

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ALAMITOS UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015050300

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on April 29, 2015, naming the Los Alamitos Unified School District.

Administrative Law Judge Paul H. Kamoroff heard this matter in Los Alamitos, California, on June 23, 24, 25, 30, and July 1, 2, 7, 8, 9, and 14, 2015.

James D. Peters appeared on behalf of Student.¹ Student's parents attended each day of the hearing. Student was present during part of one day of the hearing.

Tracy P. Johnson, Attorney at Law, appeared on behalf of District. Michael Keller, Ed. D., Director of Special Education for District, attended each day of the hearing.

The record closed on August 3, 2015, upon receipt of written closing briefs from the parties.

¹ Mr. Peters identified himself as a paralegal from the law office of Guy Leemhuis. Mr. Leemhuis did not appear at the hearing. Mr. Peters was assisted by Donna Kohatsu during the hearing, who was not identified as an attorney.

ISSUES²

Whether District denied Student a free appropriate public education during the 2013-2014 school year and extended school year, beginning September 1, 2013, and during the 2014-2015 school year, by:

1. Failing to offer Lindamood Bell services for language, literacy, language processing, and memory development;
2. Failing to offer an appropriate assessment plan;
3. Failing to offer appropriate behavioral services;
4. Failing to offer appropriate parent training specific to students with structural brain differences and related disorders;
5. Failing to offer an educationally related mental health services assessment to enable the development of an accurate functional behavior assessment;
6. Failing to offer an appropriate functional behavior assessment;
7. Failing to offer appropriate speech and language services;
8. Failing to offer an appropriate academic placement;
9. Failing to appropriately assess Student in the areas of (a) psychoeducational development; (b) vision therapy; (c) physical therapy; and (d) auditory processing;
10. Failing to provide an appropriate applied behavior analysis trained school aide;

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) On July 14, 2015, Student withdrew with prejudice Issues 19 and 20, which alleged she was denied a FAPE because District failed to provide her physical therapy and aqua-therapy.

11. Failing to develop appropriate goals;
12. Failing to offer an appropriate applied behavior analysis home program;
13. Failing to offer appropriate occupational therapy services;
14. Failing to offer appropriate assistive technology;
15. Failing to offer appropriate vision therapy;
16. Failing to offer auditory integration training therapy;
17. Failing to make an offer of FAPE at the February 5, 2015, and February 24, 2015 IEP meetings; and
18. Failing to allow Student's parents to meaningfully participate in the development of her IEP's.

SUMMARY OF DECISION

Student is a young girl who underwent amygdalohippocampectomy, a rare surgical procedure for the treatment of epilepsy. The procedure reduced Student's susceptibility to life threatening seizures. However, the removal of Student's hippocampus and amygdalae impacted her memory, language, and emotional reactions. As a result, Student exhibited unique delays in academic and behavioral development. Student asserts, amongst other claims, that District failed in its offer of services, assessments, and personnel, to appropriately address Student's unique needs.

District contended that it adequately assessed Student, that its staff was highly qualified, and that the academic placement and related services it provided Student were appropriate to meet her unique needs.

For the following reasons, this Decision finds that District's offer of placement, services, personnel, and assessments constituted a FAPE, except for its failure to adequately remediate Student's behavior problems. Student required a prescribed behavior support plan based upon a formal behavior assessment to address her individual behavioral needs. District's failure to provide Student a formal behavior

assessment and behavior plan denied her a FAPE.

FACTUAL FINDINGS

STUDENT

1. Student was an eight year-old girl who resided with her parents within District's boundaries during the applicable time frame. Student has been, and continues to be, eligible for special education under the eligibility category other health impairment due to a seizure disorder. She has also been found eligible for special education as a child with a speech and language impairment. At the time of the hearing, she attended Rossmoor Elementary School, a District school, and had just completed her first grade in a regular education class.

2. Student had a history of seizure disorders since 10 months of age, which included daily seizures. In May 2012, Student underwent an amygdalohippocampectomy, which consisted of a left temporal lobectomy. Since her surgery, Student has been seizure free. Consequences of the lobectomy included Student experiencing difficulty with language, attention, behavior, and memory retrieval. Following the surgery, Student required prompting for attention, priming for instruction, and was occasionally removed from class due to non-compliant behavior, and sometimes she refused to work altogether. Cognitively, Student experienced a decrease in abilities, from average abilities pre-surgery, to borderline and low range abilities following the surgery.

CONDUCT PRIOR TO THE 2013-2014 SCHOOL YEAR

3. Student filed a prior request for due process against District in December 2012. To resolve this matter, District and Student entered into a settlement agreement in January 2013. The terms of this agreement included a waiver of all education claims against District through August 31, 2013. This waiver covers an IEP offered on

November 27, 2012, which was Student's operative IEP through her next annual IEP, held on November 18, 2013. Allegations from the November 2012 IEP are also precluded by the applicable two-year statute of limitations. Student is therefore prevented from challenging her educational program until the November 2013 IEP.³

THE NOVEMBER 18, 2013 IEP

4. District convened an annual IEP meeting for Student on November 18, 2013. Student was in kindergarten at Rossmoor. This was Student's second year in kindergarten, as her parents and District had, prior to the start of the 2013-2014 school year, agreed to retention. Along with Student's parents, all necessary IEP team members were present at the IEP team meeting: District's Director Dr. Keller; school principal Kiva Spiratos; school psychologist Kayley Peacock; general education teacher Amanda Rosado; District speech pathologist Katie Hoey; District occupational therapist Jennifer Stoskopf Bastain; a school nurse; resource specialist program teacher Julia Stockman; District program specialist Jennifer Bain; and Student's independent neuro-psychologist, Dr. Grace Mucci.

5. The IEP team reviewed Student's present levels of performance. Student was having difficulty with comprehending directions, following rules and routines, and controlling her behaviors. It was normal for Student to act out or hurt others when she

³ A parent may not bring a due process claim challenging the appropriateness of an IEP that was created outside the statute of limitations in the absence of an implementation issue, although the IEP document was in effect within the statute of limitations. Special education law does not recognize the doctrine of continuing violations as an exception to the two year statute of limitations. Student is therefore barred from challenging District's offer of FAPE up to the November 18, 2013 IEP. (*J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269.)

became frustrated. Student had difficulty keeping up with her peers and completing tasks.

6. Dr. Mucci presented the results from independent testing, which was adequately reviewed by the District IEP team.⁴ Student presented delayed scores in verbal comprehension, visual spatial abilities, fluid reasoning, working memory, and processing speed. Since her surgery, Student had declined in her receptive language skills, language comprehensions, and phonemic awareness. Pre-surgery testing indicated that Student had intellectual abilities in the average range. Following the surgery, scores indicated that Student was functioning at the low average to borderline range.

7. Student's regular education and resource specialist program teachers reported that Student was on par with her classmates in some areas of reading, and had received high scores in her ability to identify letters, letter sounds, rhyming words, syllables, and phonemes. Student had difficulty identifying high frequency scores, and scored 1/55 on this subtest. Student was able to sustain visual tracking when reading, and neither Student's teachers nor the school nurse suspected any vision processing delays. Student did experience difficulty comprehending, or understanding, what she read. She was unable to identify any sight words, which was far below what was expected of her typically developing peers.

8. In writing, Student was able to copy a word and to follow visual examples, but was not yet able to copy a sentence. She did not have any difficulty hand-writing letters. Student used an age appropriate grasp during writing, coloring, and cutting, and did not require any modified tools. Recent testing showed that Student had average abilities in fine motor precision and fine motor integration. Although testing found that

⁴ Dr. Mucci did not testify during the hearing.

Student had some difficulty with manual dexterity, she used smooth coordinated motor movements when utilizing classroom tools such as pencils, crayons, and scissors.

9. In math, Student had difficulty following cognitively guided instruction,⁵ the teaching methodology used by her regular education teacher, and had difficulty staying focused while in class.

10. Student demonstrated delays in the area of speech, language and communication. She required prompting and modeling to respond to most questions, to interact with others, and when presented with a non-preferred task. Student demonstrated below average receptive and expressive language skills, with receptive and expressive semantic skills in the far below average range.

11. Student had serious behavior difficulty which impeded her social development. The IEP team reported that Student never asked permission before using objects that belonged to others and never showed good sportsmanship. Student never transitioned appropriately between activities or ended conversations appropriately. Student was frequently non-compliant to instructions from the teacher and staff, and required prompting to follow instructions. She had difficulty maintaining friends, socializing with peers, and getting along with peers or adults. Student frequently hit or pinched other students. Overall, Student's behavior impeded the learning of herself and others. Yet, the IEP did not offer a behavior plan to address these behaviors.

12. Student's teacher, and school staff, had tried various behavior interventions, strategies and supports prior to the IEP meeting. District staff tried structured transitions, prompts to remain on task, on-going positive reinforcement

⁵ Cognitively guided instruction was a developmental math program that emphasized assessing the processes that students use to solve problems and problem solving in the classroom, instead of the repetition of number facts.

across the school day, and unlimited breaks from the classroom. During class, the teacher used a token board reinforcement system to support positive behaviors. These behavior interventions were ineffective. Student's level of attention, compliance, response to prompts, and overall behaviors were inconsistent and varied throughout the school day.

13. The November 2013 IEP team found that Student required goals in the areas of reading, writing, math, speech and language, and behavior. Based upon input from Student's parents, Dr. Mucci, Student's teachers, and qualified District staff, the IEP team developed 10 new goals. Goal one was a reading goal which specifically targeted Student's needs in sound skills and decoding, with the objective of increasing Student's ability to read sight words. Goal two addressed Student's need in reading comprehension and was for Student to answer multiple comprehension questions related to a short story. Goal three was designed to increase Student's ability to write sentences. Goal four, in math, anticipated increasing Student's ability to count. Student was offered four goals in speech and language. These goals sought to improve Student's ability to verbally express herself, name attributes of objects, retell stories, and to increase her mean length of utterance (morphology). Finally, Student was offered two behavioral goals, which were for Student to increase her in-class compliance, follow instructions and routines, to decrease her frustration when confronted with unspecified stressors, and to be less disruptive in the classroom.

