

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. 2015040291

PARENT ON BEHALF OF STUDENT,

v.

BRENTWOOD UNION SCHOOL DISTRICT.

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on April 3, 2015, naming Brentwood Union School District. The matter was continued for good cause on May 22, 2015.

Administrative Law Judge B. Andrea Miles heard this matter in Brentwood, California, on June 2, 4, 9, 10, and 18, 2015. Thereafter, a continuance was granted for the parties to file written closing arguments and the record remained open until July 9, 2015.

The written closing arguments were received, but the record was not closed on July 9, 2015, because supplemental briefing on Issue 2 and Issue 3 was ordered. The matter was continued until August 10, 2015, so that the parties could submit supplemental briefs.

Student's supplemental brief was filed on July 27, 2015. Upon timely receipt of Brentwood's supplemental response brief, the record was closed and the matter was submitted for decision.

Nicole Hodge Amey, Attorney at Law, represented Student. Student's

grandmother attended a portion of the hearing. Marie Fajardo, an advocate with Ms. Hodge Amey's law firm, was present throughout the hearing.

Van Vu, Attorney at Law, represented Brentwood. Margo Olson, Director of Special Education, attended the hearing on behalf of Brentwood.

## ISSUES<sup>1</sup>

1. Did Brentwood deny Student a free appropriate public education during the 2013-2014 school year by failing to assess Student's social-emotional and behavioral needs as part of its May 29, 2013 initial psychoeducational assessment?

2. Did Brentwood deny Student a FAPE during the 2013-2014 school year by failing to conduct the following assessments:

- a. a functional analysis assessment; and
- b. a social behavioral assessment?

3. Did Brentwood deny Student a FAPE during the 2014-2015 school year, until April 3, 2015, by failing to conduct the following assessments:

- a. a functional analysis assessment; and
- b. a social behavioral/functional behavior assessment?

4. Did Brentwood deny Student a FAPE during the 2013-2014 school year by failing to include a behavior intervention plan as part of Student's individual education plans during that school year?

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<sup>1</sup> At the start of the hearing Student's motion to withdraw three issues in their entirety was granted. Here, the ALJ has reorganized and renumbered the remaining issues for clarity. These are the issues heard and decided. The ALJ has the authority to redefine a party's issues providing no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

5. Did Brentwood deny Student a FAPE during the 2014-2015 school year by failing to provide a behavior intervention plan?

6. Did Brentwood deny Student a FAPE by failing to conduct a legally compliant psychoeducational assessment in December 2013 as follows:

- a. by incorrectly stating that Student was taking the medication Risperidone;
- b. by spending insufficient time assessing Student's needs; and
- c. by determining that Student met the criteria for emotional disturbance?

7. Did Brentwood procedurally deny Student a FAPE by:

- a. failing to have the school psychologist attend the September 24, 2013 IEP team meeting; and
- b. failing to invite the behaviorist to all IEP team meetings?

## SUMMARY OF DECISION

This decision holds that Brentwood denied Student a FAPE from the beginning of the 2013-2014 school year until December 18, 2013, because it failed to conduct an assessment of Student's social-emotional and behavioral needs as a part of the May 2013 initial assessment. Brentwood's failure to assess in these areas resulted in an IEP which did not address Student's needs in this area and caused Student to fail to receive educational benefit in the areas of behavior, task completion, and peer relationships. Student also established that Brentwood failed to assess him in the area of social behavior until December 18, 2013, resulting in a denial of FAPE from the beginning of the 2013-2014 school year until December 18, 2013. Student further established that Brentwood denied Student a FAPE during the 2014-2015 school year until May of 2015, by failing to complete an assessment student in the area of behavior.

Student failed to meet his burden of proving that Brentwood denied Student a FAPE during the 2013-2014 and 2014-2015 school years by failing to conduct a functional analysis assessment of Student. However, this decision finds that from

November 2014 through May 15, 2015, Student was denied a FAPE because Brentwood failed to conduct a functional behavior assessment of Student.

Throughout the 2013-2014 school year, Brentwood did not implement behavior intervention, incentives, and services to sufficiently meet Student's needs. Student's learning was being impeded by his behavior to such an extent that Brentwood should have developed and implemented a behavior intervention plan. This failure resulted in a denial of FAPE from December 18, 2013, through the end of the 2013-2014 school year.

Although Brentwood implemented some successful behavior supports for Student at the beginning of the 2014-2015 school year, these supports should have been documented in a behavior intervention plan and been part of Student's IEP. Student's need for a behavior intervention plan continued until it was finally offered as a part of Student's IEP on May 15, 2015. Brentwood's failure to provide Student a behavior intervention plan until May 15, 2015, resulted in a denial of FAPE. These denials of FAPE resulted, as discussed above, in Student not receiving educational benefit in the areas of peer interactions, task completion, and behavior.

Additionally, this decision determines that Brentwood did not fail to conduct a legally compliant psychoeducational assessment in December 2013 on the basis that the written assessment incorrectly stated that Student was taking the medication Risperidone; that the evaluator spent insufficient time assessing Student's needs; and because the assessment determined that Student met the criteria for emotional disturbance.

Finally, this decision finds that Student failed to present any evidence or law to support his contention that Brentwood was required to invite a behaviorist to all IEP team meetings, a school psychologist to the September 24, 2013 IEP team meeting and, therefore, did not procedurally deny Student a FAPE on this basis.

Ultimately, Student was denied a FAPE for failure to assess, and then failure to

provide, Student with a behavior intervention plan from the beginning of the 2013-2014 school year until May 15, 2015. As a result, Student is awarded compensatory education in the form of behavior services in the areas of peer relationships, behavior, and task completion.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is a 10-year-old boy who resided with his grandmother within the geographical boundaries of Brentwood School District at all times relevant to this case. Student currently qualifies for special education under the primary category of emotional disturbance and the secondary category of specific learning disability. Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) prior to entering Brentwood School District.

2. Student was born in another state, where he lived with his father and mother until they separated. While attending public school in this other state, Student was retained for kindergarten. Student did not receive special education services or any other type of special program services while in school in the other state. Student missed a great deal of school while he lived out of state, most likely due to poor parental support.

3. In 2010, when Student was six years old, Student's mother and father separated. Student remained in the custody of Mother until Mother transferred full custody to Father. In December 2012, Student, his younger brother, Father, and Father's girlfriend moved to California to live with Grandmother in Brentwood.

4. After moving into Grandmother's home, Father experienced mood and substance abuse issues. Father has a history of volatile and aggressive behaviors, drug use, and mental health issues. As a young adult, Father was diagnosed with bipolar

disorder and learning disabilities. In July 2013, Father became incarcerated in the county jail. At the time of this hearing, Father was still incarcerated. Shortly after Father was incarcerated, Grandmother obtained custody of Student and his younger brother. Student has maintained contact with his father during his incarceration.

5. After Student moved to California, Student's mother continued to live in the state where Student formerly lived. Mother has kept in sporadic telephone contact with Student.

#### STUDENT'S NEEDS FROM JANUARY 2013, THROUGH THE END OF 2012-2013 SCHOOL YEAR

6. In January 2013, Student began attending the first grade at Marsh Creek Elementary School, one of Brentwood's elementary schools. At the time Student began school in Brentwood, he was below grade level in all academic areas.

7. Student's former elementary school provided Brentwood with Student's Withdrawal Form, dated December 6, 2012. The Withdrawal Form indicated that Student was "low in all areas" and that he needed "a lot of one on one time to keep him focused and to explain the task." The notations on the form recommended that a "behavior and academic plan" be put in place to ensure Student's success.

8. While at Marsh Creek, Student struggled to stay focused and follow directions while in class. Student required a great deal of adult support to stay on task, engage in activities, listen to instructions, and behave appropriately on the playground. Additionally, Student continued to be below average for his grade level academically, struggling in reading, writing, and mathematics. Although Brentwood did not provide a one-on-one aide to Student, an aide assigned to Student's classroom regularly worked with him.

9. In March 2013, Marsh Creek's Student Study Team met to discuss concerns over Student's academic, social-emotional, and behavioral progress. The

Student Study Team was made up of Marsh Creek staff members, including Student's first grade teacher, Ms. Morris.<sup>2</sup> Student's behavioral and academic deficits caused the Student Study Team to recommend that Student be assessed to determine whether he qualified for special education. On March 14, 2013, the Student Study Team summarized its concerns regarding Student's behavior and academic deficits in a referral and summary form.

10. The referral form indicated that Student had been experiencing difficulty completing "any" classwork until March 8, 2013, when Student resumed taking medication for ADHD.<sup>3</sup> Once medicated, Student was able to follow one-step directions and had less difficulty staying on task. Prior to being medicated, Student needed one-to-one attention to complete even small tasks, such as writing his name. Even after the medication compliance was established, Student's behavioral difficulties continued to interfere with Student's ability to access his education, although to a lesser extent.

#### MAY 29, 2013 PSYCHO-EDUCATIONAL ASSESSMENT

11. In order to evaluate whether Student qualified for special education services, Monica Fuller, a credentialed school psychologist with Brentwood, and Kara Fox, a credentialed special education teacher with Brentwood, conducted a psycho-educational assessment of Student. Ms. Fuller and Ms. Fox summarized their findings in a written report.

12. As part of the assessment, Ms. Fuller reviewed Student's educational records and a developmental history questionnaire, which Grandmother had completed.

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<sup>2</sup> Ms. Morris's first name was not put into evidence.

<sup>3</sup> No evidence was presented to indicate when Student stopped taking his medication for ADHD.

The written assessment report acknowledged that even while attending school out of state, Student required a great deal of adult support to help him focus in class.

13. Ms. Fox conducted the academic testing portion of the assessment using the Woodcock Johnson III Test of Achievement, a normed assessment, to assess Student in the areas of reading, writing, math and oral language. The Woodcock Johnson allowed the evaluators to determine Student's skills level in comparison to other students from across the United States. Student was assessed over two 30-minute sessions. The academic assessment revealed that Student's reading skills were predominately at a kindergarten level, his math skills were between kindergarten level to first grade level, and his writing skills were at a kindergarten level to first grade level.

14. One of the Woodcock Johnson's subtest, Understanding Directions, required Student to listen to audio recorded instructions and follow the directions in sequence. This portion of the test required sustained attention and effort on Student's part. During the subtest, Student was able to follow directions when they were simple; however, Student had difficulty following multiple step instructions. Student scored in the "low average" range on the subtest.

