38. Student contends that Temecula denied Student a FAPE because the IEP and amendments did not properly address his academic regression. However, Student's IEP and amendments addressed his kindergarten regression by providing for specialized academic instruction. The Temecula witnesses were experienced educators. Their testimony was persuasive that the specialized academic instruction in the IEP was reasonably calculated to address Student's regression at the time the IEP offer was made.

39. The Temecula witnesses were also persuasive that any minor regression that Student suffered after returning from his summer vacation was the typical "summer slide" and was a matter that could be addressed by the services already existing in Student's program. Student did not provide persuasive evidence to the contrary, and therefore there was no denial of FAPE.

IMPLEMENTATION THE FEBRUARY 19, 2014 IEP AMENDMENT

40. The evidence was undisputed that Temecula did not faithfully implement the February 2014 amendment to the IEP that added the RAVE-O methodology. Temecula concedes that there was a failure to implement that portion of the IEP, but argues that Student gained educational benefit so there was no harm.

41. In *Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*), the court held that a material failure to implement an IEP constitutes a denial of FAPE. A material failure occurs when “there is more than a minor discrepancy” between the services provided and the services required by the IEP. (*Ibid.*)

42. The materiality standard of *Van Duyn* does not require that the child have suffered “demonstrable educational harm” to prevail, although a child’s progress or lack of progress may be probative on the issue of whether the failure to implement was material. (*Van Duyn, supra*, 502 F.3d at p. 822.) The court cautioned that nothing in the court’s decision was intended to weaken a school’s obligation to provide services in accordance with an IEP. (*Ibid.*)

43. What is particularly troubling in the instant case is the willful nature of the failure to implement. Because of Temecula’s actions, the entire February 19 amendment to the IEP became essentially meaningless – Student’s teacher unilaterally decided to substitute her educational judgment over that of the IEP team.

44. When Congress enacted the IDEA, it envisioned a collaborative process, in which parents and public schools would work together to develop a program for a disabled child. That program does not have to be the best program nor one that maximizes a child’s education. Instead, Congress focused on the *process* by which the child’s program was developed, trusting the combined wisdom of parents and educators to meet a child’s individual needs. (See *Rowley, supra*, 458 U.S. at p. 205.) The IEP

process only works when a school district faithfully adheres to the program chosen by the IEP team, including any methodology specified in the IEP.

45. In the instant case, Student's teacher undoubtedly meant well when she deviated from Student's IEP. She sincerely believed that RAVE-O was not right for Student and that Student would gain greater benefit from other methodologies. However, it was up to the IEP team to change Student's IEP, not an individual teacher. When the teacher chose not to implement the RAVE-O program, Student's mother was cut out of the IEP process, every bit as much as if she was not permitted to speak during an IEP meeting. Under these circumstances, the willful failure to implement was material, even if Student gained educational benefit despite the failure to implement.

46. Temecula materially failed to implement the terms of Student's IEP. Student met his burden to show that Temecula denied him a FAPE between March 8, 2014, when the RAVE-O program was supposed to start under the IEP terms, and August 19, 2014, the date of filing this case.

REMEDIES

47. As a remedy in the instant case, Student's parents have requested that Student be placed at the Big Springs nonpublic school, and they seek reimbursement for out of pocket expenses incurred to date. If placement at Big Springs is not awarded, Student's parents request an order that Student continue with his after school therapy services through Big Springs. They also seek 100 hours of private mental health counseling by a provider of their choice, occupational therapy compensatory education, and an independent educational evaluation in the area of assistive technology.

48. Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Parents of Student W v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) There is no obligation to provide day-for-day compensation for time missed. The remedy of

compensatory education depends on a “fact-specific analysis” of the individual circumstances of the case. (*Ibid.*) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996] (*Burlington*)).