14. Based upon Dr. Mucci's testing, input from Student's parents, and information gathered from District staff, District offered Student the following special education services: (1) specialized academic instruction, three times per week for 30 minutes per session, in the resource specialist program class; (2) speech and language services in a small group for 30 minutes per session, twice weekly; (3) individual speech and language, 30 minutes per week; (4) occupational therapy for 60 minutes per month;

(5) behavior consultation, four hours per month; and (6) an instructional assistant throughout the school day. The IEP found that Student required extended school year services to guard against regression. The IEP team agreed to reconvene in May 2014, to discuss the extended school year services.

15. The November 2013 IEP also offered Student various accommodations, modifications and supports. Student was provided shortened assignments, visual directions and visual models accompanied by verbal prompting. Student was bothered by loud noises, and the IEP offered her the use of noise cancelling headphones. The team also agreed to keep in place the various behavior interventions strategies which had previously proved ineffective, including prompts to remain on task, on-going positive reinforcement across the school day, and unspecified breaks from the classroom.

16. The IEP team considered a continuum of educational placements for Student and determined that general education, with specialized academic instruction outside of general education, was the least restrictive environment.

17. District staff encouraged Student's parents and Dr. Mucci to participate and ask questions during the IEP team meeting. They did so, and each was an active participant during the IEP discussion. Student's mother and father approved all parts of the November 2013 IEP.

THE MAY 27, 2014 IEP

18. As promised, District convened an amendment IEP team meeting on May 27, 2014, to discuss the pending extended school year. The IEP team also met to devise a plan to assist Student's transition from Kindergarten to the first grade. Parents, along with all necessary District staff, which included the same participants to the November 2013 IEP meeting, attended. Dr. Mucci participated by telephone.

19. District staff briefly reviewed Student's progress since the November 2013

IEP meeting. Jennifer Bain, District's program specialist, reported that Student had made behavioral progress. Julia Stockman, Student's resource specialist program teacher, reported progress on Student's academic goals, with some fluctuation in math and reading.

20. For the 2013-2014 extended school year, the IEP team offered District's intensive general education summer reading program, along with an instructional aide throughout the school day. The team agreed to continue the same services and goals contained in the November 2013 IEP, as Student transitioned into the first grade. Student's parents consented to the May 27, 2014 IEP offer.

THE NOVEMBER 5, 2014 IEP

21. District timely convened an annual IEP team meeting for Student on November 5, 2014. Student was seven years old and attended a first grade general education classroom at Rossmoor. Student's parents attended the IEP meeting, along with all necessary District staff: Dr. Keller; Ms. Spiratos; school psychologist Grace Delk; general education teacher Kristin Whittaker; Ms. Bain; Ms. Hoey; a school nurse; and Ms. Stockman. Dr. Mucci participated by telephone.

22. The IEP team reviewed Student's present levels of performance. Student's reading skills in decoding were at a beginning first grade level, which was on par with her classmates. She had improved her ability to read sight words and to answer reading comprehension questions, although she did so inconsistently. Student was a good speller, but struggled with the writing process and had inconsistent word retrieval skills. Student required multiple prompts to stay focused and to remain attentive to tasks. She had improved in the area of communication, with improvements noted in morphology, and gains in her expressive language skills. However, Student had a poor understanding of how words were associated with other words. Student worked best when given auditory directions accompanied with visual cues and repeated prompting, in a

structured setting with individual support.

23. Student used regular lined paper and did not demonstrate any delay in her ability to manipulate objects with her hands. She wrote letters and numbers with proper vertical alignment and orientation to the designated space. Student was able to physically access her educational environment with ease, and did not display any fine or gross motor difficulties.

24. The IEP team reviewed the 10 annual goals from the November 2013 IEP team meeting. Student made progress in her reading goal to increase her knowledge of sight words. She met her goal in reading comprehension to answer questions related to a short story. Student did not meet her goal to write sentences, as she became easily off task and required multiple prompts. Student met her math goal to improve counting. Student met three of four speech and language goals, demonstrating improvement in her ability to verbally express herself and name attributes of objects. She also, increased her mean length of utterance. Student was yet unable to consistently retell a story. District's program specialist, Ms. Bain reported that Student had met her two behavior goals, which would have indicated an increase in compliant behaviors. Yet, the IEP team still concluded that Student's behaviors impeded the learning of herself or others.

25. The IEP team determined that Student did not require assistive technology or low incidence services. Although there was no information presented which indicated that Student required assistive technology to benefit from her instruction, Ms. Whittaker made iPads⁶ available to each student in her general education classroom.

26. The November 2014 IEP team found that Student required goals in the areas of reading, writing, math, speech and language, and behavior. Based upon input from Student's parents, Dr. Mucci, Student's teachers, and qualified District staff, the IEP

⁶ An iPad is a tablet computer.

team developed 13 new goals. Goal one was for Student to increase her accuracy in reading decoding. Goal two anticipated improving Students reading comprehension. Goal three was designed to improve her sentence writing. Goals four and five were to improve math vocabulary and computations. Goals six through 10 were in speech and language, and sought to improve Student's ability to retell a story, state attributes, identify items, and answer "W/H questions.

27. The remaining goals were in the area of behavior. Goal 11 was for Student to request clarification from the teacher when she did not understand an instruction. The baseline for this goal stated that it was normal for Student to not respond to the classroom teacher on five separate occasions during a 30-minute task. It did not state how long each occasion was, or how Student would meet this goal. Goal 12 was for Student to attend to choral instructions in a whole group. The baseline indicated that Student ignored the teacher, looked away from instruction, and required six prompts during a 30-minute activity. Goal 13 reported that Student became frustrated during class, was frequently non-responsive to the teacher, and would "shut down." The goal was for Student to demonstrate "self-awareness" when presented with stressors. There was no indication what Student's stressors were, or how this goal would be accomplished. Unlike goals one through 10, the behavior goals failed to delineate a person who would be responsible for implementation and tracking of the goals.

28. The November 2014 IEP offered Student an increase in accommodations. Student was provided shortened tasks and assignments, unspecified breaks from class, the ability to leave class, visual directions and visual models accompanied by verbal prompting, adjusted pacing for assignments, repeated instructions, noise cancelling headphones, and on-going positive reinforcement.

29. Parents and District staff agreed that Student was not demonstrating any needs in the area of occupational therapy. Student had age appropriate fine motor skills

and could easily utilize pencils, crayons, and scissors. The IEP team therefore agreed to discontinue Student's occupational therapy services. During the hearing, the school's occupational therapist Jennifer Bastain credibly testified that Student did not demonstrate any area of deficit which required occupational therapy or physical therapy intervention, and no evidence was presented which contradicted her testimony.

30. District offered Student the following special education services: (1) specialized academic instruction, three times per week for 30 minutes per session, in the resource specialist program class, along with an additional 30 minutes per week of consultation from the resource specialist teacher; (2) speech and language services in a small group for 30 minutes per session, twice weekly; (3) individual speech and language, 30 minutes per week; (4) behavior consultation, four hours per month; and (5) an instructional assistant throughout the school day. The IEP team agreed to meet in May 2015, to discuss extended school year services.

31. For the 2013-2014 and 2014-2015 school years, the instructional assistants supported Student throughout the school day. Student was reliant on her aides for academic, behavioral, and social support. In addition to frequently redirecting or prompting student during class, Student's aides often removed her from class because of disruptive behavior, and when tasks became too difficult and Student required individualized instruction. Although the aides were supervised by a general education classroom teacher and Ms. Bain, they independently decided when to remove Student from class, and when she was able to be returned to class. The aides did not track with any specificity the duration or frequency of Student's removal from class, or antecedents to behaviors. Beth Ellison, who was one of Student's aides during the 2013-2014 and 2014-2015 school years, testified that District had provided her intermittent training in

applied behavior analysis.⁷ However, the aides did not implement any particular or consistent behavior strategies, or follow a prescribed behavior plan.

32. The IEP team discussed a continuum of placement options for Student, in consideration of the least restrictive environment. The team again agreed that general education, with specialized academic instruction outside of general education, was an appropriate educational placement. With the exception of behavior, the IEP team members were qualified to provide and design an educational program specially designed to meet Student's unique needs. Specifically, they were knowledgeable about the general education curriculum and the continuum of special day classes and resources available to Student. District team members, including Ms. Whitaker, Dr. Keller, Ms. Spiratos, and Ms. Stockman, were familiar with the general education classrooms at Rossmoor, and the resource specialist program where Student's specialized academic instruction was implemented. District team members had knowledge about implementing goals in general education and in the resource specialist program.

33. Student's parents, along with Dr. Mucci, actively participated during the IEP meeting. Dr. Mucci requested that District assess Student in the area of reading. District agreed to this request and, shortly after the IEP meeting, provided Student's parents an assessment plan for a reading assessment. However, Student's parents refrained from consenting to the IEP. Parents requested additional time to consider the IEP offer. As of the hearing, Student's parents had not consented to the November 5, 2014 IEP.

⁷ Applied behavior analysis is a behavior modification methodology which focuses on the observable relationship of behavior to the environment, including antecedents and consequences.

THE ASSESSMENT PLAN

34. On November 24, 2014, District timely sent Students parents an assessment plan for a reading evaluation.⁸ The plan properly designated the school psychologist and the resource specialist program teacher as the examiners. Student's parents signed and returned the assessment plan the next day. In addition to consenting to the reading evaluation, Parents checked two additional evaluation areas: academic achievement and intellectual development.

35. On December 11, 2014, District timely sent Parents a prior written notice letter which stated that District was proceeding with the reading evaluation and had agreed to Parents' request for the academic achievement and intellectual development evaluations. Additionally, District proposed conducting Student's triennial evaluation, which was due in November 2015, early.