15. Ms. Fuller administered the psychological portions of the assessment. Ms. Fuller administered the Wechsler Intelligence Scale for Children, Fourth Edition, to assess Student's cognitive abilities by measuring Student's verbal comprehension, perceptual reasoning, working memory, and processing speed. A person's full scale intelligence quotient (IQ) is determined by combining results from those four areas of testing. However, Student's full scale IQ could not be interpreted due to the level of variability of Student's scores in those four areas.

16. Student's test results demonstrated Student's weakness in the areas of working memory and processing speed. On the portions of the test which measured Student's working memory, Student scored in the 4th percentile or "borderline" range.

Working memory refers to a person's ability to sustain attention and work with information that is held in a person's short-term memory. On the portions of the test which measured Student's processing speed, Student scored in the 16th percentile or "low average" range. Processing speed refers to a person's ability to work quickly on simple cognitive tasks with a visual-motor component.

17. Student's performance on the Verbal Comprehension Index and Perceptual Reasoning Index were similar enough to determine the General Ability Index. The General Ability Index differs from the full scale IQ because it is not directly influenced by Student's performance on the working memory and processing speed tasks. Student's General Ability Index indicated that Student's intellectual functioning fell into the average range.

18. Ms. Fuller administered the Comprehensive Test of Phonological Processing to assess Student's phonological awareness, phonological memory, and rapid naming ability. These three skills are strongly associated with a person's ability to read. The results of the test indicated that Student's skills fell in the low to low average range in all three of these skill areas. Student's deficits in these three skill areas were likely to impact Student's reading fluency and his reading comprehension.

19. Ms. Fuller utilized the Developmental Neuropsychological Assessment, Second Edition, to assess Student's attention and executive functioning abilities. Executive functioning is a class of mental functions involving goal directed actions such as planning, self-regulation, organization, impulse control, cognitive flexibility, divided or parallel attention, initiation and fluency of goal directed action, and working memory. Frequently, people who are diagnosed with ADHD are found to have executive functioning deficits.

20. The results of the Developmental Neuropsychological Assessment suggested that Student had impaired attention and executive functioning skills.

Students with executive functioning deficits can experience difficulty with writing and reading fluency. This finding was consistent with Student's delayed reading and writing skills.

21. Ms. Fuller utilized Student's performance on the administered assessment to determine whether Student met the California Education Code eligibility criteria for Specific Learning Disability. Student's test results illustrated the existence of a discrepancy between Student's ability and achievement in reading, math, and writing that was due to a processing disorder in Student's executive functioning. Ultimately, Ms. Fuller concluded that Student qualified for special education under the eligibility category of Specific Learning Disability.

22. Ms. Fuller observed Student in class on multiple occasions and on the playground. However, in her report she only included her observation of Student for a small portion of one school day. Ms. Fuller did not conduct any testing regarding Student's social-emotional and behavioral needs or provide any analysis of Student's social-emotional and behavioral needs in her written report. Ms. Fuller admitted that she could have utilized both formal and informal social-emotional and behavioral assessment tools to evaluate Student, but she chose not to do so. Ms. Fuller felt that the referral for assessment was based only on Student's inability to focus in class and his academic deficiencies. However, the evidence showed that Student had exhibited behaviors in the classroom and out on the playground that warranted further investigation by the assessors. The referral was based on concerns regarding both Student's social-emotional functioning and behavioral functioning, therefore, the assessment should have included social-emotional and behavioral components.

23. As part of the assessment referral, Ms. Morris informed Ms. Fuller that Student had extreme difficulty staying focused during class and required constant prompting to perform any task. Student's off-task behavior regularly disrupted the rest

of the class. Student also had difficulty properly interacting with his peers. In her report, Ms. Fuller attributes Student's maladaptive behaviors to attention and executive functioning deficits. The assessment provided some recommendations and general strategies for helping deal with Student's attention and executive functioning deficits.

24. The psychoeducational assessment did not include any observations of Student's first grade teacher, Ms. Morris, who was the primary source for the reporting of Student's maladapted behaviors. However, Ms. Fuller did include in her report that Ms. Morris utilized a positive reward system with Student during class time as a behavior intervention.

25. The report recommended placement in general education with resource support in order to allow Student to be more focused on his school work.

#### MAY 30, 2013 IEP TEAM MEETING

26. The initial IEP team meeting to discuss Student's eligibility for special education was scheduled for May 30, 2013, at Marsh Creek. However, the meeting was canceled because Grandmother was unavailable for the scheduled meeting.

27. The IEP team meeting was not rescheduled at Marsh Creek because Student was transferred to Mary Casey Black Elementary School due to redistricting within the Brentwood district. Mary Casey Black was a newly established elementary school which opened in late July 2013. Student began attending this school for second grade on July 30, 2013.

#### AUGUST 1, 2013 IEP TEAM MEETING

28. On August 1, 2013, Student's IEP team met to discuss the results of Student's psychoeducational assessment and to make a determination regarding Student's eligibility for special education. Although staff members from Marsh Creek were invited to the meeting, they did not attend. Grandmother attended the meeting

instead of Father because Father had been incarcerated. At that time Grandmother had temporary custody of Student and was in the process of obtaining legal custody of him.

29. Since Ms. Fuller was not present, a school psychologist from Mary Casey Black presented the May 2013 psychoeducational assessment to the IEP team. At the time of the meeting, Student had only attended Mary Casey Black for several days. However, during that short time, Student's second grade general education teacher Lisa McLaughlin observed some of Student's behaviors, which she addressed at the meeting. Student experienced difficulty respecting his peers' personal space. At times Student would attempt to hug peers without permission and at other times Student would attempt to take items away from his peers without permission.

30. During the IEP team meeting, the IEP team determined that Student fit the eligibility criteria for Specific Learning Disorder. The IEP team based its determination on the May 2013 psychoeducational assessment, which did not assess or address Student's social-emotional or behavioral needs.

31. Student's August 1, 2013 IEP included five goals in the areas of high frequency words; blending and decoding; number sense; addition and subtraction; and respecting other's personal space. It offered Student 30 minutes twice a day of specialized academic instruction in a special education classroom for small group instruction of Language Arts and mathematics, and the remainder of Student's day in a general education classroom. The 60 minutes a day of specialized academic instruction was to be divided equally between English Language Arts and mathematics. However, without the social- emotional or behavioral testing, Brentwood did not have the information it needed to address the behaviors that were interfering with his academic and behavioral progress.

32. Additionally, Student received the accommodations of flexible time for assignments, explicit expectations, shortened assignments as needed, preferential

seating, and positive behavior reinforcement. The IEP suggested the use of the positive reinforcement system “cup and beads.” Each time Student exhibited a desired behavior he would be provided with a bead in his cup. Once he reached a certain number of beads he would be allowed to choose a prize from the prize basket.

33. However, most of the recommendations for accommodations and supports in the May 2013 assessment were not adopted as part of Student’s August 1, 2013 IEP. Brentwood provided no credible explanation for their failure to include them, especially considering that the IEP team had little experience with Student.

34. The only behavior goal addressed in the August 1, 2013 IEP was that of respecting others’ personal space. That goal was created by the IEP team at Mary Casey Black because of Ms. McLaughlin’s observations of Student’s behavior during the first few days of school. A behaviorist was not present at the August 1, 2013 IEP team meeting.

35. Grandmother consented to the August 1, 2013 IEP. Father also consented to the IEP.

#### SEPTEMBER 3, 2013 AND SEPTEMBER 24, 2013 IEP TEAM MEETINGS

36. Student’s second grade general education and special education teachers observed Student’s academic and behavior challenges after the implementation of his initial IEP. To address Student’s academic needs, Brentwood convened another IEP team meeting on September 3, 2013, to discuss whether Student needed additional special education support to meet his needs. At the September 3, 2013 IEP team meeting, the IEP team consisted of: Grandmother, the principal of Mary Casey Black, Student’s second grade teacher at Mary Casey Black, and Student’s special education teacher. After a discussion of Student’s academic needs, the IEP team decided that Student’s August 2013 IEP should be amended to include additional specialized academic instruction and that the services could be provided either in a special education classroom or in the

general education classroom depending on Student's needs.

37. The September 3, 2013 IEP offered Student 30 minutes, five times a week, of specialized academic instruction in language arts; and 45 minutes, four times a week, of specialized academic instruction in mathematics. The specialized instruction was to be provided both in a separate classroom and in the general education classroom.

Grandmother consented to the September 3, 2013 IEP.

38. However, Student continued to struggle with his academics and his behaviors. From August 27, 2013, through September 19, 2013, Student had seven documented behavioral incidents which required the principal's intervention. Student's specific behavior during those incidents varied, but all of the incidents were disruptive to the class and involved Student refusing to follow directions and rules. In one instance, while Ms. McLaughlin was speaking to another student, Student repeatedly climbed on top of his desk and jumped off. During another incident, Student used inappropriate language with another Student and clogged the sink drain with paper towels. Student also took items from other students without permission.

39. On a regular basis Student disrupted the general education class by refusing to follow directions and participate in class. At times his refusal to perform task took the form of a "shut down." During a "shut down" Student would pull his sweatshirt hood up over his head and lay his head down on his desk. When prompted to participate, Student would either not respond or verbally refuse the directed task.

40. In September 2013, Shannon Biggs, a school counselor, became aware of Student's maladaptive behaviors while providing services to Student's entire general education class. Ms. Biggs possesses a master degree in marriage and family therapy and a pupil personnel services school counseling credential. She worked in Student's general education classroom two days a week for 30 minutes, where Ms. Biggs observed Student engage in "shut downs."

41. On September 24, 2013, an IEP team meeting was held to discuss Student's social-emotional needs, as well as his negative behaviors at school. Present at the meeting were Grandmother, Student's general education teacher, his special education teacher, and the principal. Neither a behaviorist nor a school psychologist was present at the meeting. At the meeting, Grandmother shared that she was having Student's ADHD diagnosis and medication reviewed. She also requested that Student be provided with a one-to-one aide.

42. After a discussion of the IEP team members who were present, additional counseling services were added to Student's IEP. The September 24, 2013 IEP offered Student one 30-minute individual or small group school-based counseling session per week. The written September 24, 2013 IEP also specified that social-emotional goals would be developed for Student and possibly a behavioral support plan; however, Brentwood did not develop a behavior support plan at this meeting. Student began receiving the counseling services soon after this IEP team meeting.

#### NOVEMBER 13, 2013 IEP TEAM MEETING

43. Student's general education teacher communicated with Grandmother two to three times a week about Student's behavior. Student's behavior was impeding his ability to learn and the ability of the other students to learn to such an extent that Student's general education teacher assisted Grandmother in writing a letter to Brentwood. The letter, dated October 22, 2013, asked for an emergency IEP team meeting to be held to discuss placing Student in a special education classroom or having Brentwood provide Student with a one-to-one aide.