49. If a school district fails to offer an appropriate program for a child and the child’s parents are forced to place the child in a private program as a result, the parents may be entitled to reimbursement of the tuition they paid to enroll the child in that school. (*Burlington, supra*, 471 U.S. at p. 369.) The determination of whether to award reimbursement and how much to award is a matter within the discretion of the court. (*Ibid.*)

50. In *C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d. 1155 (*C.B.*), the court noted that a parent or guardian is entitled to reimbursement for a private school only if: 1) the public placement violated the IDEA; and 2) the private school placement was proper under the IDEA. “If either criterion is not met, the parent or guardian may not obtain reimbursement [citation omitted]. If both criteria are satisfied, the district court then must exercise its ‘broad discretion’ and weigh ‘equitable considerations’ to determine whether, and how much, reimbursement is appropriate.” (*Id.* at p. 1159.) Reimbursement may be appropriate, even if the private school does not meet all the state’s educational standards or furnish every special service the child needs. The student “need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.” (*Ibid.*, quoting from *Frank G. v. Board of Education* (2nd Cir. 2006) 459 F.3d 356, 365.)

51. Given the two significant denials of FAPE in this case – the failure to timely assess for initial eligibility, which delayed Student’s initial IEP, and the material failure to implement the RAVE-O program – some compensatory remedy is appropriate. Because of these violations, Student’s parents incurred expenses providing private therapy services to Student through Big Springs. They seek reimbursement for the money spent on those services, for the assessment done by Big Springs, and for their gas mileage in transporting Student.

52. Based on the evidence in this case, placement in the Big Springs nonpublic school is not in Student’s best interests. Student has been making significant progress in his second grade general education classroom. His behavior has improved, he is progressing rapidly in reading, he is feeling positive about school, and his other academic subjects have improved. To take him out of the general education classroom and place him in a small, special education class without typical peers would not be an appropriate move for Student.

53. Although both the Big Springs witnesses and Ms. Frey testified that Student needs to continue his behavioral services at Big Springs, their testimony was not persuasive in light of the evidence regarding Student’s progress in his second grade public school class. To the extent that Student may have required intensive behavioral services from Big Springs in the past, the evidence at hearing demonstrated that he no longer needs them to make progress at school. The evidence showed that Student’s public school teachers in second grade are easily able to redirect him, hold him to task, and enable him to learn without the severe behaviors of his earlier years.

54. However, the equities of the case support an award of reimbursement to Student’s parents for the money they contracted to pay for Student’s services at Big Springs, including mileage reimbursement. Temecula committed two serious violations of special education law. Temecula ignored a parental request for special education

assessment and it failed to comply with Student's IEP. The former violation prevented Student from getting the special education support he needed until months into his first grade year. The latter violation effectively cut Student's parents out of the IEP process. No matter how well-intentioned the teachers involved in these two violations might have been, these are still serious violations. It was reasonable under the circumstances for Student's parents to seek private services for Student, given the history of this case.

55. The Big Springs intensive behavior therapy was specifically designed to meet Student's behavioral needs. Those behavioral needs were a large component of his educational problems. Although the Big Springs therapy program did not provide a FAPE under the state standards, it was sufficient to meet the standard for a parental placement under the holding of the *C.B.* case. It is appropriate to order Temecula to reimburse Student's parents for the costs they incurred for tuition, assessment and transportation.

56. As for Student other requested remedies, the equities of the case do not support any further award. Temecula did not fail to assess or fail to provide appropriate services in the areas of behavior, mental health, occupational therapy, or assistive technology, so there is no need to order any compensatory remedies related to those areas. Student is currently progressing very well both socially and behaviorally in his second grade classroom, so there is no need for compensatory education beyond the reimbursement for the expenses his parents were forced to incur.

ORDER

1. Within 60 days of the date of this Decision, Temecula shall reimburse Student's parents \$21,000 for the amounts Student's parents have paid or are obligated to pay to Big Springs for behavioral/academic services that Student has received from Big Springs up to and including the end of February 2015. Documents submitted in this

hearing constitute adequate proof of payments made and/or money owed by Student's parents to Big Springs.

2. Within 60 days of the date of this Decision, Temecula shall reimburse Student's parents \$1,165.25 for their mileage for transporting Student to and from Big Springs. Documents submitted in this hearing constitute adequate proof of Student's parents' transportation costs in taking Student to and from Big Springs.

3. Within 60 days of the date of this Decision, Temecula shall reimburse Student's parents \$528 for the initial assessment done by Big Springs.

4. Student's remaining requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party on issues (a) and (e) and Temecula prevailed on issues (b), (c), and (d).

RIGHT TO APPEAL

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

DATED: April 17, 2015

/s/

SUSAN RUFF

Administrative Law Judge

Office of Administrative Hearings