36. Student had been previously assessed by District, so the proposal was for District to reassess Student. Reassessments require parental consent. To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan.

37. Here, District's December 11, 2014 letter properly included a copy of

⁸ In California, the term "assessment" is used interchangeably with "evaluation."

Student's special education procedural safeguards, along with a revised assessment plan. The assessment plan was in English, the language used by Student and her parents. The plan was easy to understand and included assessments for academic achievement by the resource specialist teacher, health by the school nurse, speech and language by District's speech and language pathologist, and intellectual development, social/emotional, and adaptive behavior, by the school psychologist. Parents agreed to District's request to expedite Student's triennial evaluation and signed the revised assessment plan.

THE TRIENNIAL EVALUATION

38. On February 5, 2015, District timely completed a triennial multidisciplinary evaluation for Student. District's multidisciplinary evaluation team included school psychologist Ms. Delk; resource specialist teacher Ms. Stockman; general education teacher Ms. Whittaker; speech and language pathologist Ms. Hoey; and the school nurse, Dominique Jorgensen. District's assessments were conducted in a way that used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, and included information provided by Student's mother and father. The assessors did not use any single measure or assessment as the sole criterion for determining whether Student had a disability. Each used technically sound instruments that assessed the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used were selected and administered so as not to be discriminatory on a racial or cultural basis. They were provided in English, Student's spoken language, and a form most likely to yield accurate information on what the Student knew and could do academically, developmentally, and functionally. The assessments were used for purposes for which the assessments are valid and reliable, were administered by a trained and knowledgeable school psychologist, speech pathologist, nurse, general education teacher, and special

education teacher, and administered in accordance with any instructions provided by the producer of each assessment. Ms. Delk and Ms. Hoey determined which tests were required based on information known at the time. No single measure, such as a single intelligence quotient, was used to determine eligibility or services.

39. Ms. Delk competently administered various standardized tests for Student. Student was in the middle of the first grade. Results of the Wechsler Intelligence Scale for Children, Fourth Edition, showed that Student was delayed in the area of verbal comprehension, which tests a child's ability to use verbal abilities to solve problems and express answers, with a score at the fifth percentile. This means that 95 percent of her typical peers had a higher ability level in this area. Testing yielded similar results in the areas of perceptual reasoning, which assesses problem solving by using visual images and non-verbal skills, and in working memory, which tested Student's ability to remember and organize auditory presented information. Student received scores at the sixth percentile in each area. In processing speed, which required motor and visual skills to process information, Student received a score at the second percentile. Student received full scale intelligence quotient of 70, which placed her at the second percentile.

40. On the Primary Test of Nonverbal Intelligence, which assessed intellectual ability nonverbally, Ms. Delk found that Student had higher abilities, with a standard score of 75, or in the fifth percentile.

41. Ms. Delk also administered the Wide Range Assessment of Memory and Learning, Second Edition, which assessed Student's memory skills. The testing revealed verbal and visual memory delays, with an overall score at the fourth percentile.

42. Ms. Delk next administered the Test of Auditory Processing Skills, Third Edition. This test was designed to assess a child's ability to process and comprehend auditory information. Student attained an average score, at the 27th percentile.

43. Ms. Whittaker and Ms. Stockman provided information and administered

some tests regarding Student's academic abilities. In math, Ms. Whittaker reported that Student required repetition and close guidance and was hindered by her language processing deficit. Even with increased individual support, Student was far behind her typical peers in understanding first grade math concepts. In reading, Student had made progress, and was able to decode at a beginning to middle first grade level. Student had also increased her ability to write; she could spell most first grade words with consistent accuracy. On the Gray Oral Reading Tests, Fifth Edition, which assessed Student's ability to fluently recognize words and meanings, implied by symbols, Student earned an overall score at the 10th percentile, which placed her at below the first grade level. On the Wechsler Individual Achievement Test, Third Edition, which tested Student's academic functioning, Student received scores at the below average range in early reading skills, reading comprehension, and in oral reading fluency. She received average scores in basic reading skills, written expression, mathematics, and math fluency. The evaluation failed to explain why Student tested in the average range in math, yet demonstrated an inability to understand basic math concepts while in class.

44. District did not assess Student in occupational therapy. However, Ms. Whittaker reported that Student held her pencil with an appropriate grip, copied information from the board, correctly formed letters and numbers, and could button, tie, and zip clothing. In gross motor skills, Student could run, jump, hop, and skip.

45. Ms. Whittaker completed the Conners' Rating Scale, Third Edition, an inventory designed to assess certain attention and behavioral problems. Student received elevated (impaired) scores in inattentiveness and executive functioning, and very elevated (very impaired) scores in learning problems/executive functioning, learning problems and in defiance/aggression. On the Behavior Assessment System for Children, Second Edition, another behavior inventory, Ms. Whittaker reported that Student displayed problems with attention; was easily distracted from class work; had

reading problems; had difficulty keeping up with her class; received failing grades; had difficulty with mathematics; did strange things; acted confused; picked at things like her hair, nails, or clothing; acted strangely; said nonsocial things; and often seemed unaware of others. Student had notable delays in adaptability, social skills, leadership, and functional communication.

46. With the exception of behavior, Ms. Whittaker and Ms. Delk's review of records, testing, and observations, informed their recommendation, and each persuasively testified that Student was appropriately placed in a regular education classroom, with the specialized academic support, instructional assistant, and the accommodations which were offered in the November 2014 IEP.

47. District's speech and language evaluation yielded similar results to what had been previously identified by the IEP teams: Student was delayed in receptive, expressive, and social language. However, a comparison of a June 2012 speech and language evaluation from the Children's Hospital of Orange County, by speech pathologist Allison Tidwell, and District's 2015 speech and language evaluation conducted by Ms. Hoey, revealed that Student had made some progress in her language abilities. For example, on the Peabody Picture Vocabulary Test, Fourth Edition, which assessed Student's receptive vocabulary and listening comprehension of spoken words, Student had increased from a raw score of 55 in 2012, to an 85 in 2015. On the Expressive Vocabulary Test, Second Edition, which assessed Student's single word expressive vocabulary skills, Student progressed from the 5th percentile in 2012, to the 19th percentile in 2015. Results of the Test of Language Development - Primary, Fourth Edition, revealed that Student also progressed in the areas of picture vocabulary, syntactic understanding, and morphological understanding, with overall progress shown in the area of spoken language. Student was administered the Test of Semantic Skills – Primary, to assess her semantic skills, in both 2012 and 2015. This was the sole area

where Student did not show any progress.

48. Overall, Student demonstrated receptive and expressive language skills within the below average range in comparison to peers of a similar chronological age.

49. Ms. Hoey was an experienced speech pathologist who received a bachelor's degree in communication disorders in 2004, and a master's degree in speech-language pathology in 2006. Ms. Hoey's testing, observations, and review of independent reports informed her service recommendation and she credibly testified that Student would meaningfully benefit from the services which had been offered in the November 2014 annual IEP: speech and language services in a small group for 30 minutes per session, twice weekly, and individual speech and language, 30 minutes per week. Although her triennial assessment revealed that Student still manifested significant speech and language delays, testing showed some areas of meaningful progress. This was corroborated by Student's progress towards her speech and language goals, as determined during the November 2014 IEP team meeting. District IEP team appropriately adopted Ms. Hoey's recommendations, and no changes were made to the services or goals which were included in the November 2014 IEP.

THE FEBRUARY 5 AND 24, 2015 ADDENDUM IEP MEETING

50. District convened an addendum IEP team meeting, held over two days on February 5 and 24, 2015, to review the triennial evaluation with Student's parents. All statutorily required persons attended, along with each of the school's assessors. Parents attended with Dr. Mucci.

51. Ms. Delk, Ms. Whittaker and Ms. Hoey reviewed the triennial evaluation with the IEP team, along with their recommendations in support of the goals and services already offered in the November 2014 IEP. Parents had not consented to the November 2014 IEP, and therefore District did not implement its goals. District IEP team members believed that the November 2014 goals, as of February 2015, were still

appropriate for Student. Dr. Mucci requested an opportunity to observe the general education classroom. District agreed, and the IEP team agreed to reconvene following her observation.

52. Dr. Mucci observed the classroom on February 9, and the IEP team reconvened on February 24, 2015. Dr. Mucci's observation yield mixed results. She found that Student's attention level had increased, but that she was still overwhelmed in class.

53. Parents, again, did not consent to District's offer to maintain the November 2014 IEP offer. They also requested that District fund an independent educational evaluation. Parents subsequently withdrew their request for a publicly funded independent educational evaluation, and filed the instant complaint on April 29, 2015.

STUDENT'S BEHAVIORS

54. District's program specialist Ms. Bain was charged with addressing Student's problem behaviors. As of the hearing, Ms. Bain was seeking her board certification in behavior analysis, but had never conducted a functional behavior assessment or independently assessed a pupil in the area of behavior. During the hearing, she admitted that she had never assessed Student.

55. During the May 27, 2014 IEP team meeting, Ms. Bain commented that Student had made considerable behavioral progress in the classroom. As District's program specialist, Ms. Bain had been responsible for providing the four hours of monthly behavior consultation included in Student's November 2013 IEP. She described to the IEP team that Student was more than 90 percent compliant while in class. During the hearing, Ms. Bain repeated this finding during her testimony. However, Ms. Bain had not assessed Student and based this data solely upon daily behavioral logs which were compiled by Student's instructional aides. The aides were provided little oversight on how to fill out the daily logs, and pertinent information, including the specific duration

and frequency of behaviors, along with antecedent and consequence data, were missing from the daily logs. What the aides did provide were various anecdotal comments. These anecdotal comments were inconsistent with Ms. Bain's finding that Student had shown behavioral progress. Rather, Student was frequently removed from class due to behaviors, often refused to respond to the aides or teacher, refused work, and sometimes acted aggressively towards peers. Student had engaged in some form of maladaptive behavior 250 times, and physically aggressive behavior towards peers six times, during the 2013-2014 school year. Similar to the information which was reviewed during the November 2013 IEP meeting, the information available during the May 2014 IEP meeting was not sufficient to identify any pattern or antecedents to Student's behaviors. Consequently, Ms. Bain's testimony was incorrect.