44. In the October 22, 2013 letter, Grandmother indicated that Student's pediatrician was concerned that Student suffered from emotional trauma which required Student to need "special support" at school. Grandmother reported that Student was defiant, distraught, and disconnected from the "real world" when he was at home. She

expressed her opinion that Student had “emotional problems.”

45. On November 13, 2013, the IEP team met to discuss Student’s progress and behaviors. Present at the IEP team meeting were: certified special education teacher Brandy Clifton; Student’s current special education teacher Debbie Lull; Student’s current general education teacher Lisa McLaughlin; School Principal Liz Ybarra; special education program specialist and school psychologist Lucy Berk-Fisher; and Grandmother. A behaviorist was not present at the meeting.

46. Since the beginning of the year, Ms. Lull, a credentialed special education teacher, had been responsible for providing Student with his specialized academic instruction. However, that responsibility was going to shift to Brandy Clifton in November 2013. In order to create a smoother transition, Ms. Lull and Ms. Clifton worked together with Student for several weeks before Ms. Clifton took over providing Student’s specialized academic instruction. This is why both Ms. Clifton and Ms. Lull attended the November 13, 2013 IEP team meeting.

47. Student was continuing to have difficulty with his behavior at school. During the meeting his special education and general education teachers informed the IEP team that Student was “shutting down” when the academic material became challenging for Student. Ms. McLaughlin expressed her concerns about Student’s lack of social boundaries with other students.

48. The IEP team discussed the need for goals in the areas of coping skills, social relationships, and initiating and persisting on tasks. During the meeting, the IEP team drafted goals in all three of those areas. The coping skills goal addressed Student’s tendency to shut down, to refuse to perform tasks, and to act out inappropriately instead of asking for a needed break. The goal provided that by Student’s annual IEP in May 2014, Student would learn coping strategies during counseling session and demonstrate those coping strategies first in counseling sessions and later in the

classroom. The people who were responsible for supporting the goal were the counseling service provider and the classroom teacher.

49. Due to the concerns expressed about Student's difficulty establishing and maintaining friendships, a social relationship goal was created. The goal was to have Student learn the skills necessary to appropriately engage with peers by May 2014. Student was to demonstrate those skills first in the setting of small group counseling sessions and later in the classroom and on the playground.

50. A third goal was added to Student's IEP which focused on Student's minimal ability to initiate tasks and minimal ability to persist in completing tasks. The goal's baseline acknowledged that Student tended to give up and shut down on tasks that he felt were too difficult. The goal required Student to demonstrate increased initiation of, and persistence at, task in four out of five trials with a 50 percent accuracy rate. The IEP team added the goal because of Student's "shut downs" and work refusals. Student's "shut downs" consisted of Student refusing to perform academic tasks, pulling his sweatshirt hood up over his head, and laying his head down on his desk. This behavior happened more frequently in Student's general education classroom. In those situations, Student generally could be redirected and he would eventually engage in the required task.

51. Grandmother informed the other members of the IEP team that Student's diagnosis of ADHD had been confirmed by Student's current doctor. She also provided the team with information on Student's current medications.

52. In an effort to meet Student's needs, the November 13, 2013 IEP offered Student the additional accommodations of having questions read aloud for tests in math and language arts as well as providing Student access to stories on compact disk when available.

53. At the IEP team meeting, Grandmother was presented with an assessment

plan so that Student's social-emotional needs could be assessed. Grandmother signed the assessment plan. By this time, it was clear that Student's behaviors were greatly impeding his learning and often the learning of others. Student needed a clear, specific behavior intervention plan, so that his behaviors could be appropriately addressed.

#### DECEMBER 18, 2013 PSYCHOEDUCATIONAL ASSESSMENT

54. Adena Young, a school psychologist with Brentwood, conducted a social-emotional and behavioral assessment of Student. The purpose of the assessment was to gather information regarding Student's social-emotional and behavioral functioning to determine whether Student met the special education eligibility criteria for emotional disturbance. Ms. Young possessed the necessary training and experience to conduct the assessment. Neither Student nor Brentwood called Ms. Young as a witness during the hearing.

55. Ms. Young used a variety of assessment tools to gather the relevant information regarding Student's social-emotional and behavioral functioning. Ms. Young's assessment consisted of a review of Student's educational records; interviews of Ms. McLaughlin, Ms. Ybarra, and Grandmother; observations of Student; the administration of the Behavioral Assessment for Children, Second Edition; and the administration of four projective measure tests. Projective measure tests are a form of personality test designed to let a person respond to ambiguous stimuli in order to reveal emotions and internal conflicts. Ms. Young assessed Student over two sessions and observed Student in his general education class, his special education class, during a play rehearsal, and during library time.

56. The Behavioral Assessment for Children is a norm-referenced, standardized test which has been validated for the purpose for which Ms. Young's utilized it. The Behavioral Assessment for Children provides information regarding a child's behavior and social-emotional functioning at school, home, and in community

settings. The test also indicates the potential for externalizing or internalizing; any school problems the child is having; and information regarding a child's adaptive skills and behavioral strengths. The Behavioral Assessment for Children required Grandmother and Ms. McLaughlin to complete a questionnaire form. Ms. Young verbally administered the test's self-assessment questionnaire to Student.

57. The three questionnaires were scored and compared to create a mean score for each assessment area. Scores in the "clinically significant" range suggest high levels of maladjustment. Scores in the "at risk" range may identify a significant problem that may not yet be severe enough to require formal treatment, or it may identify the potential of a developing problem that needs careful monitoring. Student scored in the clinically significant range in 12 of the categories and in the at risk range in seven of the categories.

58. The test revealed that Student exhibited clinically significant levels of depression, and that Student was easily upset and often negative. Ms. McLaughlin reported that Student often seemed lonely, sad, and pessimistic. Grandmother reported that Student almost always cried easily and almost always changed moods quickly.

59. In the area which measured Student's externalization of problems, Grandmother and Ms. McLaughlin's reports were consistent with Student's behavior described in his school records. The area of externalizing problems includes hyperactivity, aggression, and conduct problems. The results indicated that Student was having significant behavioral difficulties at school. Both Grandmother and Ms. McLaughlin reported that Student exhibited clinically significant tendencies to act in a hostile manner towards others and to engage in antisocial and rule breaking behavior.

60. The test showed that Student tended to be overly active, rush through work, and act without thinking. Those test findings were consistent with the testimony of Student's teachers.

61. In the area of adaptive skills, the test results indicated that Student had difficulty adapting readily to changes in his environment, interacting successfully with peers and adults, accomplishing academic and social goals with others, performing everyday tasks at home, using skills that are conducive to strong academic performance, and communicating in ways that other can understand.

62. In Ms. Young's written report she inaccurately stated that Student had taken the medication Risperidone in the past. Although Ms. Young included that information in her report, the report did not indicate that Ms. Young had drawn any conclusions from that information or that the information had impacted her findings in anyway. Additionally, Student did not present any evidence that the inclusion of that information had any impact on the accuracy on the assessment's findings.

63. As part of the assessment, Ms. Young administered four projective measures: the Draw a Person and Three Wishes, the Kinetic Family Drawing, Sentence Completion, and the Guess Why Game. Student was somewhat unresponsive to the Draw a Person and Three Wishes measure. When asked what he would wish for, Student said, "I don't know...no, I don't want anything." The Kinetic Family Drawing measure required Student to draw a picture where everyone in his family was doing something. After being given the directions, Student sat unresponsively silent with his head in his hands. This behavior seemed contrary to his Grandmother's and his teachers' reports that he enjoyed drawing. Eventually, Student drew stick figures of his grandmother, grandfather, mother, and father. When asked what each of his family members in the picture were doing, Student merely shrugged. On the Sentence Completion measure, Student's responses were age and gender appropriate. However, Student was unable to complete sentences about negative emotions, such as "what upsets me" or "my greatest fear." On the Guess Why Game measure, Student was read scenarios about a boy named Robert and was asked to guess the reason Robert acted or felt a certain way. Some of

Student's responses had a theme of sadness to them, citing Robert's sadness for reasons he acted or felt a certain way, but Student had difficulty answering questions which involved other types of negative emotions.

64. Ms. Young utilized the criteria set forth in the California Code of Regulations and the California Education Code to determine whether Student fit the eligibility criteria for emotional disturbance. In her report, Ms. Young found that Student exhibited three characteristics of the emotional disturbance criteria both to a marked degree and over a long period of time: a general pervasive mood of unhappiness or depression; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; and inappropriate types of behavior or feelings under normal circumstances exhibited in several situations.

65. Both Grandmother and Ms. McLaughlin reported that Student exhibited clinically significant levels of a general pervasive mood of unhappiness or depression at home and at school. Ms. Young observed Student to present with a flat or sad affect which were consistent with Grandmother and Ms. McLaughlin's reports of depression. This finding is supported by Ms. Ybarra's observations which were included in the assessment. Ms. Ybarra reported that Student presented with a frown or flat affect approximately 70 percent of the time. Ms. Ybarra's testimony supported the observations that she provided to Ms. Young at the time of the assessment. Additionally, Ms. Young's finding was supported by Student's responses on the projective measures portion of the assessment, as Student's responses indicated feelings of sadness.

66. Ms. Young found that Student exhibited an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. She based her finding on the results from the Behavioral Assessment for Children, interviews, and her own personal observations. Both Grandmother's and Ms. McLaughlin's reports on the

Behavioral Assessment for Children's social skills and withdrawal scales indicated that Student had difficulty developing appropriate relationships with peers and adults. Ms. Ybarra reported to Ms. Young that Student was unable to maintain friendships with other children and that he had hit or "gone after" other children at school. Student had difficulty respecting his peers' boundaries. During Ms. Young's observations of Student at school, Student demonstrated limited social interactions with his peers despite opportunities to do so.

67. Ms. Young found that Student presented with inappropriate types of behavior or feelings under normal circumstances in several different situations. School staff reports and Ms. Young's observations indicated that Student tended to present with a flat or negative affect even during enjoyable activities events such as participating in a school play, receiving an award, or listening to an age-appropriate story. Student's responses on the projective measures portion of the assessment supported this finding.

68. Ms. Young observed Student during general education instruction, special education instruction, library time, and play rehearsal. Ms. Young also observed Student during the testing she administered to him. Ms. Young's report does not specify the amount of time she observed Student as part of the assessment. Student did not present any evidence of the existence of a standard for the amount of time required for the administration of a psychoeducational assessment or a social-emotional and behavioral assessment. Nor did Student present any evidence that the amount of time that Ms. Young spent assessing Student was insufficient to support her findings.