56. In regard to the 2014-2015 school year, Ms. Bain inconsistently testified that Student had only a single aggressive behavior in both September and February 2015, which she mentioned to illustrate behavioral progress; yet she also testified that Student had problems with physically aggressive behaviors from February through May 2015, to the point where she had initiated new intervention strategies not included in Student's IEP.

57. Ms. Bain was unpersuasive in her opinion that the behavior interventions included in Student's November 2013 IEP, along with the two behavioral goals, had been sufficient to remediate Student's behaviors. Ms. Bain was under a misunderstanding that a formal behavior assessment, such as a functional behavioral assessment, was only appropriate when behavioral interventions had been tried and failed. For Student, Ms. Bain reported that the IEP based behavioral interventions had successfully remediated Student's problem behaviors and she therefore did not require a formal behavior assessment. However, during the 2014-2015 school year, Student's instructional aides continued to report, anecdotally, problem behaviors in daily behavior

logs. Contrary to Ms. Bain's testimony, Student's problem behaviors had increased, with 583 maladaptive behaviors, and 19 physically aggressive behaviors, reported during the 2014-2015 school year. As of April 2015, Student had targeted a particular classmate and repeatedly assaulted her, causing her minor physical injury. The classmate, crying, sought intervention from the classroom teacher. Absent a behavior assessment, District did not have sufficient information to curb Student's problem behaviors. For these reasons, Ms. Bain's testimony that Student had progressed behaviorally and therefore did not require a behavior assessment was unreliable.

58. Student's behavior expert, Dr. Dian Tackett, was critical of District's failure to conduct a functional behavior assessment. Dr. Tackett received a doctorate degree in special education, a master's degree in special education, a bachelor's degree in psychology, a California teaching credential, and was a Board Certified Behavior Analyst. She had worked in special education for 26 years in various capacities, including training and supervising school staff. She held special education teaching credentials and had conducted many functional behavior assessments over the years. Dr. Tackett testified that, as of the November 2013 IEP meeting, Student required a functional behavior assessment and behavior support plan. As a therapist, Dr. Tackett believed that it was necessary to first assess a pupil before providing intervention services. In the area of behavior, the assessment first process was necessary to identify proper intervention strategies which were individualized to Student's needs. This required the collection of reliable data to develop a reinforcement inventory to determine what motivated Student to behave properly. For example, Student was permitted to leave class when she became disruptive, which she may have perceived as a reward for acting out. The purpose of a functional behavioral assessment was to identify the problem behaviors and antecedents to those behaviors, to develop a support plan that would teach Student to substitute negative behaviors with positive behaviors. Behaviors and

antecedents to behaviors needed to be identified, and behavioral data needed to be collected to develop a hypothesis as to why the behaviors occurred, so that individualized intervention strategies could be implemented.

59. Dr. Tackett persuasively opined that District should have offered a functional behavioral assessment during the November 2013 IEP meeting, given the information available to the IEP team at that time. Moreover, by the end of the 2013-2014 school year, District had substantial information from the daily behavioral logs that the interventions it was providing were ineffective. Yet, following the accumulation of the daily logs by District staff, District failed to offer a formal behavior assessment at either the May 27, 2014, the November 5, 2014, or the February 2015 IEP team meetings. This failure, and Student's need for a formal behavior assessment, were proven by the daily behavior logs collected over the 2014-2015 school year, which reported an increase in inappropriate and aggressive behaviors.

60. Dr. Tackett's opinion was supported by Erica Koford, who served as Student's instructional aide at Rossmoor during the 2012-2013 school year, through the 2013 extended school year. Although that school year was not in dispute, Ms. Koford's daily interaction and close observations of Student, approximately three months prior to the November 2013 IEP meeting, were relevant and persuasive. Ms. Koford reported that she frequently removed Student from the classroom due to disruptive behaviors. Student seldom followed instructions, frequently did not respond to prompting, often sat or lay on the floor, and refused to cooperate with anyone for extended periods of time. It was also common for Student to pinch and hit Ms. Koford and other students. Ms. Koford was supervised by Ms. Bain, who also supervised Student's instructional assistants during the 2013-2014 and 2014-2015 school years. Ms. Koford complained that she was provided little oversight from Ms. Bain and was not provided any instruction on how to track or extinguish Student's problem behaviors.

61. The information ascertained from Ms. Koford was available to District staff at the time of the November 2013 IEP team meeting, yet District failed to offer a behavior assessment or behavior support plan. This information was supported by School Principal Kiva Spiratos, who testified that, prior to the November 2013 IEP team meeting, Student frequently refused to work while in class, and it was common for her to sit on the floor under her desk for hours at a time. Consequently, as of the November 2013 IEP meeting, and during each subsequent IEP meeting, District had sufficient information that Student required a formal behavior assessment and behavior plan.

62. Just prior to the hearing, Ms. Koford had been retained by Student's parents to privately tutor Student. She reported that Student's behaviors, as of June 2015, were identical to the behaviors she had observed in July 2013.

63. Student's expert, Dr. David Paltin, also emphasized the need to identify antecedents to Student's behaviors. Dr. Paltin is a state licensed psychologist with specialty interests in the areas of child and adolescent therapy. Dr. Paltin received his bachelor's degree in psychology in 1984, his master's degree in 1988, and his doctorate in 1990. Dr. Paltin had treated several children who had undergone surgeries like Student, the result of which he referred to as a structural brain difference.

64. As a therapist with experience serving children with structural brain differences, Dr. Paltin was especially concerned that Student's ability to modulate her behavioral and emotional reactions were impacted by her surgery, in light of having certain parts of the brain removed, including the amygdala, which regulates emotional reactions. Based upon Student's school file, Dr. Paltin was not able to determine either from the assessments or the behavior logs how often Student's behaviors were occurring and how often she was successful in remaining in the classroom. There were indications in the data that Student was removed from the classroom because of her behaviors, but there was no data or discussion on how often, when, where, and under

what circumstances Student had behaviors that rose to a level which disrupted her learning or the learning of her peers. It was important to have known what worked and what did not work in remediating Student's behavior. There was no data taken, for example, on whether Student's aggressiveness towards peers was an attempt by her to communicate, or what positive replacement behaviors had worked in those circumstances. All that the school data indicated was that Student engaged in various forms of maladaptive behavior throughout the school day. For these reasons, Dr. Palin's testimony was persuasive that, to meet Student's unique needs, it was crucial for Student to be formally assessed in the area of behavior and to be provided a prescribed behavior plan.

65. Dr. Paltin was also persuasive that the defect in failing to provide a behavior assessment and behavior plan resulted in the development of inadequate behavior goals. Each goal permitted the indiscreet removal of Student from class if she became disruptive, and for other unspecified reasons. Yet, removing Student from class did not teach her any positive replacement behaviors, which would be the underlying purpose of a behavior goal. Goals without assessment were not individualized to Student's needs and provided no guidance to the aides or Ms. Bain, who were charged with remediating Student's behaviors.

THE ACADEMIC PLACEMENT

66. Student's experts Dr. Tackett, Dr. Paltin, and Anne Perry, were critical of Student's educational placement. For the 2013-2014 and 2014-2015 school years, District provided Student placement in a general education classroom, with specialized academic instruction in a resource specialist program classroom, along with an individual aide and related services. Student's experts were concerned that District had failed to take sufficient steps to remediate Student's academic delays, particularly in the area of reading. Each expert also complained that the IEP goals were insufficient

because they lacked short term objectives.

67. Anne Perry was the director for the Lindamood Bell center. Lindamood Bell was a private company that provided instruction to children based on various proprietary methodologies. Ms. Perry testified regarding the results of testing conducted by Lindamood Bell staff on May 23, 2014, compared to testing conducted by Lindamood Bell staff on May 7, 2015. She held a California multiple subject teaching credential and had taught as a classroom teacher in the past. Ms. Perry had a bachelor's degree in English and a master's degree in teaching. She had worked for Lindamood Bell since 2006. She had been trained in the various aspects of the Lindamood Bell programs and had supervised others in connection with those programs.

68. Lindamood Bell staff administered identical testing during the 2014 and 2015 assessments, which provided a clear comparison of Student's ability levels. Student did not receive any Lindamood Bell services between the testing. Based on the results of the testing comparison, the Lindamood Bell report recommended that Student should receive 160 to 200 hours of Lindamood Bell instruction, consisting of instruction for four hours a day, five days a week for a period of eight to ten weeks. Although Anne Perry did not directly perform the testing, in her opinion, the testing and recommendations made in the Lindamood Bell report were appropriate for Student.

69. However, a comparison of the May 2014 testing, and the May 2015 testing shows that Student made remarkable academic progress during this time frame. For example, results of the Woodcock Reading Mastery Test, Third Edition, showed that Student progressed from the beginning first grade to a mid-second grade level, 1.5 years improvement; Slosson Oral Reading Test results yielded over two years improvement, from Kindergarten to a mid-second year ability; the Wide Range Achievement Test showed 2 years of improvement in reading, from Kindergarten to second grade; 1.5 years improvement in spelling, from beginning first grade to the

middle of second grade; and improvement in math from Kindergarten to a mid-first year level ability; the Gray Oral Reading Test showed Student increased from first grade to second grade ability levels, 1year of improvement; results from the Lindamood Auditory Conceptualization Test-3, showed substantial progress, from Kindergarten to a second grade level; Student also attained over one year of progress per the Symbol Imagery Test.

70. When reviewing these scores during her testimony, Ms. Perry exclaimed that Student had made “awesome” progress. However, Student had not received Lindamood Bell placement or services during this timeframe; Student’s progress was therefore attributable to District’s educational program. Consequently, the Lindamood Bell testing results did not support Ms. Perry’s opinion that Student required Lindamood Bell services, including a private placement at the Lindamood Bell center, to receive an educational benefit.

71. Regarding Student’s placement, Dr. Paltin and Dr. Tackett recommended that Student receive placement in a general education classroom with special education supports, resource specialist support, an individual aide, speech and language, and extended school year services. Dr. Paltin also recommended that Student would benefit from the use of assistive technology and suggested that her parents receive training. With the limited exception of Dr. Paltin’s recommendation for assistive technology and parent training, Student’s experts’ recommendations mirrored the placement and services which District offered Student in the November 2013, and November 2014 IEP’s. Therefore, in their denunciations of the academic placement, Student’s experts were not as persuasive as Ms. Delk, Ms. Whittaker, and Ms. Stockman, who credibly testified in support of Student’s academic placement.

72. Neither Student’s mother nor father testified during the hearing, so it was not possible to determine exactly what it was about the academic placement with which

they disagreed. Each witness who testified who had knowledge in the area, affirmed that Student was appropriately placed in general education with specialized academic instruction in a resource specialist program classroom.

DISTRICT'S READING LAB

73. In part, Student's academic progress was attributable to intensive reading interventions which were included in her general education program. For the 2014-2015 school year, Student participated in District's reading lab at Rossmoor. The reading lab was an intensive reading program which was offered to general education and special education children alike. For Student, it was considered a general education intervention because it was not included as a related service in her IEP. Student's general education teacher selected Student, along with three to four of her typical classmates, to participate in this reading intervention program, based upon their delays in reading. The school's reading intervention program was provided four times each week, Monday through Thursday, for 45 minutes per session.

74. Marcia Fries supervised District's reading labs, which were located at various District schools, including Rossmoor. Ms. Fries was a competent educator who persuasively reported that Student had required, and had benefited from, the intervention strategies employed in the reading lab. The reading lab had a low student to teacher ratio and utilized a reading intervention curriculum that was multifaceted and similar to what was used for Student in the resource specialist program. For Student, District selected methodologies from the programs Phonics for Reading, Read Naturally, Strategies to Achieve for Reading Success, Lindamood Bell's Visualizing and Verbalizing program, and reading strategies from Fountas and Pinnell.

75. Work samples and informal testing revealed that Student had progressed in the areas of phonics and fluency, and was at grade level in the area of decoding. Student still experienced delays in reading comprehension. However, decoding is a

foundational skill for reading comprehension, and Ms. Fries surmised that Student would soon make strides in this area as well. Overall, Ms. Fries credibly reported that District's program, supported by the reading lab, had been effective in curbing Student's unique academic delays.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁹

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)¹⁰ 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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "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

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

¹⁰ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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))

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

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502,

56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [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].) In this matter, Student had the burden of proof on all issues.

ISSUES 1 AND 8: THE ACADEMIC PLACEMENT

5. The IDEA requires that IEP's be "reasonably calculated to enable the child to receive educational benefits[.]" (*Rowley*, 458 U.S. at 207.) School districts must provide disabled students with specialized instruction such that students are afforded a basic floor of opportunity and receive at least "some educational benefit" from such instruction. (*Mercer Island*, *supra*, 592 F.3d at p. 951.) Districts are not required, however, to provide a potential-maximizing education. (*Rowley*, 458 U.S. at 197 n. 21.) Moreover, "no single substantive standard can describe how much educational benefit is sufficient to satisfy the Act. Instead, the Supreme Court left that matter to the courts for case-by-case determination." (*Hall by Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985).)

6. In this case, Parents did not testify, however, Student's experts Dr. Paltin, Dr. Tackett and Ms. Perry alleged that Student's IEP's were academically insufficient. Their concern that Student's placement was insufficient was not without some merit. For instance, despite grade level abilities, Student still struggled in math while in class. However, Dr. Paltin and Dr. Tackett's recommendations, in significant part, mirrored the academic program that District offered Student: general education with a resource specialist program, related service, various accommodations, and an individual aide. Ms. Perry suggested that Student should instead receive a Lindamood Bell program at a

private center. In contrast, every one of Student's educators testified in support of Student's classroom placement and emphasized that she had progressed academically.

7. A preponderance, or more than 50 percent, of the evidence supported Student's educators. For example, in May 2014, Student was performing at a Kindergarten level in oral reading, word reading, math and auditory conceptualization; by May 2014, she was performing at a second grade level in oral reading, word reading, and auditory conceptualization, and at a middle-first grade level in math. Student's spelling, paragraph reading, and symbol imagery abilities also increased substantially between 2014 and 2015. Student also met, or partially met each of her goals; from November 2013 to November 2014, Student progressed in decoding, reading comprehension, word and sentence writing, counting, and speech and language abilities. Although Ms. Perry's assertions are given due weight, she had no direct interaction with Student and was not "in a better position to judge a student's progress than a teacher who has spent hours with the student every day for a whole school year." (*M.P. ex rel. Perusse v. Poway Unified Sch. Dist.* (S.D.Cal. July 12, 2010, No. 09 CV 1627 JLS (NLS)) 2010 WL 2735759, at *8.) Student also failed to take into account the school's reading lab, which afforded her an intensive reading program and utilized multiple reading methodologies. Ms. Fries persuasively testified that Student had received an educational benefit from this program, and no contrary evidence was submitted by Student. While the reading lab did not utilize solely Lindamood Bell instruction, the teaching method requested by Parents, the *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left to the school district's discretion. (*Rowley, supra*, 458 U.S. at pp. 207-208.)

8. Due to the foregoing, Student failed to prove by a preponderance of the evidence that she was denied a FAPE due to an inadequate academic placement or

because District failed to provide her placement or services at the Lindamood Bell center.

Extended School Year

9. In addition to special education instruction and services during the regular school year, school districts must provide extended school year services in the summer if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom extended school year services must be offered under section 3043

. . . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.

(See also 34. C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).)

10. Here, Student's due process complaint asserted that District failed to address her needs during the extended school year. However, Student failed to address this issue at all at hearing. The only evidence presented described that District offered Student placement in an extended school year program. Student presented no evidence that the offered program would have denied her a FAPE, other than suggesting a preference for placement at the Lindamood Bell center. However, starting with *Rowley*,

courts have held that an educational agency is not held to a standard of parental preference. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21 [the IDEA does not require a potential maximizing education]; see also *Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.) An appropriate education under the IDEA need not be “the *only* appropriate choice, or the choice of certain selected experts, or the child’s parents’ *first* choice, or even the best choice.” (*G.D. v. Westmoreland School Dist.* (1st Cir. 1999) 930 F.2d 942, 948 (italics in text).) In short,

(T)he assistance that the IDEA mandates is limited in scope.

The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals with that program. (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

11. Here, while a program at the Lindamood Bell center funded by District is attractive to Parents, the proper focus is on District’s offered educational plan, which was reasonably calculated to confer Student with educational benefit. Student therefore failed to meet her burden of persuasion as to this issue.

ISSUES 2, 5, AND 9: THE TRIENNIAL EVALUATION

12. Before any child can be found eligible for special education, a school district is required to assess the child in all areas of suspected disability. (20 U.S.C. § 1414(a); Ed. Code, § 56320.) Once a child has been found eligible for special education, a school district must reassess the child at least every three years, unless the parents and

district agree otherwise. (Ed. Code, § 56381, subd. (a)(2); 34 C.F.R. § 300.303(b)(2)).)

13. Student asserted that District denied her a FAPE by failing to appropriately assess her in the areas of educationally related mental health, psycho-education, vision therapy, physical therapy, and auditory processing. A preponderance of the evidence failed to support Student's claim.

The Assessment Plan

14. Student first contends that District's assessment plan was unlawful. Although Student had the burden of proof, she provided no evidence to support this claim.

15. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

16. Here, on December 11, 2014, District timely sent Parents a prior written notice letter which stated that it had agreed to Parents request for additional assessments in academic achievement and intellectual development. District also proposed conducting Student's triennial evaluation early. Included with the letter was a copy of Student's special education procedural safeguards and an assessment plan. The

assessment plan included assessments for academic achievement by the resource specialist teacher, health by the school nurse, speech and language by District's speech and language pathologist, and intellectual development, social/emotional, and adaptive behavior, by the school psychologist. Parents timely signed and returned the assessment plan.

17. The December 11, 2014 assessment plan was properly served on Parents with written notice of parental rights and an explanation of procedural safeguards that are required by law. The assessment plan, which was in English, was understandable to Student's parents. The assessment plan explained the general types of assessments that were proposed, as well as the District personnel who would conduct the assessments. Consequently, District met its statutory obligations pertaining to its assessment plan.

Educationally Related Mental Health Assessment

18. Student next asserts that she required an educationally related mental health assessment.

19. On October 8, 2010, former California Governor Arnold Schwarzenegger vetoed a legislative funding appropriation for Chapter 26.5 educationally related mental health services and announced that the mandate to comply with Chapter 26.5 was "suspended." In February 2011, an appellate court upheld the funding veto, holding that even though the Governor could not unilaterally suspend the law, the funding veto relieved local county mental health agencies of the obligation to implement the services. (*Government School Boards Ass'n v. Brown* (2011) 192 Cal.App 4th 1507.) Consequently, District was responsible for providing an educationally related mental health assessment to Student, if one was needed to offer her a FAPE.

20. District does not dispute that it has never offered Student a mental health assessment. Rather, District contends it was not required to provide Student a mental health assessment because that was not a suspected area of need. District points out

that Student's parents, along with her independent neuro-psychologist Dr. Mucci, attended each IEP meeting, and this area of assessment was never requested or contemplated. IEP meetings were also attended by qualified District staff, including school psychologist Ms. Delk. Yet none of these participants requested any form of mental health assessment, or suggested that it was needed as an area of suspected disability.