69. Ms. Young's findings were supported by the evidence presented at hearing. The evidence established that at the time of Ms. Young's assessment Student fit the criteria for emotional disturbance as set out in the assessment.

#### JANUARY 15, 2014 IEP TEAM MEETING

70. Student's behavior had improved once his doctor changed his

medications. However, Student continued to exhibit defiant and impulsive behavior in the general education classroom and, to a far lesser extent, in the special education classroom.

71. On January 15, 2014, an IEP team meeting was held to review Ms. Young's assessment, to discuss whether Student fit the eligibility criteria for emotional disturbance, and to discuss Student's progress on his goals. The IEP team consisted of Grandmother, Ms. Ybarra, Ms. Young, Ms. Clifton, and Ms. Laughlin.

72. Student's general education teacher informed the IEP team that she was concerned with the slow progress Student was making in her class. Student's special education teacher reported on Student's progress. Grandmother expressed her concern that Student needed a one-to-one aide and additional individualized specialized instruction time.

73. The written IEP noted that Student's behavior was not impeding his learning or the learning of others. However, that statement is inconsistent with the information Student's general education teacher provided Grandmother and Student's documented behavioral incidents during that time. At the meeting, Student's social relationship goal was modified to "[Student] will initiate social interactions with peers using appropriate verbal language (e.g., "Do you want to play?") and body language (e.g. eye contact, posture) in 5 out of 10 opportunities as measured by data collection."

74. The IEP team modified Student's initiate and persist on tasks goal. The goal's new baseline noted that Student was getting started independently on academic activities in 0 out of 10 opportunities in his general education class and in 8 out of 10 opportunities in his special education class. The goal was modified to, "By May 2014, [Student] will start his classwork with one individual prompt from teacher in 5 out of 10 opportunities."

75. The IEP team added a new social-emotional goal for Student. The goal's

baseline noted that Student exhibited difficulty talking about emotions and social situations. The goal established that, by May 2014, Student would be able to describe and process his emotions and social experiences through words, pictures, and social-emotional activities in eight out of 10 opportunities.

76. The IEP also offered Student some of the same accommodations and supports and some additional ones. The IEP provided the accommodation of small group setting; reminders to stay on task; extra breaks; directions read aloud; flexible time for assignments and assessments; explicit expectations; shortened assignments when needed; preferential seating; and positive reinforcements.

77. The IEP offered Student 330 hours of specialized academic instruction for reading, writing, and mathematics per week to be provided both in the general education classroom and the special education classroom. The IEP also offered Student 30 minutes of counseling services to be provided in a small group setting or individual setting depending on Student's social-emotional needs.

78. Ms. Young presented her assessment. The IEP team discussed the eligibility criteria for emotional disturbance and whether Student met the eligibility criteria for emotional disturbance. Ultimately, the team determined that Student fit the eligibility criteria for emotional disturbance. The team found that Student's primary eligibility was emotional disturbance and Student's secondary eligibility was a specific learning disability.

79. At the meeting, Grandmother did not disagree with the IEP team's decision to find Student eligible for special education under the category of emotional disturbance. Grandmother requested that another IEP team meeting be scheduled and that a representative of Brentwood Union School District be present for the meeting to address her request for additional specialized academic instruction and the services of a one-to-one aide. Grandmother signed the IEP.

80. Although Ms. Young's assessment did not recommend creating a behavior intervention plan, it was clear from her findings that Student needed one. Student's behaviors were severe enough that they were interfering with his learning and the learning of others. Student required a behavior intervention plan in order to be able to access his education.

#### MARCH 3, 2014 IEP TEAM MEETING

81. Since the prior IEP team meeting, Student made some academic progress and Student's behavior at school and home improved. Student's improved behavior may have been attributable to his change in his ADHD medication. Although, Student appeared calmer at school, as evidenced by his ability to remain in his seat, Student continued to exhibit maladaptive behaviors. Student's needs in the area of behavior, peer relationships, and task completion were not appropriately addressed, as Student's teachers were left to create their own behavior plan for Student instead of having one included in Student's IEP.

82. On March 3, 2014, the IEP team met to discuss Grandmother's request for Student to be assigned a one-to-one aide during general education instruction. The IEP team consisted of: Grandmother, the Special Education Program Specialist, Student's special education teacher, Student's general education teacher, the school principal, and Grandmother's advocate.

83. At the meeting, Grandmother informed the IEP team that she did not agree with Student being found eligible for special education under the criteria of emotional disturbance. Multiple issues were discussed during the IEP team meeting, but no changes were made to Student's IEP.

#### APRIL 24, 2014 IEP TEAM MEETING

84. On April 24, 2014, an IEP team meeting was held. The IEP team consisted

of: Grandmother, Ms. Ybarra, Ms. McLaughlin, and Ms. Lull. Grandmother requested that Student be placed on school based independent study from April 25, 2014, through May 5, 2014. Student's IEP was modified to include that provision.

#### MAY 29, 2014 IEP TEAM MEETING

85. On May 29, 2014, Student's annual IEP team meeting was held. The following IEP team members were present at the meeting: Grandmother; Lucy Berk-Fisher, a district representative; Liz Ybarra, school principal; Shannon Biggs, school counselor; Brandy Clifton, special education teacher; Laurena Davis, occupational therapist; Lisa McLaughlin, general education teacher; and Marie Fajardo, Grandmother's advocate.

#### Student's Progress

86. During the 2013-2014 school year, Student made some academic, behavioral, and social-emotional progress. Student's classroom behavior had improved, as had his social relationships. However, Student still had significant needs in the areas of peer relationships, task completion, and behavior. Although Student more frequently engaged in appropriate social play and conversations both in the classroom and on the playground, he continued to have difficulty effectively engaging with his peers. While speaking to peers, Student would often face away from them, causing his peers not to realize that he was attempting to engage them. Student used verbal language to interact with peers in 3 out of 10 situations, but Student did not use proper body language during those interactions. Student's social relationship goal called for him to initiate social interactions with peers using appropriate verbal language and body language in 5 out of 10 opportunities.

87. Student met his social-emotional goal, which required Student to be able to describe and process his emotions and social experiences through words, pictures,

and social-emotional activities in 8 out of 10 opportunities. Over the school year, Student had become more willing to answer questions about his feelings and more able to process his emotions.

88. Student failed to meet his initiate and persist on tasks goal. Student's goal was to initiate the completion of his classwork with one individual prompt from the teacher in 5 out of 10 times. Five out of 10 times Student met that goal with mathematic classwork, but only 3 out of 10 times with other types of classwork.

89. Student failed to meet his respect others' personal space goal. The goal required Student not to touch other people or their items without first asking and receiving permission to touch them. Although Student made strides towards his goal, Student required prompting and, at times, Student continued touching other peoples' items without permission.

90. Student failed to meet his coping skills goal, which required Student to ask for help or a break in 6 out of 10 opportunities when he felt he was unable to engage in classroom activities. Student never asked to take a break and only asked for help in 2 out of 10 opportunities. These were still areas of need for Student for which he required a behavior intervention plan to support the goals.

91. Although the evidence established that Student made progress in reading and writing, Student did not meet any of his three reading and writing goals. However, Student met both of his math goals. Student received academic benefit in the areas of reading, writing, and math but his reading, writing, and mathematics skills were still below grade average.

#### Occupational Therapy Assessment

92. During the May 29, 2014 IEP team meeting, Ms. Davis, a licensed occupational therapist with Brentwood, reviewed the result of the occupational therapy assessment she had conducted. Ms. Davis determined that despite Student's challenges

with his handwriting, his motor skills fell into the average range. During the assessment, Ms. Davis found Student to have some sensory challenges. Based on her findings, Ms. Davis provided some strategies for dealing with Student's sensory challenges.

93. The sensory strategies were designed with the purpose of helping to increase Student's attention level during academic instruction. The recommended sensory strategies were incorporated as accommodations and supports in Student's IEP. Additionally, the IEP offered Student 60 minutes monthly of occupational therapy consultation.

94. The sensory strategies, which were included in the IEP, specified that they were to be incorporated throughout Student's day and that they were not be used as rewards or consequences to behavior. The sensory strategies were designed to help increase Student's attention level and to help decrease Student's distractions.

#### Additional Supports, Services, Accommodations, and Modifications

95. Even though Student had made some progress emotionally, socially, behaviorally, and academically, he still needed assistance staying focused, completing work, and successfully interacting with his peers. In his general education class, Student still refused to complete his work at times. Academically, Student was not progressing at a rate which was commensurate with his intellectual ability.

96. Instead of developing and implementing a behavior intervention plan, which set out specific interventions and responses to Student's behavior, Student's IEP team determined he needed the services of a one-to-one aide for 180 minutes daily. The aide was assigned during instruction of academic subjects in the areas where Student experienced the most difficulty.

97. Student's May 29, 2013 IEP offered him the following accommodations and modifications: small group setting for language arts and math assessments; reminders to stay on task; extra breaks; directions read aloud and rephrased; directions

restated; explicit expectations; extended time to complete assignments; shortened assignments; test questions and answer choices read aloud on tests that do not test reading ability; preferential seating; positive reinforcements; access to an Alpha Smart<sup>4</sup> for keyboarding; and the aforementioned sensory breaks and tools. Student's IEP did not contain specifics regarding a positive behavior plan. Instead, the IEP team discussed using the "Hoot Loot" program as a positive behavior reinforcement. The "Hoot Loot" program was used by teachers and staff throughout the school and was not designed specifically for Student. The program provided for teacher and other staff members to give a student "Hoot Loot" (fake money) when observing a student following directions or performing or behaving in a positive manner. Students were allowed to exchange their "Hoot Loot" for items at the school store. Although Student responded well to rewards based behavior supports, the "Hoot Loot" program was not sufficient to meet Student's behavior needs.

#### New Goals

98. Student's May 29, 2014 IEP offered Student new goals in the areas of reading, writing, and mathematics. Student's previous personal space of other's goal and social relationships goal were modified and included as new goals in the IEP. Student's former coping skills goal was broken into two separate goals and the required success rate was increased to

#### BEHAVIORAL NEEDS FROM THE BEGINNING OF THE 2014-2015 SCHOOL YEAR THROUGH JANUARY 2015

99. From the beginning of the 2014-2015 school year to November 2014, Student did not experience any "shut downs" in his general education class.

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<sup>4</sup> An Alpha Smart keyboards is a portable work processing keyboard.

Nevertheless, Student continued to have difficulty staying focused and staying seated during class. Amy Galbraith, Student's general education teacher for third grade, utilized the behavior interventions, sensory strategies, and accommodations from Student's May 29, 2014 IEP to help with Student's behaviors. To help Student's focus, she seated Student in the front of the classroom near her. Student's assigned one-to-one aide assisted Student with his work and helped Student to refocus on the task before him. Ms. Galbraith provided Student with break cards which he could use if he felt he was unable to participate and needed a break. However, Student chose not to utilize the break cards. Ms. Galbraith used positive reinforcements with Student on a daily basis to help promote positive behavior. Student was permitted to use "fidgets" or small manipulatives to help him focus during instruction.

100. At the beginning of the 2014-2015 school year, Jay-Lynn Thompson, a special education teacher with Brentwood, was assigned to be Student's special education teacher. She provided Student with instruction and assistance both in a separate special education classroom and in Student's general educational classroom. Student's special education aide also assisted Student with instruction in Student's general education classroom. Ms. Galbraith and Ms. Thompson discussed Student's performance and behaviors on a daily basis. Ms. Thompson provided Ms. Galbraith with modified academic assignments for Student's use during general education.

101. If available, Ms. Thompson assisted Student when Student exhibited behavior issues in his general education classroom. While working with Student, Ms. Thompson utilized a number of positive behavioral strategies. Ms. Thompson was familiar with positive behavioral strategies due to her background working with students who fit the criteria of emotional disturbance. Ms. Thompson felt that Student presented as "fragile" with his moods and emotions. As Student loved recognition and praise for accomplishing tasks and remaining on task, Ms. Thompson would use praise to help

motivate Student. At times she would praise another student, who was exhibiting a desired behavior. In response to Ms. Thompson's praise, Student often would then mimic the other student's desired behavior. Ms. Thompson would then praise Student for his desired behavior. Ms. Thompson found that Student's response to the positive behavioral strategies varied, thus forcing her to vary the strategies she used.

102. From the beginning of the school year until November 2014, Student made progress with his goals and was able to access his education. However, all of the strategies that Ms. Thompson and Ms. Galbraith were using should have been part of a behavior intervention plan for Student as the strategies were necessary and effective. Student was entitled to have these documented in his IEP as part of a behavior intervention plan. Had either teacher been re-assigned or absent, there is no evidence that Student would have continued to receive these interventions which he both needed and to which he was entitled.

103. In November 2014, Student began exhibiting more consistent maladaptive behaviors. Over the next several months Student's maladaptive behaviors increased. Student became more defiant with his general education teacher and aide and more reluctant to complete his work. On a lesser scale, Student became less compliant in his special education classroom. Student's defiant behavior caused Ms. Thompson to increase the amount of time she spent assisting Student in his general education classroom and the amount of time she spent consulting with Student's aide. Ms. Thompson worked with Student's aide on how to use positive behavioral strategies with Student. Again, these strategies should have been incorporate into a behavioral intervention plan that was part of Student's IEP.

104. Until November 2014, Student had not exhibited "shut downs" during the 2014-2015 school year. Over the next several months Student's "shut downs" increased, as did the amount of time Student spent in a "shut down." Initially, Student's "shut

downs" lasted approximately 20 minutes, but as the school year progressed Student's "shut downs" increased to 45 minutes. At times Student would "shut down" when he became frustrated over his work, but Student also "shut down" for other reasons. The causes of Student's "shut downs" tended to vary, as something would bother Student one day and then not bother him the next.

105. Student's maladaptive behaviors seemed to increase after Student learned that his father was going to be incarcerated longer than initially believed. The increase in Student's "shut downs" caused Ms. Thompson to become concerned that Student's "shut downs" were limiting the amount of instructional time Student was receiving and impacting his ability to access his education. The more maladaptive behaviors Student exhibited in his general education classroom, the more time Ms. Thompson spent working with Student in the general education classroom. Ms. Thompson was spending 45 to 60 minutes, three to four times a week, working with Student in the general education classroom and consulting with Student's aide.

106. Ms. Thompson used a positive reward system while working with Student. At times, she would allow Student to perform a magic trick for the class as a reward. In the special education classroom, Student was allowed to sit on a bean bag chair while completing his work. Although the positive incentives and accommodations became less effective once Student began having increased behavioral problems in November 2014. As Student's maladaptive behaviors increased, Student experienced difficulty performing or delayed in performing tasks which Student had proved previously that he could perform.

107. The increase in Student's maladaptive behaviors created an increase in Student's difficulty with peer interaction. Where previously there had been an improvement in Student's interactions with peers, Student aggression towards other students increased beginning in November 2014. On November 5, 2014, Student was

involved in a physical fight with two other students.<sup>5</sup> During another incident, Student and another boy injured a younger, smaller student during “play fighting,”

108. On January 8, 2015, Student threw a note at his one-on-one aide. The note contained a picture of a middle finger on it. On that same day, Student rolled a set of papers which he played with in class instead of attending to required academic tasks. Student was referred to the school principal over the incident and Grandmother was notified.

109. Student’s escalating behavior showed that Student continued to need a dynamic behavior intervention plan that outlined a specific, systematic plan for Student’s behavior support. Instead, Brentwood chose to rely on a series of well-meaning and sometimes successful staff members to provide Student behavior support. Brentwood’s choice prevented the IEP team and Grandmother from participating in the creation of a behavior intervention plan for Student.

#### JANUARY 27, 2015 BEHAVIORAL INCIDENT

110. Student’s behaviors continued to escalate with Student experiencing his most severe behavioral incident on January 27, 2015. On that day, Student refused to work on a math assignment with his aide, and continuously refused to follow prompts from his aide and Ms. Thompson to follow directions and participate. Student ignored all prompts and took some toys out of his desk and began playing with them. Ms. Thompson’s attempts to use positive behavior interventions with Student were unsuccessful. After approximately 15 minutes of Student refusing to give Ms. Thompson the items with which he was playing, Ms. Thompson took the items from Student. Student responded by knocking all of the items off of his desk and crying.

111. When the rest of the class left for recess, Student refused to leave the

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<sup>5</sup> Details of that incident were not established during the hearing.

classroom. Student was in “shut down” mode for approximately 40 minutes before the school principal was called for assistance. The principal attempted to get Student to accompany her to her office and have lunch, but Student refused. The rest of the class was due to return to the classroom to resume their academic instruction. For approximately 10 minutes, the principal attempted to use various de-escalation techniques which she had learned from the Crisis Prevention Intervention training she had received. Student failed to respond to any of the techniques. Prior to attempting to move Student, the principal provided Student the choice of accompanying her to her office or being escorted to the office.

112. Both the principal and the assisting teacher had been trained in Crisis Prevention Intervention techniques, including transporting students. When the principal and another teacher stepped closer to Student in order to transport Student, he became extremely upset. Student wrapped his legs around the desk where he was sitting and then he attempted to kick the principal and the teacher. Due to the level of Student’s resistance, two aides, who were also training in Crisis Prevention Intervention techniques, were called to assist. While transporting Student to another classroom where other students were not present, Student tried to head butt, kick, scratch, and grab the clothing of the staff members. Student also cursed at staff members.

113. Approximately 10 to 15 minutes into the Crisis Prevention Intervention restraint, Student’s eyes rolled back. The assisting teacher was afraid that Student had experienced a seizure so they began to monitor Student’s breathing. Staff members called campus police to the scene, but by the time an officer arrived, Student was sleeping normally. It is not unusual after such a physical and emotion experience, such as Student experienced, for a child to fall asleep.

114. During the incident, Grandmother was notified. Later that day, Grandmother took Student for a doctor’s appointment which had been previously

scheduled. The doctor informed Grandmother that Student had not experienced a seizure.

#### DR. LEVINE'S PSYCHOEDUCATIONAL ASSESSMENT

115. In early March 2014, Brentwood approved Grandmother's request for a psychoeducational independent education evaluation. In June 2014, Grandmother informed Brentwood that she had selected Dr. Levine, a licensed clinical psychologist, as the independent evaluator. Due to conflicts in her schedule, Dr. Levine conducted her assessment in September and October 2014 and completed her written report on December 28, 2014.

116. Dr. Levine's assessment was comprised of a clinical interview with Grandmother on September 22, 2014; a review of Student's school records and prior evaluations; observations of Student during recess and a geography lesson on September 25, 2014; and the administration of various tests. The amount of time Dr. Levine observed Student was very limited because Student's aide accidentally revealed to Student that Dr. Levine was present to observe Student. Dr. Levine left as Student was most likely not exhibiting typical behavior while she was present.

117. Dr. Levine conducted the testing of Student on September 29, 2014, September 30, 2014, October 16, 2014, and October 17, 2014. Dr. Levine administered the Beery-Buktenica Developmental Test of Visual-Motor Integration; the Behavior Assessment System for Children, Second Edition; the Brief Rating Inventory of Executive Function; the Children's Memory Scale; the Comprehensive Test of Phonological Processing, Second Edition; Conner's Parent Rating Scale-Revised; Conner's Teacher Rating Scale-Revised; the Delis-Kaplan Executive Functions System; the Gray Oral Reading Test; portions of the Neuropsychological Evaluation, Second Edition; the Test of Variables of Attention; the Wechsler Intelligence Scale for Children, Fourth Edition; and the Wechsler Individual Achievement Test, Third Edition.

118. The results of Student's cognitive and intellectual functioning testing showed significant discrepancies between and within the index scores, thus preventing Dr. Levine from calculating Student's full scale IQ. However, Dr. Levine found Student to have age-appropriate intellectual development.

119. Consistent with Ms. Fuller's assessment, Dr. Levine found Student to have attention and executive functioning deficits. The assessment also revealed that Student met the diagnostic criteria for Specific Learning Disorder with impairment in reading, written expression, and mathematics, as well as Attention Deficit Hyperactivity Disorder from the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders. She did not however, make a determination of eligibility for special education under any category.

120. The information Grandmother provided to Dr. Levine, both through assessment questionnaires and through her interview, portrayed Student differently than the information Grandmother provided to Ms. Young during her assessment of Student. To Dr. Levine, Grandmother reported far less negative behaviors at home. It is unclear whether this was due to a change in Student's behavior since the year before or whether Grandmother was attempting to portray a different picture of Student's characteristics and behaviors at home.

121. During at least one portion of the testing, Student refused to respond to questions and made the statements, "I don't want to do this. I'm not going to say anything." Additionally, on the self-reporting measure of the Beck Youth Inventories test, Student's responses reflected a lower than typical endorsement of symptoms for a child Student's age in the areas of anxiety, depression, and anger. Dr. Levine noted that Student's underreporting was consistent with her opinion that Student was reluctant to share information about his inner emotional state.

122. Dr. Levine found that the clinical interviews of Grandmother, teacher, and

school counselor suggested that Student may have exhibited symptoms of a “mood disorder,” such as irritability, verbal outbursts, crying, and social withdrawal, during second grade, but that the symptoms appeared to have “significantly remitted” during third grade. Dr. Levine recommended that Student’s symptoms be monitored closely, particularly given Student’s family history of bipolar disorder.

123. Dr. Levine speculated that some of the stressful and traumatic events that Student experienced over the last several years may have resulted in symptoms of depression and/or anxiety in Student. She recommended that Student participate in weekly talk therapy outside of the school setting to help Student process his feelings and experiences and to help Student master emotional coping strategies.

124. Although Dr. Levine opined that Student’s struggle with significant learning and attention disorders “significantly fueled and exacerbated” Student’s difficulties with his behavior, emotional regulation, and peer interaction, she did not indicate that it was the sole reason for Student’s emotional and behavioral issues at school. If that were the case, Student would not have exhibited the level of maladaptive behavior and emotional dysregulation that he exhibited at home. Dr. Levine’s report did not provide an analysis of whether Student met the special education criteria for emotional disturbance nor did her report provide an opinion on that issue.

125. In her report, Dr. Levine provided a number of general recommendations, recommendations for academic accommodations, specific recommendations for reading and math, non-school-based recommendations, and behavior recommendations for home.

126. Student presented Dr. Levine’s report to show that Brentwood’s December 2013 psychoeducational assessment was not legally compliant because it found Student to be eligible under the criteria of emotional disturbance. However, Dr. Levine’s report did not provide an analysis of whether Student met the special education criteria for

emotional disturbance, nor did her report provide an opinion on that issue.

#### JANUARY 29, 2015 IEP TEAM MEETING

127. On January 29, 2015, an IEP team meeting was held. Present at the meeting were: Grandmother, Ms. Fajardo, Grandmother's advocate, Brentwood school psychologist Amanda Balog, Ms. Ybarra, Ms. Berk-Fisher, Ms. Galbraith, and Ms. Davis. Tiffany Herron-Lumpkin, Grandmother's advocate, and Dr. Simone Levine, an independent evaluator, were present by telephone. The IEP team met so that Dr. Levine could present her independent psychoeducational assessment of Student.

128. After presenting her assessment of Student, Dr. Levine provided her opinion that Student did not meet the special education criteria for emotional disturbance. Dr. Levine informed the IEP team that although emotional regulation was very challenging for Student, Student's emotional dysregulation was the result of his academic deficits and his Attention Deficit Hyperactivity Disorder diagnosis. However, Dr. Levine's opinion on this issue is given little weight because she did not provide an analysis of her opinion using the California Code of Regulations' criteria for emotional disturbance.

129. Dr. Levine recommended that a functional behavior assessment be conducted in order to help better understand Student's negative behaviors. A functional behavior assessment is an analytical process based on observations, review of records, interviews, and data analysis to determine the function the behavior serves for the student, how that function can be met more appropriately, and how the environment can be altered to better support general positive behaviors from the student. The IEP team agreed to have a functional behavior assessment conducted.

130. During the meeting, the IEP team discussed changing Student's placement in order to better meet his needs. Ms. Galbraith and Ms. Thompson both believed that a small group setting was more conducive to Student's learning process. Even though a

portion of the time Student was receiving small group instruction during general education and special education placement at Mary Casey Black, he was also receiving one-to-one and larger group based instruction. The IEP team was concerned that Student needed additional services to address his emotional dysregulation.

131. The IEP team discussed possible placement in a service specific class at Brentwood's Ron Nunn Elementary School. Prior to joining the staff at Mary Casey Black, Ms. Thompson spent two years working in that program at Ron Nunn. The program at Ron Nunn would have provided a learning environment with a smaller student to teacher ratio and would have been able to provide more behavior supports for Student as the specific class served students with emotional regulation issues. Ms. Fajardo shared her opinion that Student's social-emotional needs were not to a level that he would require the service specific class at Ron Nunn. Grandmother informed the team that recent changes in the family, as well as Father's prolonged incarceration, had caused Student emotional distress. The district members of the IEP team disagreed with Ms. Fajardo, citing Student's January 27, 2015 behavioral incident as example. The IEP team discussed several other placement options and the possibility of Student remaining of at Mary Casey Black with additional supports and services. The IEP team did not reach a consensus on the issue and the issue of placement was tabled until the next IEP team meeting.

#### Behavior Intervention Plan

132. In November 2014, Ms. Balog started working directly with Student. Ms. Briggs had been providing counseling services to Student because Grandmother had requested to have Ms. Briggs as the provider. However, Ms. Briggs was scheduled to go on maternity leave so she and Ms. Balog started to work in tandem with Student for several weeks in order to provide Student with a smoother transition between counseling providers. Prior to that transition, Ms. Balog had observed Student in the

classroom and had consulted with Student's teacher and aides regarding positive behavior interventions.

133. Student's decreased engagement in both his general education and special education classes, combined with Student's escalating behaviors, caused Brentwood to decide to create a proposed behavior intervention plan. The behavior intervention plan was to be presented to Student's IEP team for review. In order to create the behavior intervention plan, Ms. Balog looked at the causes of Student's maladaptive behaviors and the functions of those behaviors by using observational data.

134. In January 2015, prior to Student's January 27, 2015 behavior incident, Ms. Balog drafted a behavior intervention plan for Student. Ms. Balog was not a behaviorist. A behavior intervention plan looks at the behaviors impeding a student's learning, the environmental factors influencing those behaviors, and provides interventions or supports to be used to either avoid the behaviors or modify the behaviors.

135. Ms. Balog was prepared to present her proposed behavior intervention plan at the January 29, 2015 IEP team meeting, but at the request of Ms. Fajardo and Grandmother, a decision was made to table her presentation until a functional behavior assessment was completed. After the functional behavior assessment was completed, Ms. Balog modified Student's behavior intervention plan.

#### FUNCTIONAL BEHAVIOR ASSESSMENT

136. Ms. Balog conducted Student's functional behavior assessment. Data was collected by Ms. Balog and Student's one-to-one aide. Ms. Balog provided a chart for the aide to complete to gather the necessary behavioral and environmental data. Additionally, Ms. Balog used the information from Grandmother, Ms. Galbraith, and Ms. Thompson's interview forms as part of her analysis.

137. The observational data was collected by Ms. Balog and Student's aide, from February 24, 2015, through April 28, 2015. Although data had been collected prior

to Grandmother consenting to the functional behavior assessment, it was not utilized as part of the assessment. However, the interviews of Grandmother and Student's teachers covered Student's behavior since the beginning of the school year.

138. Although the results of the functional behavior assessment supported Ms. Balog's original behavior intervention plan, Ms. Balog revised Student's behavior intervention plan after she completed the functional behavior assessment. The revised behavior intervention plan contained most of the same information as the first behavior intervention plan, with exception of the additions of sensory strategies and a reactive strategy for incidents where Student escalated to physical aggression. Ms. Balog included the new reactive strategy because of Student's January 27, 2015 behavior incident.

#### MAY 15, 2015 IEP TEAM MEETING

139. Student's behavior continued to deteriorate throughout the rest of the school year. Student regularly refused to perform any academic work in both his general and special education classrooms, often engaging in behaviors that disrupted the rest of the class. Student would chose to participate in a preferred activity, such as manipulating items or toys on his desk, instead of following directions. Student continued to engage in "shut downs" where he would refuse to work and became uncommunicative. His relationships with his peers had continued to decline. When Student became frustrated by his peers, he would yell at them to "get away" and would blow into their faces. During the 2014-2015 school year, Student did not meet his two coping skills goals, his social-emotional goal, his personal space of others goal, and his social relationship goal. Student did not receive educational benefit in the areas of behavior, peer relationships, and task completion.

140. During the school year, Student did receive educational benefit in math, reading, and writing, although the progress was slow and he was below grade level.

Student was approaching proficiency in many areas of math, but Student did not meet his mathematics goal. Student also did not meet his writing goals or his keyboarding goal. Student's maladaptive behaviors continued to impede his ability to learn.

141. On May 15, 2015, an IEP team meeting was held. Ms. Balog presented the functional behavior assessment and the revised behavior intervention plan, which was a part of the IEP. During the meeting, Student's educational placement was discussed. The May 15, 2015 IEP offered Student placement in the Counseling and Education Program at the Floyd I Marchus School. The program was run by Contra Costa County Department of Education and was designed for students with emotional and behavioral needs. Grandmother consented to the IEP and Student immediately began attending school at Floyd I. Marchus School.

142. Student did not challenge the contents of the behavior intervention plan in this case, and no findings are made in regards to the appropriateness of the behavior support plan. The evidence showed that the behavior intervention plan was in place through the end of the school year.

#### REQUESTED REMEDIES

143. Student did not present evidence to support his request for placement at a non-public school, the amount of compensatory education needed, or the other requested remedies.

144. At the time of the hearing, Student was still attending the Counseling and Education Program at Floyd I. Marchus School and Grandmother felt Student was making progress.

145. Grandmother testified that Student has been receiving private counseling services.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>6</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>7</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

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<sup>6</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>7</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

that is developed under the IDEA's procedures with the participation of parents and school personnel that describes 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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, 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. 951, fn. 10.)

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

ISSUE 1: DID BRENTWOOD DENY STUDENT A FAPE DURING THE 2013-2014 SCHOOL YEAR BY FAILING TO ASSESS STUDENT'S SOCIAL-EMOTIONAL, AND BEHAVIORAL NEEDS AS PART OF ITS MAY 29, 2013 INITIAL PSYCHOEDUCATIONAL ASSESSMENT?

5. Student contends that at the time of Brentwood's May 29, 2013 psychoeducational assessment, Brentwood had sufficient notice of Student's social-emotional and behavioral needs such that Brentwood should have assessed Student in those areas. Brentwood contends that its psychoeducational assessment sufficiently assessed Student's needs and that Student's only known behavioral needs were related to his inattention.

6. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall

be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The pupil must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the pupil has a disability or whether the pupil's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

7. The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

8. Brentwood's argument is not compelling. Student's educational records from his prior school out of state related that Student lacked parental support and that he required a "behavioral plan" in order to be successful. But more importantly, the staff at Marsh Creek had direct knowledge of Student's maladaptive behaviors. Prior to becoming medication compliant, Student was unable to even write his name without an adult continuously prompting him. Even after resuming his medication, Student still struggled behaviorally. By assuming that all of Student's behaviors were the result of Student's attention and executive functioning deficits, Ms. Fuller failed to conduct an assessment which was sufficiently comprehensive to identify all of Student's special education and related service needs, regardless of whether they were commonly linked to Student's disability category of specific learning disorders.

9. A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the

event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

10. Brentwood's failure to assess Student in all areas of suspected disability constituted a procedural denial of FAPE. From the beginning of the 2013-2014 school year until the presentations of Ms. Young's assessment at the December 18, 2013 IEP team meeting, Student's emotional and behavioral needs remained unrecognized and unmet. Only once a student's needs are identified can an IEP be constructed to serve those needs. In this case, the delay in assessing Student's needs prevented Student from being provided counseling and other behavior supports. It also deprived Grandmother the right to meaningfully participate in the IEP development process because she did not have the information necessary to participate due to the failure to assess. Thus, the procedural violation resulted in a denial of FAPE from the beginning of the 2013-2014 school year, until December 18, 2013.

## ISSUE 2: DID BRENTWOOD DENY STUDENT A FAPE DURING THE 2013-2014 SCHOOL YEAR BY FAILING TO CONDUCT A FUNCTIONAL ANALYSIS ASSESSMENT AND/OR A SOCIAL BEHAVIORAL ASSESSMENT?

### Functional Analysis Assessment

11. Regulations implementing the Hughes Bill (Ed. Code §§ 56520, et seq.) required that a local educational agency conduct a functional analysis assessment, resulting in a behavior intervention plan, when a student exhibited a "serious behavior problem," and the IEP team found that the instructional/behavioral approaches specified in the student's IEP had been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subds. (d), (e), and (g).) Effective July 1, 2013, the Hughes Bill was repealed upon the passing of Assembly Bill 86 (AB 86). Under AB 86, an educational agency is no longer required to

conduct a functional analysis assessment or create a behavior intervention plan for students exhibiting "serious behavior problems." Instead, the educational agency must follow the IDEA which provides that IEP teams must address behavior when it impedes a student's or other students' access to education. (Ed. Code, § 56520, amended.) However, nothing within the law prohibits local educational agencies from conducting functional analysis assessments or developing behavior intervention plans if a Student's needs warrant this level of assessment or intervention.

12. Throughout the hearing, Student used the terms functional analysis assessment and functional behavior assessment interchangeably, and in his closing brief he failed to address the issue of whether Student was denied a FAPE as a result of Brentwood's failure to conduct a functional analysis assessment of him. When outlining the issues in his closing brief, Student changed the term "functional analysis assessment" to "functional behavior assessment" and argued the issue accordingly. Whereas, in Student's supplemental brief, Student contended that Brentwood should have provided Student with a functional analysis assessment and argues that, although the Hughes Bill was repealed, school districts are not prohibited from conducting functional analysis assessments.

13. While Student is correct that nothing within the law would have prohibited Student from conducting a functional analysis assessment of Student, Student failed to provide any evidence to support his contention that Student was denied a FAPE as a result of Brentwood's failure to conduct a functional analysis assessment, because he did not show that Student needed this more intensive assessment in the area of behavior at this time. Therefore, Student failed to meet his burden of proving by a preponderance of the evidence that Brentwood denied Student a FAPE during the 2013-2014 school year by failing to conduct a functional analysis assessment of Student.

## Social Behavioral Assessment

14. In Student's supplemental brief, Student contends that the term social behavioral assessment refers to "formal standardized assessments" which assesses a child's "social emotional status" as discussed during testimony of Ms. Fuller and Ms. Berk-Fisher. Brentwood asserts that Student's contention misstates Ms. Fuller's and Ms. Berk-Fisher's testimony and that Student is attempting to expand the issue by arguing that the term social behavioral assessment references a social-emotional and behavioral assessment.

15. The term social behavior assessment does not appear anywhere within the law and no evidence was presented that it is a term of art. However, when addressed in its most basic form, the term social behavior assessment appears to describe an assessment of Student's behavior. As addressed above, Brentwood's May 2013 psychoeducational assessment focused solely on Student's inattentive behavior and did not look beyond that issue.

16. In her report, Ms. Fuller did not provide a full picture of Student's behaviors. Ms. Fuller did not provide her own observations of Student's behaviors during class nor did she provide observations of Student's behavior in class by Student's teacher, Ms. McLaughlin. As referenced above, Student's behaviors impacted his ability to access his education thus triggering the need for an assessment of Student's behavior. A more complete analysis of Student's behaviors would have allowed the IEP team the opportunity to provide more complete behavior supports in Student's IEP during the first part of the 2013-2014 school year. Whereas, Ms. Young's December 2013 assessment directly addressed Student's social-emotional and behavioral functioning and allowed the IEP team a complete picture of Student's unique behavioral needs. Therefore, from the beginning the 2013-2014 school year until December 18, 2014, when Ms. Young's assessment was completed, Brentwood's failure to conduct a

social behavioral analysis of Student denied him a FAPE.

ISSUE 3: DID BRENTWOOD DENY STUDENT A FAPE FROM THE BEGINNING OF THE 2014-2015 SCHOOL YEAR UNTIL APRIL 3, 2015 BY FAILING TO CONDUCT A FUNCTIONAL ANALYSIS ASSESSMENT AND/OR A SOCIAL BEHAVIORAL ASSESSMENT?

Functional Analysis Assessment

17. As analyzed above, Student failed to prove by a preponderance of the evidence that he was denied a FAPE as a result of Brentwood's failure to conduct a functional analysis assessment from the beginning of the 2014-2015 school year until April 3, 2015, because he did not prove that he needed this level of intensive assessment.

Social Behavioral Assessment/Functional Behavior Assessment

18. Even though the law does not define the meaning of a functional behavior assessment or when and if it is needed, a student's behavior needs can require that it be conducted in order to provide a student a FAPE. In November 2014, as the behavioral incentive, interventions, and supports failed to meet Student's behavioral needs, Brentwood had a responsibility to explore other options and should have completed a functional behavior assessment. A functional behavior assessment is an analytical process based on observations, review of records, interviews, and data analysis to determine the function the behavior serves for the student, how that function can be met more appropriately, and how the environment can be altered to better support general positive behaviors from the student. A functional behavior assessment would have provided the IEP team with more behavior specific information to help form a behavior support plan or behavior intervention plan.

19. In May 2015, Brentwood's functional behavior assessment was completed. The school psychologist utilized the results from the assessment to modify the

previously written behavior intervention plan. The lack of proper behavior supports prevented Student from being able to access his education. Thus, from November 2014 through May 15, 2015, Student was denied a FAPE because Brentwood failed to conduct a functional behavior assessment of Student.

**ISSUE 4: DID BRENTWOOD DENY STUDENT A FAPE DURING THE 2013-2014 SCHOOL YEAR BY FAILING TO INCLUDE A BEHAVIOR INTERVENTION PLAN AS PART OF STUDENT'S IEPs DURING THAT SCHOOL YEAR?**

20. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavior interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).) It is the intent of the Legislature that children with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029 (*Neosha R-V*); *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

21. The evidence clearly shows that during the 2013-2014 school year Student's behaviors impeded his learning and the learning of the other students in class. However, the law does not specifically require that an IEP team adopt a behavior intervention plan. Brentwood included some positive behavior incentives in Student's IEPs during the 2013-2014 school year.

22. Brentwood held numerous IEP team meetings in an effort to address Student's academic and behavioral needs. Under the law, the IEP team must consider strategies, including positive behavioral interventions, and supports to address behaviors that impede a student's learning. Despite the IEP team's attempts, Student's

behaviors continued to impede his learning. By the November 2013, IEP, Student should have had a behavior intervention plan. Although there was an improvement in Student's behaviors in the latter half of the 2013-2014 school year after Student received more services and supports, Student continued to struggle behaviorally. Student failed to meet almost all of his IEP goals in 2013-2014 including his social-emotional and behavioral goals.

23. Even though the IEP team found that Student fit the criteria for emotional disturbance, Student's positive behavior interventions and supports did not significantly change. Once the IEP team became aware of Student's social-emotional and behavioral needs and that Student's behaviors were impeding his learning, the IEP team should have looked at increasing supports and services to address those needs, and this included a behavior intervention plan. So, although the current law does not require that a behavior intervention plan be created, in the event that a student's behavior needs rise to level that warrants a behavior intervention plan a school district has an obligation to provide a behavior intervention plan in order to ensure Student a FAPE.

24. In the case at hand, Student's behavior's continued to impede his learning throughout the 2013-2014 school year. Brentwood was obligated to provide Student with a behavior intervention plan once Brentwood was aware of Student's intensive social-emotional and behavioral needs and that the implemented interventions, incentives, and services did not meet those needs. Brentwood's failure to provide Student with a behavior intervention plan beginning November 2013 resulted in Student being denied a FAPE through the end of the 2013-2014 school year.

#### ISSUE 5: DID BRENTWOOD DENY STUDENT A FAPE DURING THE 2014-2015 SCHOOL YEAR BY FAILING TO INCLUDE A BEHAVIOR INTERVENTION PLAN AS PART OF STUDENT'S IEPs DURING THAT SCHOOL YEAR?

25. Although there had been an improvement in Student's behavior at the

beginning of the 2014-2015 school year, Student continued to struggle with maladaptive behaviors. Although the testimony supports that from the beginning of the 2014-2015 school year through October 2014 Student's ability to access his education improved, the improvement was due to his teachers implementing their own informal behavior intervention plan, without reducing it to writing and attaching it to Student's IEP. Even with those behavior supports, Student's maladaptive behaviors began to increase in November 2014.

26. By January 2015, the school psychologist felt that Student's decreased engagement in both his general education and special education classes, combined with Student's escalating behaviors, required that a behavior intervention plan be created. The behavior intervention plan was to be presented to Student's IEP team for review. In order to create the behavior intervention plan, Ms. Balog looked at the causes of Student's maladaptive behaviors and the functions of those behaviors by using observational data. At the January 29, 2015 IEP team meeting, at Grandmother's and her advocate's request, the behavior intervention plan was not incorporated in Student's IEP because they wanted to wait until the functional behavior assessment was completed. After the completion of the functional behavior assessment, the modified behavior intervention plan was incorporated as part of Student's IEP on May 15, 2015. Had Brentwood not agreed to wait until the functional analysis assessment was completed to include the behavior intervention plan as part of the IEP offer, the behavior intervention plan would have been considered as a part of the January 29, 2015 IEP. However, Brentwood agreed to wait to make the plan a part of the IEP until such time as the functional analysis assessment was completed. Accordingly, Brentwood denied Student a FAPE from the beginning of the 2014-2015 school year until May 15, 2015.

ISSUE 6: DID BRENTWOOD DENY STUDENT A FAPE BY FAILING TO CONDUCT A LEGALLY COMPLIANT PSYCHOEDUCATIONAL ASSESSMENT IN DECEMBER 2013?

27. Both the IDEA and the California Education Code specify the manner in which assessments must be conducted and the qualifications of the assessors. (20 U.S.C. § 1414 (a) and (b); 34 C.F.R. § 300.502; Ed. Code, § 56320.) As part of a reevaluation, the IEP team and other qualified professionals must review existing evaluation data on the child, including teacher and related service providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).)

28. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds.

(a) & (b).)

29. The law requires the personnel who assess a student to prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

30. Student asserts that Brentwood's December 2013 psychoeducational assessment was not legally compliant because it incorrectly stated that Student had taken Risperidone; that Ms. Young spent insufficient time assessing Student's needs; and because the assessment found that Student fit the special education criteria for emotional disturbance. The analysis of this issue is limited to whether any of those three things invalidated the assessment.

#### Incorrectly Stating that Student was Taking the Medication Risperidone

31. Ms. Young included in her written report that Student had previously taken the medication Risperidone. Student contends that the inclusion of that incorrect information invalidates the assessment. Student failed to present any evidence that the inclusion of that incorrect information invalidated the results of the December 2013 assessment or caused the assessment to fail under the law. Therefore, Student did not meet his burden of proving by a preponderance of the evidence that the inclusion of the

incorrect medication information prevented the assessment from being legally compliant.

#### Spending Insufficient Time Assessing Student's Needs

32. Student contends that the time Ms. Young spent assessing Student's needs was insufficient. Brentwood argues that Student failed to present any evidence to support his contention. Brentwood's argument is supported by the record.

33. The purpose of the assessment was to gather information regarding Student's social-emotional and behavioral functioning to determine whether Student met the special education eligibility criteria for emotional disturbance. Ms. Young used a variety of assessment tools to gather the relevant information regarding Student's social-emotional and behavioral functioning. Ms. Young's assessment consisted of a review of Student's educational records; interviews of Ms. McLaughlin, Ms. Ybarra, and Grandmother; observations of Student; the administration of the Behavioral Assessment for Children, Second Edition; and the administration of four projective measure tests. Ms. Young assessed Student over two sessions and observed Student in his general education class, his special education class, during a play rehearsal, and during library time. Student did not present any evidence of the existence of a standard for the amount of time required for the administration of a psychoeducational assessment. Nor did Student present any evidence that the amount of time that Ms. Young spent assessing Student was insufficient to support her findings. Thus, Student failed to meet his burden of proving that Brentwood's December 2013 assessment was not legally compliant.

#### Determining that Student Met the Criteria for Emotional Disturbance

34. Student contends that because Dr. Levine found that Student's behaviors were caused by Student's academic deficits Ms. Young's finding are incorrect.

Brentwood contends that a conclusion made by an assessor, in and of itself and in the absence of any failure to comply with testing procedures, does not cause the assessment to legally fail.

35. A student is eligible for special education and related services in the category of emotional disturbance when he exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance:

- (a) an inability to learn which cannot be explained by intellectual, sensory, or health factors;
- (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations;
- (d) a general or pervasive mood of unhappiness or depression; or
- (e) a tendency to develop physical symptoms or fears associated with personal or school problems.

(Cal. Code Regs., tit. 5, § 3030, subd. (i).)<sup>8</sup>

36. This decision does not reach a conclusion regarding Student's eligibility for special education under the category of emotionally disturbed because that was not an issue in this hearing. Instead, this portion of Issue 6 is limited to whether Student was denied a FAPE because Brentwood's December 2013 psychoeducational assessment failed to conduct a legally compliant psychoeducational assessment because the

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<sup>8</sup> The eligibility definition for emotionally disturbed is the one in effect at the time addressed in this Decision. The definition has since been amended. (See Cal. Code Regs., tit. 5, § 3030, subds. (b)(4), (b)(9) [effective July 1, 2014].)

assessment found Student eligible for special education under the category of emotional disturbance.

37. Ms. Young utilized the criteria set forth in the California Code of Regulations to determine whether Student fit the eligibility criteria for emotional disturbance. In her report, Ms. Young found that Student exhibited three characteristics of the emotional disturbance criteria both to a marked degree and over a long period of time: a general pervasive mood of unhappiness or depression; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; and inappropriate types of behavior or feelings under normal circumstances exhibited in several situations. Ms. Young supported her analysis with the assessment's findings and her own observations. Conversely, Dr. Levine's report did not provide an analysis of whether Student met the special education criteria for emotional disturbance, nor did her report provide an opinion on that issue.

38. Additionally, the assessments occurred approximately one year apart. Dr. Levine's report found that the clinical interviews of Grandmother, teacher, and school counselor suggested that Student may have exhibited symptoms of a "mood disorder," such as irritability, verbal outbursts, crying, and social withdrawal during second grade, but that the symptoms appeared to have "significantly remitted" during third grade. Dr. Levine recommended that Student's symptoms be monitored closely, particularly given Student's family history of bipolar disorder. Ms. Young assessed Student in late fall of second grade. These findings of Dr. Levine are consistent with Ms. Young's findings. Accordingly, it is found that Student failed to meet his burden of proving that Brentwood's December 2013 assessment was not legally compliant because it determined that Student met the criteria for emotional disturbance.

ISSUE 7: DID BRENTWOOD PROCEDURALLY DENY STUDENT A FAPE BY FAILING TO INVITE NECESSARY TEAM MEMBERS TO IEP TEAM MEETINGS?

39. There are two parts to the legal analysis of whether a school district offered a student a FAPE: whether the educational agency has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate, meaning it was “reasonably calculated to enable the child to receive educational benefits.” (*Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically result in a denial of a FAPE. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

40. A procedural violation of the IDEA results in a denial of a FAPE only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d at p. 1484.)

41. An IEP team is required to include: one or both of the student’s parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b).)

### The School Psychologist at the September 24, 2013 IEP Team Meeting

42. A school psychologist was not present at the September 24, 2013 IEP team meeting. A school psychologist is not specifically named as a required IEP team member under the IDEA, the Code of Federal Regulations, or the Education Code. Additionally, the attendance of a school psychologist was not required at that IEP team meeting because no assessments were presented at the meeting, so there would not have been any need for a school psychologist to be present to interpret the instructional implications of assessment results. Accordingly, Student did not meet his burden of proof on this issue.

### The Behaviorist at All IEP Team Meetings

43. A behaviorist was not present at any of the IEP team meetings which are at issue in this case. As in the case of the school psychologist, a behaviorist is not specifically named as a required IEP team member under the IDEA, the Code of Federal Regulations, or the Education Code. Student did not present any evidence showing that a behaviorist's presence was required at any of the IEP team meetings.

## REMEDIES

1. Student prevailed on Issue 1 and portions of Issues 2, 3, 4, and 5. As a remedy, Student requests compensatory education in the areas of math, language arts, reading with a one-on-one tutor; placement at a non-public school; psychotherapy services; and an independent functional behavior assessment.

2. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359 at pp. 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light

of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d at p. 1497.)

3. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Id.* at 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) An independent educational evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

4. An award of compensatory education need not provide a “day-for-day compensation.” (*Student W. v. Puyallup School Dist., supra*, 31 F.3d at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

5. In this case, the denials of FAPE for assessment and failure to provide a behavior intervention plan for Student can be directly traced to Student’s failure to receive educational benefit in the areas of behavior, task completion, and peer relationships from the beginning of the 2013-2014 school year through May 2015. Although Student still has needs in the areas of reading, writing, and math, Student did not meet his burden to show that he failed to receive some educational benefit in those areas. Therefore, Student is entitled to compensatory education in the areas of behavior, peer relationships, and task completion.

6. Student, however, failed to put on any evidence supporting the type, amount, and frequency of any compensatory remedies, despite being ordered to do so prior to the hearing. Student has also matriculated to a new school, which seems to have a stronger behavioral component. Taking all of this into account, some remedy is required to compensate Student for the denial of FAPE, but Student failed to meet his burden as to placement in a non-public school or academic tutoring.

7. To compensate for the denial of FAPE, Brentwood shall find an independent behavior assessment by a provider that meets district standards. This assessment shall include classroom observations and observation in the home, as a part of the assessment. The independent assessor shall also determine whether Student currently needs a behavior support or behavior intervention plan and if so, shall develop a draft plan.

8. Brentwood will hold an IEP team meeting within 30 days of the completion of the assessment and draft plan. The IEP team shall consider the assessment and draft plan.

9. In addition, Brentwood will provide Student with 30 hours of consultation behavioral services by a Board Certified Behavior Analyst (BCBA). These services will be provided to Grandmother and staff at Student's placement in order to implement positive behavioral strategies for Student. Brentwood will also provide Student with 15 hours direct behavioral services from the same BCBA. These services shall focus on behavior, task completion, and peer relationships, are to begin after the IEP meeting specified above, and shall be completed no later December 15, 2016.

10. All other requested relief is denied.

## ORDER

1. Brentwood shall fund an independent behavior assessment by a provider that meets district standards. This assessment shall include classroom observations and

observation in the home, as a part of the assessment. The independent assessor shall also determine whether Student currently needs a behavior support or behavior intervention plan and, if so, shall develop a draft plan.

2. Brentwood shall hold an IEP team meeting within 30 days of the completion of the assessment and draft behavior plan. The IEP team shall consider the assessment and draft plan.

3. Brentwood shall provide Student with 30 hours of consultation behavioral services by a Board Certified Behavior Analyst (BCBA). These services will be provided to Grandmother and staff at Student's placement in order to implement positive behavioral strategies for Student. Brentwood will also provide Student with 15 hours direct behavioral services from the same BCBA. These services shall focus on behavior, task completion, and peer relationships, are to begin after the IEP meeting specified above, and shall be completed no later December 15, 2016.

4. All other 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 prevailed on Issue 1 and portions of Issues 2, 3, 4, and 5. Brentwood was the prevailing party on all other issues heard and decided.

## RIGHT TO APPEAL

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

DATED: August 31, 2015

/s/

B. ANDREA MILES

Administrative Law Judge

Office of Administrative Hearings