21. Finally, the hearing record does not contain any evidence which supports a need for a mental health assessment. Although evidence demonstrated that Student experienced behavioral difficulty, her experts Dr. Tackett and Dr. Paltin persuasively recommended that her behaviors should be remediated through a functional behavior assessment and behavior support plan. Consequently, Student failed to meet her burden of proof that she required an educationally related mental health assessment to receive a FAPE.

District's Triennial Evaluation

22. Student contended that District's February 2015 triennial evaluation denied her a FAPE, by failing to appropriately assess her in the areas of psycho-education, vision therapy, physical therapy, and auditory processing.

23. District timely completed its triennial multidisciplinary evaluation for Student in February 2015. District's multidisciplinary evaluation team properly included the school psychologist, resource specialist teacher, general education teacher, school speech and language pathologist, and the school nurse. District's evaluation was conducted in a way that used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, and included information provided by Student's mother and father. The assessors did not use any single measure or assessment as the sole criterion for determining whether Student had a disability. Each used technically sound instruments that assessed the relative contribution of

cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used were selected and administered so as not to be discriminatory on a racial or cultural basis. They were provided in English, Student's spoken language, and a form most likely to yield accurate information on what Student knew and could do academically, developmentally, and functionally. The assessments were used for purposes for which the assessments are valid and reliable, were administered by a trained and knowledgeable school psychologist, speech pathologist, nurse, general education teacher, and a special education teacher, and administered in accordance with any instructions provided by the producer of each assessment. Qualified District staff, including Ms. Delk, Ms. Stockman, and Ms. Hoey, properly determined which tests were required based on information known at the time. No single measure, such as a single intelligence quotient, was used to determine eligibility or services. All statutory requirements for a reassessment were dutifully complied with by qualified District staff. (34 C.F.R. § 300.304(c)(7).)

24. Ms. Delk competently administered various standardized tests for Student in the areas of intelligence, verbal comprehension, nonverbal intelligence, problem solving, memory and processing speed. Ms. Delk also administered the Test of Auditory Processing Skills, Third Edition, which was designed to assess Student's ability to process and comprehend auditory information. Student attained an average score, at the 27th percentile, and no further assessments were recommended in auditory processing during the time frame in dispute.

25. Ms. Whittaker and Ms. Stockman reviewed Student's present levels of performance and properly administered tests regarding Student's academic abilities. The assessors used a variety of tests to comprehensively assess Student in math, reading and writing. Student's abilities in language processing, writing, written expression, spelling, reading fluency, oral reading, reading decoding, reading comprehension,

mathematics and math fluency were each adeptly evaluated.

26. District did not assess Student in occupational therapy or physical therapy. However, Ms. Whittaker reported that Student held her pencil with an appropriate grip, copied information from the board, correctly formed letters and numbers, and could button, tie, and zip clothing. In gross motor skills, Student could run, jump, hop, and skip. The record is devoid of any evidence which suggested that Student had difficulty in the areas of fine motor or gross motor development. The record also failed to demonstrate that Student required assessment, or services, in the areas of occupational or physical therapy. Ms. Whittaker and Ms. Bastain credibly testified that Student did not demonstrate any area of deficit related to occupational therapy or physical therapy and no evidence was offered which contradicted this testimony.

27. Similarly, evidence submitted during hearing failed to demonstrate that Student required assessment in the area of vision processing. Student was able to sustain visual tracking when reading, and neither Student's teachers nor the school nurse suspected any vision processing delays. During the hearing, Ms. Delk, Ms. Bastain, and school nurse Erin Lawrence testified that Student did not demonstrate any area of deficit which required vision therapy, and there was no evidence presented which contradicted this testimony.

28. In fact, Student failed to present any evidence from an occupational therapist, physical therapist, optometrist, ophthalmologist, vision expert, or audiologist, to support her claims.

29. Dr. Paltin surmised that District's February 5, 2015 triennial evaluation was inappropriate because he would have preferred a more thorough assessment of the etiology of Student's needs. However, District staff, including Ms. Whittaker, Ms. Stockman, Ms. Delk and Ms. Hoey, more persuasively described that Student was appropriately assessed in each area of identified deficit. The assessments were based

upon an assessment plan which Parents and Dr. Mucci had a hand in developing, and were accurately administered by qualified District staff. With the exception of behavior, the record showed that District's triennial evaluation assessed each area of deficit which had been identified for Student, and more than met minimal legal standards.

30. For the foregoing reasons, Student failed to meet her burden of proof that District denied her a FAPE by failing to provide a lawful assessment plan or by failing to appropriately assess her in the areas of mental health, psycho-education, vision therapy, physical therapy, or auditory processing.

ISSUES 3, 6 AND 10: STUDENT'S BEHAVIORS

31. Student contends that District's failure to conduct a functional behavior assessment and its failure to develop a behavior support plan denied her a FAPE, by causing her a deprivation of educational benefit because her disruptive behaviors were not identified and addressed, resulting in Student's frequent removal from class and difficulty with peer relationships. District contends that its responses were timely and appropriate and that observations conducted by Ms. Bain were tantamount to a functional behavior assessment.

32. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) If a functional behavior assessment is used to evaluate an individual child to assist in determining the nature and extent of special education and related services that the child needs, the functional behavior assessment is considered an evaluation under federal law. (*Letter to Christiansen*, 48 IDELR 161 (OSEP 2007). Consequently, a functional behavior assessment must meet the IDEA's legal requirements for an assessment, such as the requirement that assessment tools and strategies provide

relevant information that directly assists in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7).)

33. Here, District did not assess Student's behavior within the meaning of the IDEA. First, Ms. Bain herself acknowledged that she had not assessed Student. Second, data collected only through observation does not suffice to meet the statutory requirement that District use "*a variety* of assessment tools and strategies." (20 U.S.C. 1414(b)(2)(A) (emphasis added); *W.H. ex rel. B.H. v. Clovis Unified Sch. Dist.* (E.D. Cal. June 8, 2009, No. CV F 08–0374 LJO DLB) 2009 WL 1605356, at *18 (suggesting that more than mere observation is required for an assessment) *M.S. Lake Elsinore Unified School District* (C.D. Cal. July 24, 2015, Case No. 13–CV–01484–CAS (SPx), 2015 WL 4511947, *6.) Third, although Ms. Bain is currently seeking her board certification in behavior analysis, the record shows that she was not qualified to independently identify behavioral antecedents. (Educ. Code § 56320(g) (requiring an assessment to be conducted by persons knowledgeable about that disability).) In fact, Ms. Bain's characterization of Student's behaviors was inconsistent and shown to be incorrect by District's daily behavior logs.

34. Finally, there is ample evidence that Student's behaviors impeded the learning of herself or others, warranting an assessment. (20 U.S.C. § 1414(a)(2)(A).) During the November 18, 2013 IEP team meeting, the team expressed their concern that Student had serious behavior difficulty which impeded her social development. Student never asked permission before using objects that belonged to others and never showed good sportsmanship. Student never transitioned appropriately between activities or ended conversations appropriately. Student was frequently non-compliant to instructions from the teacher and staff, and required prompting to follow instructions. She had difficulty maintaining friends, socializing with peers, and getting along with peers or adults. Student frequently hit or pinched other students. Student's behavior

impeded the learning of herself and others. In light of the information available at the time the November 2013 IEP was developed, it was not reasonable to forego a formal assessment and behavior plan. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

35. By the May 27, 2014 IEP team meeting, school data showed that Student was frequently removed from class due to behaviors, often refused to respond to the aides or teacher, refused work, hid under tables during instruction, and sometimes acted aggressively towards peers. Student had engaged in some form of maladaptive behavior 250 times, and physically aggressive behavior towards peers six times, during the 2013-2014 school year.

36. During the 2014-2015 school year, Student's behaviors continued to impede her learning and that of others, and increased in aggressiveness towards peers. School data records noted 583 maladaptive behaviors, and 19 physically aggressive behaviors, during the 2014-2015 school year.

37. Student's experts Dr. Tackett and Dr. Paltin persuasively testified that, without a behavior assessment, District did not have sufficient information to curb Student's problem behaviors. It was necessary to first assess Student before providing intervention services. The assessment first process was necessary to identify proper intervention strategies which were individualized to Student's needs. This required the collection of reliable data to develop a reinforcement inventory to determine what motivated Student to behave properly. For example, Student was permitted to leave class when she became disruptive, which she may have perceived as a reward for acting out. The data which was acquired in the daily behavior logs was insufficient to determine how often, when, where, and under what circumstances Student had behaviors that rose to a level which disrupted her learning or the learning of her peers. It was important to know what worked and what did not work in remediating Student's

behaviors. The purpose of a functional behavioral assessment was to identify the problem behaviors and antecedents to those behaviors, and to develop a support plan that would teach Student to substitute negative behaviors with positive behaviors. Behaviors and antecedents to behaviors needed to be identified, and behavioral data needed to be collected to develop a hypothesis as to why the behaviors occurred, so that individualized intervention strategies could be implemented. Finally, Student's surgery impacted her ability to modulate her emotional reactions which may have contributed to the manifestation of problem behaviors. For these reasons, Dr. Paltin and Dr. Tackett's testimony was persuasive that, to meet Student's unique needs, it was necessary for her to be formally assessed in the area of behavior and to be provided a behavior support plan which was based upon reliable data.

38. District's failure to assess Student's behavior constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B.v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940 ("we have, more often than not, held that an IDEA procedural violation denied the child a FAPE.")) A procedural violation of the IDEA constitutes 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; or (3) caused a deprivation of educational benefits." (*W.H. ex rel. B.H. supra*, 2009 WL 1605356, at *18; 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505(f)(2); *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1484 .) Here, Student's maladaptive behaviors resulted in off-task behavior and her removal from the classroom on many occasions, thereby causing her to miss instruction or services. Therefore, District's failure to assess Student in behavior deprived her of educational benefits, and, accordingly, District denied Student a FAPE on that basis. (*Carrie I. ex rel. Greg I. v. Dep't of Educ., Hawaii* (D.Haw. 2012) 869 F.Supp.2d 1225, 1247 ("The lack of assessments alone is enough to constitute a lost educational

opportunity.”.)

39. Parents’ frustration stemming from Students inattention, removal from class, and behavior difficulty, led them to claim that Student was also denied a FAPE because her instructional assistants lacked training in applied behavior analysis. This claim is misplaced. District was free to choose the manner in which it trained its aides. (*Rowley, supra*, 458 U.S. at pp. 207-208.) Nonetheless, Student’s assistant Beth Ellison persuasively testified that she had, in fact, received intermittent training specific to applied behavior analysis. Student was reliant on her aides for academic, behavioral, and social support. In addition to frequently redirecting or prompting student during class, Student’s aides often removed her from class because of disruptive behavior, when tasks became too difficult, and when Student required individualized instruction. The aides independently decided when to remove Student from class and when to return her to class, but failed to track with any specificity the duration or frequency of Student’s removal from class, or antecedents to behaviors. In sum, the aides were left to their own discretion due to the lack of an appropriate behavior plan on how to address Student’s behaviors, when to implement accommodations, and how to fill out the daily behavior logs; all of which was performed inconsistently and not in a manner which was designed to extinguish the cause, or antecedents, of the behaviors. Again, Dr. Tackett and Dr. Paltin’s testimony that Student required a consistent behavior support plan based upon a formal behavior assessment is illustrative here; the problem herein lies with the lack of a behavior support plan that the aides could implement, not due to a lack of training. Student therefore did not meet the burden of proof for her claim that the aides lacked appropriate training.

40. For the foregoing reasons, a preponderance of evidence established that District denied Student a FAPE by failing to provide her a formal behavior assessment and correlated behavior plan. Student was not denied a FAPE because her instructional

assistants lacked training in applied behavior analysis.

ISSUES 4, 7, 12, 13, 14, 15, 16: RELATED SERVICES

41. Student complained that District unlawfully failed to offer her various related services. In particular, she asserted that she required occupational therapy, vision therapy, auditory integration therapy, applied behavior analysis services at home, assistive technology, parent training, and additional speech and language, to receive a FAPE. District avers that the services it provided reflected Student's individual needs at the time the IEP's were formulated, and permitted Student to benefit educationally from her instructional program.

42. Related services include speech and language services, occupational therapy services, and other services as may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527 (*Union*).) Related services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

Occupational Therapy

43. In addition to other qualified District staff, school occupational therapist Ms. Bastain participated in Student's November 18, 2013 IEP team meeting. At that time, Student was able to copy a word and to follow visual examples. She did not have any difficulty hand-writing letters. Student used an age appropriate grasp during writing, coloring, and cutting, and did not require any modified tools. Testing showed that Student had average abilities in fine motor precision and fine motor integration. She used smooth coordinated motor movements when utilizing classroom tools such as

pencils, crayons, and scissors. Nonetheless, the IEP team agreed to continue Student's occupational therapy, at 60 minutes per month.

44. At Student's November 5, 2014 IEP team meeting, qualified District staff again reviewed Student's present levels of performance. Student used regular lined paper and did not demonstrate any delay in her ability to manipulate objects with her hands. She wrote letters and numbers with proper vertical alignment and orientation to the designated space. Student held her pencil with an appropriate grip, copied information from the board, correctly formed letters and numbers, and could button, tie, and zip clothing. Student had age appropriate fine motor skills and could easily utilize pencils, crayons, and scissors. In gross motor skills, Student could run, jump, hop, and skip. Student was able to physically access her educational environment with ease, and did not display any fine or gross motor difficulties. For these reasons, Parents and District staff agreed that Student was not demonstrating any need in the area of occupational therapy. The IEP team therefore agreed to discontinue Student's occupational therapy services. Ms. Whittaker and Ms. Bastain credibly testified that Student did not demonstrate any need for occupational therapy.

45. In contrast, Student failed to provide an expert witness in the area of occupational therapy, or evidence that she required this service. The record is devoid of any evidence which suggested that Student had difficulty in the area of occupational therapy. Student therefore failed to meet her burden for this claim.

Vision Therapy

46. Here, evidence submitted during hearing failed to demonstrate that Student required vision therapy. Student's teacher Ms. Whittaker persuasively testified that Student was able to sustain visual tracking when reading, and school nurse Erin Lawrence credibly testified that Student did not demonstrate any vision deficits.

47. Student failed to present an optometrist, ophthalmologist, or vision

specialist during hearing, and the record fails to show any evidence that Student required vision therapy. Student therefore failed to meet her burden of proof for this claim.

Auditory Integration Therapy

48. In her complaint, Student alleged she required auditory integration therapy due to a perceived deficit in auditory processing. During hearing, Student failed to present an audiologist or similarly qualified witness, or to present any evidence that she required auditory integration therapy.

49. In contrast, school psychologist Ms. Delk administered the Test of Auditory Processing Skills, which yielded average scores for Student. Ms. Delk credibly testified that, during the time frame in dispute, there was no reason to believe that Student required services in the area of auditory processing.

50. Student had the burden of proof for this claim, and for every claim examined during the hearing. Student failed to meet her burden for the claim that she required auditory integration therapy services.

Applied Behavior Analysis at Home

51. Again, Student asserted a claim in her complaint which she abandoned during hearing. Here, the claim abandoned was that she required a comprehensive home based program which solely utilized applied behavior analysis services, to benefit from her academic placement. However, the record lacks any evidence which supports this claim.

52. Although Dr. Paltin and Dr. Tackett persuasively pointed out that Student required a formal behavior assessment and correlated behavior support plan, each recommended placement at school, primarily in a general education classroom. There was no evidence presented which established that Student instead required a

comprehensive home based applied behavior analysis program. Consequently, Student failed to meet her burden of proof for this claim.

Assistive Technology

53. Dr. Paltin briefly opined that Student would benefit from an assistive technology device, such as a smart pen. When determining whether related services are necessary for the pupil to benefit educationally from her instructional program, the IEP team must consider special factors, such as whether the child needs assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2); Ed. Code, § 56341.1, subd. (b).)

54. Here, the IEP team, including qualified District staff, Dr. Mucci, and parents, determined that Student did not require assistive technology to benefit from her educational placement. Nonetheless, Student was provided access to an iPad computer, as were all general education students. School educators, including Ms. Whittaker and Ms. Stockman, testified that Student did not require any additional assistive technology service or device to benefit from her educational placement. Student's educators' testimony was supported by Legal Conclusions five through 11, which found that Student benefited academically from her instructional placement, without the use of a smart pen or similar assistive technology device.

Parent Training

55. Dr. Paltin also suggested that it would be helpful for Student's parents to receive training. However, during testimony, he was unclear why it was necessary that Parents receive training for Student to benefit educationally from her instructional program. Given Legal Conclusions five through 11, that held Student benefitted academically from her instructional program without parent training, Student was unable to meet the burden of proof for this issue.

Speech and Language Services

56. For the 2013-2014, District offered Student speech and language services in a small group for 30 minutes per session, twice weekly, and individual speech and language at 30 minutes per week, which Parents accepted. Student was provided four goals in speech and language. These goals sought to improve Student's ability to verbally express herself, name attributes of objects, retell stories, and to increase her mean length of utterance. The level of services proved effective, and Student met three of four speech and language goals, demonstrating improvement in her ability to verbally express herself, name attributes of objects, and increasing her mean length utterance.

57. For the 2014-2015 school year, the IEP team, including school speech pathologist Ms. Hoey, diligently reviewed Student's present levels of performance and developed four new speech and language goals. To meet these goals, qualified staff recommended the same duration and frequency of speech and language services.

58. In February 2015, Ms. Hoey evaluated Student in speech and language. Testing yielded similar results to what had been previously identified by the IEP team: Student was delayed in receptive, expressive and social language. However, a comparison of a June 2012 speech and language evaluation, with the 2015 speech and language testing, revealed that Student had made progress in her language abilities. For example, testing showed an increase in Student's abilities in receptive vocabulary and listening comprehension of spoken words; Student had increased from a raw score of 55 in 2012, to an 85 in 2015. In Student's single word expressive vocabulary skills, Student progressed from the 5th percentile in 2012, to the 19th percentile in 2015. Student also progressed in the areas of picture vocabulary, syntactic understanding, and morphological understanding, with overall progress shown in the area of spoken language. Although Student still demonstrated receptive and expressive language skills

within the below average range in comparison to peers of a similar chronological age, District had properly identified her areas of deficit and provided her a level of services which had born meaningful progress.

59. Ms. Hoey, who was an experienced and thoughtful speech pathologist, persuasively testified that Student had progressed in her receptive and expressive speech and language skills, and would continue to do so if provided the goals and level of services offered in the November 2014 IEP. In contrast, Student failed to present a speech and language pathologist, or speech expert, or any speech and language report, that contradicted Ms. Hoey's testimony. Student therefore failed to meet her burden of proof for this claim.

60. Overall, with the exception of behavior, Student's educational program, including her placement and related services, were reasonably calculated to provide her an educational benefit. The IEP, which included placement in a general education classroom with individual aide support; specialized academic instruction, three times per week for 30 minutes per session, in a smaller, resource specialist program classroom; direct speech and language services, three times per week for 30 minutes per session; along with general education interventions which included an intensive reading lab, four days per week for 45 minutes per session, offered a solid plan to meet Student's educational needs. Student failed to meet her burden of proof that she required additional related services to benefit from her educational program.

ISSUE 11: THE IEP GOALS

61. Student alleged the goals contained in her November 2013 and November 2014 IEP's did not include adequate short term objectives and failed to address all areas of need. District disputes this clam and asserts that the goals it developed met all statutory requirements and adequately addressed Student's needs.

62. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

63. The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.) There is no requirement that an IEP include baselines for the goals, other than addressing a student's present level of performance. (*Student v. San Diego Unified School District* (2011) Cal.Offc.Admin.Hrngs Case No. 2011080459, at pp. 10-11.) Since the 2004 amendments to the IDEA, the requirement to develop short-term objectives or benchmarks only concerns children with disabilities who are assessed using alternate assessments aligned to alternate achievement standards. (See, 20 USC § 1414(d)(1)(A)(i)(I)(cc).) Here, District was under no legal obligation to develop short-term objectives or benchmarks for Student.

64. The weight of the evidence does not support Student's contention that her goals were inadequate in any area other than in behavior.

65. Based upon input from Student's parents, Dr. Mucci, Student's teachers and qualified District staff, the November 2013 IEP team developed 10 new goals. Each area of Student's identified area of academic deficit was addressed, including reading writing, math, and speech and language.

66. During the November 2014 IEP team meeting, District reviewed her present levels of performance and progress and determined whether Student had met her prior goals. If Student had not met the goal, District reviewed Student's progress and in-class performance to determine why the goal had not been met. District then either revised the goal or developed new goals to address the area in which Student was not progressing. The goals were based on Student's present levels of performance, and the goals were measurable. The IEP documents indicated how the goals would be evaluated, and indicated, other than the behavioral goals, who would be responsible for implementing the goals. The 10 academic and speech and language goals in the 2014 annual IEP were consistent with suggestions by Dr. Mucci, parents, and qualified District staff and sought to remediate Student's delays reading, writing, math, and speech and language. Goals were specifically designed to improve Student's accuracy in reading decoding, reading comprehension, sentence writing, math vocabulary and computations, receptive and expressive communication, Student's ability to retell a story, state attributes, identify items, and answer " W/H" questions.

67. Except for behavior, the goals met every area of Student's known area of deficit including reading, writing, math, and speech and language. Had District had the opportunity to implement the 2014 goals and the services offered in the November 2014 IEP, Student would have received an educational benefit within the *Rowley* standard.

68. Student primarily complained that the goals were defective because they failed to include short-term objectives. However, District was not obligated to offer short-term objectives, and District persuasively demonstrated that Student's academic and speech and language academic goals were being met through the general education classroom, resource specialist program, reading lab, and the speech and language service. Student therefore failed to meet her burden of proof as to those areas of need.

69. However, the evidence supports Student's position that the behavior goals were inappropriate to meet her needs. Dr. Paltin and Dr. Tackett persuasively testified that the failure to formally assess Student in behavior resulted in the development of inadequate behavior goals. Student was frequently off task, inattentive, and removed from class if she became disruptive. Yet, removing Student from class did not teach her any replacement behaviors for the problem behavior. The goals did not address the underlying basis for Student's non-compliant behavior and did nothing to help her extinguish the behavior. Goals without assessment were not individualized to Student's needs and provided no guidance to the aides or Ms. Bain, who were charged with remediating Student's behaviors.

70. Student continued to engage in problem behaviors during both the 2013-2014 and 2014-2015 school years. The fact that Student's aggression increased between February and May 2015 is further evidence that the behavior goals did not address the reasons Student engaged in the behaviors and did not offer appropriate replacement behaviors that would address extinguishing the behaviors. Although District had not implemented the November 2014 goals, similar to the November 2013 goals, none were designed to extinguish antecedents to behavior. Because no antecedents had been determined, no appropriate replacement behaviors were developed, and Student continued to engage in the problem behaviors. Student therefore has met her burden of

proof that the two behavior goals offered in the November 2013 IEP, and the three behavior goals offered in the November 2014 IEP, failed to meet her behavior needs and therefore denied her a FAPE.

ISSUE 17: THE ADDENDUM IEP

71. Student complains that the February 5, and 24, 2015 addendum IEP, failed to include an offer of FAPE.

72. The Ninth Circuit, in its decision in *Union*, explicitly stressed the importance of a written, formal offer of FAPE. In *Union*, the school district believed that a specific placement was appropriate for the student in the case. However, it had never made a specific offer of that placement because it believed that the student's parents would never agree to it. The Ninth Circuit found that school districts are required to make specific written offers of placement in a student's IEP and that failure to do so is not just a technical violation:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child ." 20 U.S.C. § 1415(b)(1)(E). (*Union, supra*, 15 F.3d. at p. 1526.)

73. Here, there is no dispute that District met its statutory requirement to make a formal offer of FAPE in Student's annual IEP of November 5, 2014. Student's annual IEP formally and specifically offered a placement in a general education classroom, with specialized academic instruction in a resource specialist program classroom, and concise related services, all at Rossmoor elementary.

74. Rather, Student asserts she was harmed because District failed to make a formal, written offer of FAPE at the addendum IEP meeting, held in February 2015. The addendum IEP documented the IEP team's review of the triennial evaluation and Dr. Mucci's observation of the school placement. However, District did not offer to change, or amend, the November 2014 IEP offer, during the addendum meeting. The February 2015 addendum IEP therefore does not offer a placement or service for Student. Nonetheless, because the November 5, 2014 IEP met District's statutory obligation of making a specific offer of placement, and no changes to that offer were made during the addendum IEP meeting, District continued to meet its statutory obligation to make a formal offer of placement.

75. Parents failed to testify, and none of the 17 witnesses who testified during the hearing suggested they were confused by District's FAPE offer. To the contrary, each witness, including Student's experts, had reviewed the annual IEP's, and understood what was being offered to Student. Consequently, Student failed to meet her burden of proof for this claim.

ISSUE 18: PARENT PARTICIPATION

76. Student alleges that District failed to allow her parents to meaningfully participate in the development of her IEP's.

77. Special education law places a premium on parental participation in the IEP process. States that accept federal funding must ensure, inter alia, that parents have the opportunity "to participate in meetings with respect to the identification, evaluation,

and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1).) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting. (34 C.F.R. § 300.322(a); Ed. Code, §§ 56341.5, subd. (a), 56342.5.) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered “(A)mong the most important procedural safeguards.” (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

78. Under these guidelines, an educational agency must permit a child’s parents “meaningful participation” in the IEP process. (*Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) The standard for “meaningful participation” is an adequate opportunity to participate in the development of the IEP. (*Id.* at p. 1133.) Parents have an adequate opportunity to participate in the IEP process when they are “present” at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include a visit by the parent to the proposed placement. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 461.) An adequate opportunity to participate can include participation at the IEP meeting by outside experts retained by the parents, and the incorporation of suggestions made by such experts into the IEP offer. (*D.S. v. Bayonne Board of Educ.* (3rd Cir. 2010) 602 F.3d 553, 565; see also *W.T. v. Board of Educ. of the School Dist. of New York City* (S.D.N.Y. 2010) 716 F.Supp.2d 270, 288 [reports from child’s private school].) An adequate opportunity to participate can occur when parents engage in a discussion of the goals contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y. 2010) 682 F.Supp.2d 387, 394.)

79. By the foregoing authority, Parents had a more than adequate opportunity

to participate in the November 18, 2013, May 27, 2014, November 5, 2014, and February 5 and 24, 2015 IEP team meetings for Student. Student's mother and father attended each meeting, and were accompanied by their independent assessor Dr. Mucci. At the November 18, 2013 IEP team meeting, Dr. Mucci presented independent testing results that were reviewed by the team members. Parent and Dr. Mucci discussed Student's needs with qualified District staff at each IEP team meeting. All statutorily required IEP team members attended each IEP meeting and discussed their knowledge of Student. Dr. Mucci and Parents participated in the IEP process through their input which informed the baselines and present levels of performance that the team eventually adopted. At the November 2014 IEP meeting, Parents requested additional assessments and District complied with their request. At the February 5, 2015 IEP team meeting Dr. Mucci requested an opportunity to visit the proposed placement. District complied with her request and reconvened the IEP meeting on February 25, following Dr. Mucci's observation. At the February 2015 IEP team meetings, District assessors discussed their respective evaluations and took comments, Dr. Mucci shared her observations, and Parents shared their input. At each IEP team meeting, team members, including Student's mother and father, along with their independent assessor, had an opportunity to speak, and, in fact, made comments and asked questions. The evidence established that the District team members did not suppress any viewpoint, did not prevent other team members from speaking, and did not ignore any inquiries. Consequently, Parents had an adequate opportunity to participate in the development of the IEP's for Student, and, therefore, they meaningfully participated in such process.

80. Based upon the foregoing, District complied with the relevant procedures that govern the development of an IEP. The evidence presented does not support a determination that Student's parents were denied an opportunity to participate in the development of Student's IEP's.

REMEDIES

81. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [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*).)

82. Appropriate equitable relief can be awarded in a decision following a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) Here, a preponderance of evidence showed that Student required a formal behavior assessment, behavior plan, and behavior goals to receive a FAPE. District failed to offer Student a formal behavior assessment or behavior support plan, and failed to offer behavior goals which were individualized to her unique needs, which denied her a FAPE. Student, however, failed to prove that she required compensatory related services in the area of behavior. It is therefore equitable to order that District provide Student a formal functional behavior assessment by a qualified assessor, to formulate behavior goals and a behavior support plan, and to participate in any called IEP team meeting.

ORDER

1. Within 10 business days of this Decision, District shall contract with an independent, doctorate-level Board Certified Behavior Analyst of its choice, to conduct a functional behavior assessment of Student, to formulate a behavior support plan, and to prepare behavior goals individualized to Student. District shall ensure that the assessment is completed within 60 calendar days of the date it executes the contract with the assessor. District shall also fund the cost for up to two hours of the assessor's time to attend the IEP team meeting convened to discuss the assessment.

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

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: Student prevailed on issues 3, 6, and, in part, 11. District fully prevailed on issues 1, 2, 4, 5, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, and 18, and partially prevailed on issue 11.

RIGHT TO APPEAL THIS DECISION

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

Dated: August 12, 2015

/s/

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings