

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

V.

MANHATTAN BEACH UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015040532

NOTICE: This decision has been
VACATED by the United States
District Court, the opinion for which
is attached at the end of this
decision.

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on April 7, 2015, naming the Manhattan Beach Unified School.

Administrative Law Judge Robert Helfand heard this matter in Manhattan Beach, California, on September 15, 16, 22, and 23, and October 8, 2015.

Bruce Bothell, Attorney at Law, represented Student. Student's parents were present throughout the hearing.

Christopher J. Fernandes, Attorney at Law, represented Manhattan Beach. Megan Atkins, Director of Student Services for Manhattan Beach, was present throughout the hearing.

The record closed on November 4, 2015, upon receipt of written closing rebuttal briefs from the parties.

ISSUES¹

1. Whether Manhattan Beach's 2014 Triennial Assessment denied Student a free appropriate public education, by failing to appropriately assess Student in the area of autism?

2. Whether Manhattan Beach's proposed Individualized Education Program of December 10, 2014, as amended on April 2, 2015, denied Student a FAPE, by: (a) failing to adopt autism as the primary special education eligibility category; (b) failing to include appropriate goals related to Student's autism, and; (c) failing to provide appropriate services in the area of behavior/socialization?

SUMMARY OF DECISION

This decision finds that Manhattan Beach denied Student a FAPE in that (1) it failed to conduct an appropriate triennial assessment in 2014, specifically in the area of autism; and (2) the December 10, 2014 IEP, as amended on April 2, 2015, failed to offer Student a FAPE, because it failed to find Student's primary eligibility category for special education as autism, failed to offer appropriate goals related to Student's autism, and failed to provide Student with appropriate behavior services.

FACTUAL FINDINGS

1. Student was a nine and a half year old girl who resided with her parents within the boundaries of Manhattan Beach during all time material. She has been

¹ 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.)

eligible for special education since October 10, 2012. Student was found eligible on October 10, 2012 under the primary eligibility category specific of learning disability and secondary category of speech and language impairment.

2. Student was quirky prior to starting school. As an infant, she did not like to cuddle. Student would insist on only playing the same games, watching the same television shows, and eating the same food at each meal. She would always carry small items, such as screw nuts or certain toy figures, including sleeping with them. Student would meltdown if those items were not present. Student exhibited sensory issues, which included not tolerating dirty or sticky hands, feeling wet, food textures, and refusing to wear underwear or socks. At times, Student also had trouble recognizing faces and would recognize people by the color of their clothes.

2011-2012 SCHOOL YEAR

3. During school year 2011-2012, Student was in kindergarten. Student was able to follow instructions, complete homework and class work, and was able to participate in group instruction in the classroom. Student demonstrated solid progress with lots of tutoring and much support both at school and home. She exhibited areas of concern with sound discrimination, reading, writing, and math skills. Additionally, Student was inconsistent in her ability to work independently and often required assistance. Because of her struggles in reading, Parents privately obtained tutoring for Student starting in January 2012, which resulted in slow progress.

4. A Student Study Team met on March 16, 2012, regarding parental concerns with Student's frustration with reading and at school in general. The Student Study Team determined that it was appropriate to give Student more time before assessing her. At the end of the 2011-2012 school year, Student met expectations in reading, but was below expectations in math and writing.

5. On June 5, 2012, Parents requested that Manhattan Beach perform an

assessment for special education due to Student's continuing difficulties in kindergarten.

BOONE FETTER CLINIC ASSESSMENT

6. Student's pediatrician Sandra Smith-Lang, M.D., referred Student for a private assessment to the Boone Fetter Clinic of Children's Hospital Los Angeles, because of concerns in the areas of learning, sensory, difficulty picking up facial cues and multiple fears. The Boone Fetter assessment team comprised a psychologist, speech and language pathologist, two occupational therapists, a nurse, and a physician. The team did not conduct any observations of Student outside the clinic nor observe interactions between Student and peers. Student was assessed on August 13 and 20, 2012. The team issued an assessment report on September 10, 2012. The assessment included input from Parents, her private tutor, and Student's kindergarten teacher. The team noted that Student "does not meet criteria for the diagnosis of Autism Disorder as defined by both the Diagnostic and Statistical Manual of Mental Disorders-4th Edition and on the Autism Diagnostic Observation Schedule (ADOS)."² The examiners did note that Student presented with significant challenges related to anxiety and that her oppositional behaviors indicated an emotional immaturity and her way of coping with situations made her anxious. The report noted that Student demonstrated difficulty in using social language with peers and difficulties participating in group or individual activities. She also demonstrated areas of concern in her ability to process, regulate, and modulate sensory information, which impacted Student's social interactions and ability to cope and adapt to new and novel situations. The team diagnosed Student as having

² The Boone Fetter team used a single measure relating to autism. The ADOS was based on planned social interactions with the examiner. The written report does not detail Student's scores on the ADOS.

“Generalized Anxiety Disorder of Childhood” and oppositional behaviors. Parents shared this report with Manhattan Beach.

OCTOBER 3, 2012 INITIAL DISTRICT ASSESSMENT

7. Manhattan Beach began its initial assessment of Student, who was then six and a half years old and a first grader, in September 2012. The assessment team included Sandra Ottaway, Ph.D., school psychologist;³ Sheryl Diamond, resource specialist; Wendy Zopel, an occupational therapy therapist, and Sarah Morales, a speech and language pathologist.⁴ The assessment written report, dated October 3, 2012, stated that the reason for referral was “due to academic difficulties in kindergarten.” The assessment was comprised of observations, parent input, teacher input, and six standardized tests.⁵ Student scored in the average range for intellectual functioning. She

³ Dr. Ottaway has a Ph.D. in clinical psychology. She possesses credentials in both school counseling and school psychology. She has been a school psychologist at District since 2003.

⁴ Ms. Morales has a M.A. in speech-language pathology. She has been a speech-language pathologist since 2000 continuing to the present in private practice. She has been employed full-time by District as a speech-language pathologist at Meadows Elementary School since 2004.

⁵ The standardized tests administered in the psycho-educational assessment were the Wechsler Intelligence Scale for Children, Fourth Edition; Children’s Auditory Verbal Learning Test-2; Connors-3 Behavior Rating Scales for parent and teacher; Behavior Assessment Scales for Children-Second Edition (parent and teacher); Revised Children’s Manifest Anxiety Scale-2; and Piers-Harris Self Concept-2.

scored below average in auditory memory/verbal learning. During her school observations, Dr. Ottaway noted that Student would stare off and zone out, exhibited slowness in following directions, covered her ears when music was played, demonstrated problems with coordination on swings, and had difficulty counting while playing a game at recess.

8. The Connors 3 Rating Scales-Short Form, which rates common behavior problems experienced by school-aged children, was given to Student's parent, kindergarten teacher, and her first grade teacher. Parent rated Student as "very elevated" in inattention, hyperactivity/impulsivity, learning problems, and executive functioning deficits. Parent rated Student as elevated in peer relation problems and average in aggression. Student's kindergarten teacher rated Student elevated only for learning problems/executive functioning. The first grade teacher rated Student "elevated" in two areas, inattention and aggression.

9. In the area of social emotional, the Behavior Assessment System for Children- Second Edition, which consists of rating scales, was given to Mother and Student's kindergarten and first grade teachers. Mother reported Student in the clinically significant range in the areas of hyperactivity, anxiety, atypicality, attention problems, adaptability, social skills, and activities of daily living, internalizing problems. She rated Student as "at risk" in depression, withdrawal, leadership, and functional communication. The kindergarten teacher rated Student as "clinically significant" in the areas of learning problems and anxiety with the rest of the areas in the average range. The first grade teacher rated Student as "clinically significant" in adaptability and "at-risk" in social skills, leadership, and study skills. Student was administered the Piers-Harris Children's Self-Concept Scale and the Revised Children's Manifest Anxiety Scale-2. These measure the child's view of her self-esteem and anxiety levels. Student reported high self-esteem and less anxiety than most students. Dr. Ottaway did not administer any testing regarding autism.

10. In the speech and language assessment, Student demonstrated deficits in pragmatics in the areas of non-verbal cues, responses to teasing, winning/losing, and appropriate conversational skills. Student exhibited deficits in auditory/verbal recall and reasoning.

11. The assessment team looked at the eligibility category of emotionally disturbed and determined that Student did not meet that category. The team did recommend that Student was eligible for special education under the category of specific learning disability in the area of math calculation with a psychological processing deficit in auditory memory. The report indicated that Student had deficits in pragmatic language and possessed sensory sensitivities.

IEP MEETING OF OCTOBER 10, 2012

12. Student's initial IEP team meeting took place on October 10, 2012. Parents voiced their concerns that Student was behind her class academically; had anxiety that led to meltdowns after school due to stress; and sensory processing issues. Parents also were concerned with Student's social skills. The IEP present levels of performance refer to Student's difficulty in sustaining attention; inflexibility in thoughts and actions; an inability to complete activities in physical education side-by-side with peers; history of tactile defensiveness and distress over having wet, sticky, or dirty hands; significant levels of learning problems; significant issues with adaptability; and issues with social skills and study skills. The IEP team found Student eligible under the category of specific learning disability in the area of math calculation with a psychological processing deficit in association with auditory memory, based on the discrepancy of Student's intellectual level and her achievement level. The team also found Student eligible under the secondary category of speech and language impairment in the areas of pragmatic language and auditory recall. Manhattan Beach's FAPE offer included language/speech

services (one group session weekly for 39 minutes), group specialized academic instruction (four, 45 minute sessions per week), individual specialized academic instruction (one, 30 minute session per week), and counseling for her anxiety (two, 20 minute sessions per month). On October 15, 2012, Parents consented to the IEP. The IEP contained eight goals including two academic goals (phonemic awareness and numerical operations), two speech and language goals (pragmatics and auditory/verbal recall and reasoning), one counseling goal relating to anxiety, and three occupational therapy goals.

13. At an IEP team meeting on May 9, 2013, the team listed as concerns anxiety, which lessened as the year proceeded during changes to structure; self-esteem issues; and the need for additional academic support. It was noted in the IEP that social changes continued to overwhelm her. Because of continuing sensory issues, Student used sensory tools such as vests and lap pads, which helped her. Other needs noted were for help in understanding projects and staying on task. Student required assistance from the class instructional aides as opposed to peers to complete her class work.

SUMMER AND FALL 2013

14. During the summer following first grade, Student attended a 120-hour program at Lindamood Bell's reading program. Lindamood Bell is a private reading program utilizing various proprietary methodologies. Student showed progress by increasing her rate of reading from 8 words per minute to 24.

15. On August 12, 2013, Larry Yin, M.D., of Boone Fetter, did a follow-up evaluation. The evaluation was based on a medical examination and discussions with Parents. The report failed to mention any observations of Student's behavior during the visit to the clinic. Dr. Yin listed his diagnoses as generalized anxiety disorder of

childhood; learning disability, somatosensory processing difficulties,⁶ and difficulties with modulation of auditory and tactile input. Dr. Yin commented that Student had shown improvement with anxiety although she continued to struggle overall. Dr. Yin also noted, "Social anxiety with reluctance to go out into the public is a newer concern as well as a desire to stay at home." Thus, Student had failed to demonstrate progress in social situations. The follow-up report was submitted to Manhattan Beach.

16. Although Student continued to demonstrate progress on her goals, she continued to struggle with reading and socialization. She required to be frontloaded, or to be verbally prepared or prompted, to meet friends and to participate during recess. She did not expand her circle of friends and was rigid during play. She refused to participate in games and activities she did not prefer. Student's interests were limited to dragons and lizards. She required the use of a cushion and a band across her feet while sitting in class because of her sensory needs. She used a glove when working with materials such as glue and did not want to wear underwear or socks.

SEPTEMBER 30, 2013 IEP AND NOVEMBER REPORT CARD

17. Student's annual IEP team meeting was held on September 30, 2013. In describing Student's disability, the IEP states: "[Student's] math calculation skills are low but she also struggles in other academic areas. [Student] gets overloaded sensorily which causes her anxiety. [Student] also has weaknesses in pragmatic language skills which may impact social relationships." Parents voiced concerns that Student was falling behind academically in reading and spelling and continued to exhibit anxiety when she

⁶ Student exhibited sensitivity to light, noises, textures, and smells. Examples of her sensitivity to textures are her resistance to wearing socks and underwear, and having her hands wet.

could not keep up with her peers during lessons. Student's second grade teacher, Barbara Gregorio, reported that Student would become anxious and "check out" when she could not follow along with class work, especially in reading comprehension. Ms. Gregorio also noted that Student required adult support to follow directions, getting started with assignments, and in the areas of reading and written expression. Student was far below grade level in math fluency. Service providers reported that Student had met her annual goals from the preceding IEP.

18. The IEP team found Student again eligible for special education under the primary category of specific learning disorder and speech and language impaired as a secondary category. The IEP team approved goals in academics (reading, math reasoning, and writing), counseling (anxiety), occupational therapy (two goals), and speech and language in the areas of pragmatics and articulation. The offer of services included occupational therapy and consultation, language and speech (four, 30 minute sessions per week), individual counseling (two, 20 minutes sessions per month), and specialized academic instruction. The specialized academic instruction comprised four, sixty minute sessions per week in reading, five, 30 minute sessions per week in computer based reading instruction, and one, 30 minute session per week in math. Parents consented to the IEP, except for the counseling services, which they felt had not been effective.

19. Student's November 2013 report card showed that she was "meeting expectations" in math, listening, speaking, and social sciences; but she was marked as "insufficient progress-risk retention" in reading and writing.

PSYCHO-EDUCATIONAL ASSESSMENT BY DR. CHRIS DAVIDSON

20. Parents retained Dr. Chris Davidson, a licensed educational psychologist, for a psycho-educational assessment, to determine Student's current intellectual, educational, behavioral, language, and social skill levels. The assessment took place

between November 16, and December 31, 2013. At the time of the assessment, Student was seven years eight months old. Dr. Davidson generated a detailed and exhaustive 227 page report. Dr. Davidson administered 12 standardized tests and two surveys to Student. She had 17 surveys or rating scales filled out by Parents, three surveys by Student's resource teacher Ms. Diamond, and five surveys filled out by her then current teacher Ms. Gregorio. Dr. Davidson conducted behavioral observations at Student's home and over a two hour school observation on December 11, 2013.

21. Dr. Davidson found that student's intellectual functioning was in the high average and average ranges except for processing speed, which registered in the low average range. Dr. Davidson found that Student displayed difficulty understanding and following directions, remembering information, paying attention, completing tasks, reading, poor reading comprehension, completing basic math facts and word problems, conveying thoughts on paper, spelling, and the act of writing. Student also had deficits in executive functioning in the areas of inattention, distractibility, recall, accuracy on tests, checking work, problem-solving, impulsivity, overreacting to small problems, unaware of how her behavior affects others, organization, and task completion. Student scored at the first grade between second to seven months level in the reading tests.

22. Student had trouble attending, tended to whine, complained or delayed when given non-preferred tasks which increase her anxiety; Student had trouble expanding her circle of friends, would play only in activities that she liked and dismissed the activities her friends wanted to engage in. When frustrated by her friends' choice of activity, Student was often rude to them. On the Connors Comprehensive Behavior Rating Scales, Student's mother and teacher rated her in the clinically significant range in the areas of emotional distress, upsetting thoughts, academic difficulties (math and language), and separation fears. Both rated Student as having significant levels of anxiety. She also demonstrated behaviors typical of Attention Deficit Hyperactivity

Disorder-Inattentive Type, Generalized Anxiety, Separation Anxiety, and Obsessive/Compulsive Disorder.

23 In the area of autism, Dr. Davidson administered the following: Childhood Autism Rating Scales-Second Edition (CARS) to parents; Gilliam Autism Rating Scale-Second Edition to parents and Ms. Gregorio; Autism Screening Instrument for Educational Planning-Second Edition to parents; Gilliam Asperger's Disorder Scale to parents; and the Asperger Syndrome Diagnostic Scale to parents. The Gilliam is a screening test to identify children with behaviors indicative of autism. Parents rated Student with a possibility of autism, while the teacher scored her in the upper limits of unlikely. The Autism Screening Instrument had Student in the borderline range. On the CARS, Student was rated "mildly autistic." The Gilliam Asperger's scored Student as borderline while the Asperger Syndrome Diagnostic Scale had her in the likely area. Dr. Davidson also administered the ADOS, which is a semi-structured evaluation of communication, social interaction, and play or imaginative use of materials for those suspected of having autism. On the ADOS, Student had a total score of 14, which indicated autism.⁷ Dr. Davidson observed Student exhibit poorly modulated eye contact, little reciprocal conversation, minimal understanding of others' emotions, lack of expressing interest in the examiner's thoughts and feelings, little concern for the examiner paying attention to her, unusual sensory seeking behaviors, difficulty sitting still, and mild signs of anxiety and self-consciousness.

24. Dr. Davidson found that Student met the Diagnostic Statistical Manual IV Edition TR definition of Autistic Disorder. She also found that Student met special education eligibility under the categories of (1) specific learning disability due to a

⁷ ADOS scores at 9 and above are within the autism classification.

significant discrepancy between Student's high average intellectual ability and academic areas of reading, math, oral expression, and written language and expression; (2) autistic-like behaviors based on her inability to use oral language for appropriate communication, history of extreme withdrawal or relating to people inappropriately and continued impairment in social interactions from infancy through early childhood; an obsession to maintain sameness, extreme occupation with objects or inappropriate use of objects or both, extreme resistance to controls, displays peculiar motoric mannerisms and motility patterns, and self-stimulating behaviors; and (3) other health impaired based on the results of teacher and parental rating scales and a October 2013 diagnosis, by Dr. Denise McDermott, a psychiatrist, that Student had attention deficit disorder. Dr. Davison also found that Student met the eligibility requirements of autistic-like behaviors⁸ by her inability to use oral language for appropriate communication, her history of extreme withdrawal and continued impairment in social interactions since infancy through childhood, an obsession to maintain sameness, extreme preoccupation with objects, extreme resistance to controls, her display of peculiar motoric mannerisms and motility patterns (clumsy and uncoordinated, preferring clothes of certain fabrics, covering ears at many sounds, restricted diet, and difficulties with handwriting and other fine motor skills), and self-stimulative, ritualistic behaviors (obsession with objects and obsessive interest in a narrow subject, being upset in changes in routine, and attempts to impose narrow interests on others).

⁸ The eligibility category of 'autistic-like behavior' changed to 'autism' effective July 1, 2015. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1), former Cal. Code Regs., tit. 5, § 3030, subd. (g).) However for IEP's and at IEP team meetings after July 1, 2014, Dr. Davidson and the IEP team still used the prior eligibility category name in its discussion and on the IEP document.

25. Dr. Davidson recommended that the IEP team find Student's primary eligibility be specific learning disability and secondary eligibilities be autistic-like behaviors and other health impaired.

MARCH 12 AND 28, 2014 IEP TEAM MEETINGS

26. The IEP team reconvened on March 12, 2014, and March 28, 2014, to review Dr. Davidson's evaluation. Dr. Davidson presented her findings. Student's teacher reported that she continued to have difficulties expanding her base of friends, often became frustrated with friends resulting in Student yelling at them, continued trouble staying organized, and struggling to wait her turn. Parents reported Student still was sad and uncomfortable on the playground.

27. The team discussed eligibility categories. Parents requested that autistic-like behaviors be added to Student's eligibility, per Dr. Davidson's evaluation. The Manhattan Beach team instead found specific learning disability and speech and language impairment as driving Student's educational needs. The Manhattan Beach team members rejected autistic-like behaviors as an eligibility category due to the different ADOS results by Boone Fetter and Dr. Davidson, which were one year apart. The team added to Student's IEP speech and language consultation for one, 30 minute session per month to support social skills working with Student's teacher and the services of a group instructional aide to assist in academics. Parents did not consent to the IEP, but agreed to partial implementation of the IEP.

INITIAL EVALUATION BY FIRST STEPS AND AUTISM PARTNERSHIP SOCIAL SKILLS PROGRAM

28. In July 2014, Parents obtained an evaluation from First Steps, a non-public agency providing behavioral interventions. The evaluation was conducted by Kristen

Carmi, the regional clinic director.⁹ Parents referred Student for evaluation to address deficits in communication and socialization. Ms. Carmi's evaluation included a review of the Dr. Davidson assessment report, the March 28, 2014 IEP document, parental interview, a 90 minute home observation, a 75 minute observation in Student's class, an observation of Student at Lindamood-Bell, and a behavioral analysis.

29. Ms. Carmi found Student's verbal behavior and play skills, within her areas of interest, "sophisticated." But, Student did not possess the skills to engage in reciprocal conversation and play, as she preferred to dominate play and conversation with her own interests. This resulted in impaired social relations. She displayed rigid obsessive behaviors and non-compliance. These deficits affected Student's ability to function independently and assessing social reinforcement for continued learning. Ms. Carmi concluded that Student's delays and difficulties were consistent with a diagnosis of autism spectrum disorder. Ms. Carmi recommended intensive applied behavior analysis program both at home (10 to 15 hours) and school.

30. On April 29, 2014, Student entered a small group social skills group for two hours per week, by Autism Partnership. The group comprised six to eight girls in Student's age range who had been diagnosed with autism. In a report dated October 2014, Autism Partnership noted that Student's deficits included non-compliance, outbursts, behavioral rigidity, related obsessive behaviors (like insisting on only wearing specific clothing, refusing to wear underwear), severe phobias, difficulty in forming relationships, and showing interest in activities that were more childlike than typical of

⁹ Ms. Carmi has a B.S. and M.A. in psychology. She received her Board Certified Behavior Analyst in 2007. She has provided applied behavior analysis services to children since 2001. She has worked at First Steps since 2007 as a program director (2007-2012) and since 2012 as regional clinic director.

same-aged peers. Autism Partnership created a treatment plan that included goals in the areas of emotional regulation, increased tolerance/flexibility; social interaction; and social communication.

FALL 2014

31. For the 2014-2015 school year, Student entered the Manhattan Beach third grade class of Karen Yates. Ms. Yates noted, in her October 20, 2014 report that Student was unsure of herself, frequently asked questions, appeared anxious as to what others said, and needed guidance in social situations with peers. Student's deficits negatively impacted her ability to work independently. Student was making progress academically except for writing and spelling where she needed extra support. Student experienced a difficult time when schedules changed. Student required guidance in social situations in finding friends and making friends. She would wear the same jacket no matter the weather. The first trimester report card showed Student meeting expectations in reading, listening, speaking, math, and science. Student was below expectations in writing.

32. Coquette McShane, a teacher support assistant (group instructional assistant) with no behavior support training, was assigned to Student and another student as an instructional aide starting in the beginning of the 2014-2015 school year.¹⁰ Student required "quite a bit of academic support" in math and writing. She needed to have material re-taught and reviewed on a step-by-step basis. Student was inflexible in her thinking. Ms. McShane would frontload information to Student as to the calendar each morning and before activities as well offering encouragement to her. For example,

¹⁰ Ms. McShane has a B.A. in English and has been a teacher support assistant or instructional aide at Manhattan Beach for 14 years.

before each recess, Ms. McShane would discuss with Student whom she should play with and how she should approach that person as well as what to say. She would then accompany Student to prompt her as to approaching the peer. Ms. McShane did not take any data as to Student's behaviors and social interactions. In May 2015, Karen Jensen, another teacher support assistant, replaced Ms. McShane on the playground. Ms. Jensen also had no behavioral training. Wendy Cheng, a behavior specialist with Manhattan Beach, requested that she keep data only during morning and lunch recesses as to her observations of Student on the playground.¹¹ Ms. Cheng instructed her on how to fill in a form that was to act as a data sheet. The data sheet lacked any real measurement as to the quality of Student's social interactions.

TRIENNIAL ASSESSMENT

33. In Fall 2014, Manhattan Beach conducted an assessment as part of Student's triennial assessment. Student's assessment team was identical to the initial assessment team except for Lynn Johnson, a resource specialist, in lieu of Ms. Diamond. When Dr. Ottaway would escort Student from her class to the examining room, Student would walk faster past each of the classroom doors they passed. She was hypersensitive to noise outside the room, which also seemed to distract her. Student admitted that she could not tell time. She asked the examiner to remove a picture of a brain as it bothered her. Student tested in the average range overall cognitively. Her overall auditory processing skills were average. She functioned in the average range on tests of written expression, reading, and in math, although her math calculation was in the low average range. The assessment team noted that there no longer was a discrepancy between

¹¹ Ms. Jensen did not observe Student during lunch where a lot of social interaction occurred.

Student's cognitive scores and her performance in any area of academic functioning, which no longer made her eligible for special education under the category of specific learning disability.

34. On the speech and language assessment by Ms. Morales, Student demonstrated appropriate receptive and expressive language skills. Ms. Morales administered three standardized tests, which included the Clinical Evaluation of Language-Fourth Edition and Social Language Development Test-Elementary. Ms. Morales found that Student had speech and language deficits in (a) pragmatics: interpretations of/productive uses of non-verbal cues, identifying/responding to more subtle examples of sarcasm/teasing/conflict, responses to winning/losing, appropriate conversation skills, flexible thinking/behavior in social situations, and (b) articulation for "th" sound. She recommended that Student receive speech and language sessions once per week for 30 minutes.

35. In the area of autism, Dr. Ottaway utilized a single measure, the Gilliam Autism Rating Scale-3 (GARS), which is a survey administered to Mother and Ms. Yates, Student's third grade teacher. The GARS is designed to determine if autistic-like behaviors had been observed. Both raters scored Student in "very likely probability of having autism." Both Mother and Ms. Yates rated Student as similar to someone with autism in the areas of social communication, emotional responses, cognitive style, and maladaptive speech. Both raters found that Student repeated words or phrases, repeated words out of context, spoke with a flat tone or affect, did not initiate conversations, paid little attention to what peers are doing, failed to predict probable consequences, required an excessive amount of reassurance if things are changed or go wrong, and became upset at changes in routine. Mother also reported autistic-like behaviors at home in the areas of restricted/repetitive behaviors and social interaction, while Ms. Yates did not observe such behaviors at school.

36. Two rating scales were administered to Student in the area of anxiety and self-concept. Student rated herself as being satisfied with her social functioning, above average range in happiness and satisfaction, and in the average range in anxiety. On the Revised Children's Manifest Anxiety Scale-2, Student rated her anxiety within normal limits.

37. Dr. Ottaway, in her report, analyzed whether Student met eligibility for special education in the area of "emotionally disturbed." She found that Student did not meet this category. She found that Student met the eligibility category of other health impaired due to a medical diagnosis of Generalized Anxiety Disorder (the Boone Fetter evaluation). Dr. Ottaway also found that Student was eligible "secondarily" under speech and language impairment and autistic-like behaviors, due to difficulties with social communication, maladaptive speech, and emotional responses. She concluded that Student's anxiety "appears to account for most of her difficulties that may be otherwise associated with autistic-like behaviors."

38. Helena Johnson, Ph.D., was retained by Parents to conduct a psycho-education evaluation and to review Manhattan Beach's 2014 triennial assessment.¹² Dr.

¹² Dr. Johnson has a B.A. and M.A. in psychology and a Ph.D. in clinical psychology with an emphasis on child and family. She worked as a therapist and later director at Anxiety Disorders Clinic of the University of Nebraska-Lincoln from 2001 through 2004. She has been a clinical therapist in private practice since 2007. Additionally, she has served since 2009 as a psychologist/consultant for the University of California, Irvine in the treatment of autism. Since 2012, she has been a consultant for the Lynwood Unified School District special education department. She has co-authored three manuscripts and made six presentations in the areas of social phobia and anxiety in children.

Johnson noted that the Manhattan Beach assessment listed severe symptoms of autism such as rigid thinking, inconsistency in applying pragmatic skills in social situations, overreactions to incidents, difficulty working independently, being upset when asked to perform non-preferred tasks, requiring guidance in social situations and in making-friends, anxiety when changing routines, being unsure of herself, wanting things to be correct, and various sensory issues. Dr. Ottaway had administered the GARS and the Behavior Assessment System, Second Edition, which are screening measures for autism. Dr. Johnson opined that best practices require the administration of the ADOS to confirm whether Student is autistic and the severity of her autism. Dr. Ottaway failed to do so. Taking into account that both Mother and teacher rated Student on the GARS as “likely probability of autism,” that there was a discrepancy between the diagnoses of Boone Fetter and Dr. Davidson, and that Student had long demonstrated autistic type symptoms, best practices required that the ADOS be administered. Dr. Ottaway failed to analyze the effects of Student’s autism on her both from a behavioral and social view and how it affected her learning. Thus, the Manhattan Beach psycho-education assessment was not appropriate. The ALJ found Dr. Johnson to be extremely knowledgeable and persuasive based upon her expertise in both anxiety and autism.

DECEMBER 10, 2014 IEP MEETING

39. Student’s IEP team met on December 10, 2014, to review Manhattan Beach’s triennial assessments and to conduct her annual IEP. In addition to the Manhattan Beach assessment team, Student’s parents attended with Ms. Carmi and Andi Waks of Autism Partnership.¹³ Attorneys for Manhattan Beach and Student also

¹³ Ms. Waks was a Site Director at Autism Partnership Seal Beach office since 2013. She has been Director of Client Services at Autism Partnership from 1999-2013.

attended. Dr. Ottaway reviewed her assessment, findings, and recommendations. The team determined Student's areas of need as math, socialization, language, conventions, writing, anxiety/problem solving, pragmatics, and sensory processing. Parents and Manhattan Beach disagreed whether Student met her annual goals.

40. The team discussed eligibility categories. Manhattan Beach team members felt that Student met the primary category of other health impaired due to the Boone Fetter medical diagnosis of Generalized Anxiety Disorder. The team also examined whether Student would be eligible under the category of emotional disturbance and felt that Student did not meet that category. Manhattan Beach members felt that Student's anxiety accounted "for most of her difficulties that may be otherwise associated with autistic-like behaviors." Parents requested that Student be found eligible under autistic-like behaviors. Manhattan Beach team members noted that Student displayed anxiety in social interactions, deficits in perspective taking, difficulty during changes in routines, not knowing what to do, wanting things to be correct, and sensory issues. Parents argued that these behaviors were typical of children with autism. Ms. Waks shared her opinion that Student's anxiety was an underlying issue of her autism, and she noted that treatment for anxiety differs from treatment for autism, which requires behavior intervention services by an Applied Behavior Analysis trained aide. Parents requested that Student be found eligible under the category of autistic-like behaviors based on her medical diagnosis of autism by her physician, the opinions of her service providers, First Step, and Autism Partnership, and the Davidson 2013 assessment. At the request of Manhattan Beach counsel, the IEP team took a break. Upon return, Manhattan Beach members agreed to add autistic-like behaviors as a secondary eligibility category.

Ms. Waks has a B.A. in communication studies, and a M.A. in psychology. She previously worked as a behavior therapist working with individuals with autism.

41. Manhattan Beach members adopted nine goals in the areas of language, written language, numbers and operations, telling time, task independence, socialization (involving unfamiliar situations), articulation, fine motor/written output, and counseling (problem solving). No goals were adopted relating to behavior. Ms. Cheng noted that Student exhibited repetitive behaviors, limited interests, inflexibility, and needed to learn to expand her circle of friends. Ms. Cheng stated that in forming goals it is important to look to the child's behaviors to target intervention to correct those behaviors. Ms. Cheng admitted that the IEP team did not have a behavior goal as Student's needs were being addressed by others goals. The only two goals that partly addressed Student's behaviors were the counseling goal and academic goal six. The counseling goal involved distressing situations. The baseline acknowledged that Student did not report significant anxiety. The sole counseling goal listed as a baseline, "[Student's] distress impacts her both academically and socially," and that Student "asks lots of questions and requires guidance." The annual goal was that Student, in a counseling setting, will come up with situations that could be distressing or nonpreferred, and then problem solve the situation giving three solutions and state five ways to decrease her negative state, with 80 percent accuracy in three out of four sessions. Academic goal six involved socialization related to novel and unstructured situations such as a rainy day schedule, friends absent, or change of play area. No data or other measureable baseline was stated as the goal merely states that Student required prompting and feedback/assurance from an adult before moving forward. As in the baseline in the counseling goal, there were no measureable means of determining Student's progress. The annual goal for academic goal six is when Student was presented with a novel, unstructured situation: she will require no more than one prompt and no assurance to join peers in four out of five situations.

42. Manhattan Beach's offer of FAPE was specialized academic instruction

twice weekly in math and writing; assignment of a group teacher instructional aide (Ms. McShane); group speech and language therapy for one session of 30 minutes per week; occupational therapy and consultation, and; counseling one, 20 minute session per week. Parents did not consent to the IEP because the services were not sufficient to meet Student's needs, although they did consent to the implementation of the goals and services, except for counseling.

43. Dr. Johnson opined as to the adequacy of the December 10, 2014 IEP and noted that at the time of the IEP team meeting Student's deficits included significant delays in pragmatic communication, social skills, and restricted patterns of interest/behavioral inflexibility, including play skills deficits, joint attention, imitation and observational learning, social reciprocity, restrictive interests, and repetitive behaviors. Dr. Johnson noted that Student presented as a child with a "severe disability." Because of Student's behavioral and social deficits, Dr. Johnson concluded Student required individual and small group social skills and behavioral interventions using applied behavioral analysis in the areas of social interaction (initiation and response, social awareness, friendship-making, and keeping friends), social communication skills, flexibility and frustration tolerance, executive functioning, and motivation toward goals. Dr. Johnson also opined that the IEP needed to set forth goals in these same areas.

44. Both Ms. Carmi and Ms. Waks also opined that, based on Student's needs caused by her autism, she required the services of an ABA aide at school to work on problematic behaviors that would teach her skills which then could be generalized. Ms. Carmi noted that frontloading, as was being done, was not appropriate as it created dependency instead of independence.

DR. JOHNSON'S EVALUATION

45. Dr. Johnson conducted a psychological evaluation of Student at the request of Parents, from January 16, to February 16, 2015, which led to a written report

dated March 9, 2015. Dr. Johnson's evaluation included a record review, parental interview, school observations on January 23, and 28, 2015, for a total of 90 minutes, an interview with Student, and the administration of eight standardized tests, including two surveys given to the Parents and Student's teachers. Student scored in the average range overall in cognitive functioning but low average in the areas of verbal comprehension, fluid reasoning, and processing speed. On the Wechsler Individual Achievement Test-Third Edition, Student scored in the average range overall, but she scored below average in the areas of numerical operations and oral expression. In adaptive functioning, the Vineland Adaptive Behavior Scales-Second Edition was administered to Parents. Student, who was then eight years 10 months old, scored in the third percentile for communication, first percentile for daily living skills, and less than the first percentile in socialization. In socialization, Student scored interpersonal relations with an age equivalent of 16 months, play and leisure time at two years two months, and coping skills at 10 months. On the Social Responsiveness Scale-Second Edition, Parents scored Student as clinically significant with severe deficits in all areas of communication and responsiveness; and Student's ABA therapist and teacher scored her with mild to severe deficits in all areas, with severe deficits due to restricted interests and repetitive behaviors. In executive functioning, Ms. Johnson, the resource teacher, scored Student in the normal range while her teacher, Ms. Yates, rated her executive functioning at school in the clinically significant range in behavioral regulation. Specifically as to autism, Dr. Johnson administered the Autism Diagnostic Interview-Revised, ADOS, and the Autism Diagnostic Observation Schedule-Second Edition. Dr. Johnson concluded that Student presented a primary diagnosis of autism spectrum disorder based on significant deficits in pragmatic communication, social skills, and restricted patterns of interest and behavioral inflexibility, which was rated as a substantial disability.

46. Dr. Johnson opined that Student required individual and small group social skills and behavioral intervention services, with behavior intervention in the school setting, as it was critical for Student to generalize skills learned in the one-to-one and small group settings. She recommended that intensive behavior intervention, such as ABA, be utilized at school in the areas of social-awareness, social communication, flexibility and frustration tolerance, executive functioning, and motivation. Dr. Johnson also recommended that the IEP team find Student's primary eligibility be consistent with Student's diagnosis of Autism Spectrum Disorder with a secondary eligibility under Speech and Language Impairment due to Student's autism-related weakness in social communication. Dr. Johnson also recommended that the IEP team adopt goals in the areas of social initiation and response, reciprocal conversation, behavioral flexibility, and executive functioning (relating to teacher's instructions, retaining multiple pieces of information, emotional control, and coping with her pace, reviewing her work).

APRIL 2, 2015 IEP

47. On April 2, 2015, the IEP team reconvened to review Dr. Johnson's evaluation. Manhattan Beach personnel stated that Student had made steady progress and appeared less rigid, more easily followed instructions, was more socially engaged, more engaged with peers in group settings, and frequently participated in class. They noted that Student responded well to frontloading, which was done as part of Student's schedule every day. Ms. Cheng stated that Student required a lot of prompting to meet up with peers and, if not prompted, Student would be alone. Parents disagreed that Student had made progress socially and behaviorally. They pointed to several occasions where Student had meltdowns or protested. Parents spoke of a history of trouble with friends, including reports that Student was bullying her friends when they did not want to do what she desired. After Dr. Johnson presented her findings, the Manhattan Beach team members admitted that Student had demonstrated inconsistency in applying

social skills across school settings. Dr. Johnson recommended that Student receive an ABA aide, adoption of a Behavior Support Plan, and adoption of goals in the areas of social initiation and response, reciprocal conversation, behavior flexibility, executive functioning skills, and expressive language skills. Manhattan Beach members added behavior consultations by the Manhattan Beach behavior expert Ms. Cheng for two hours monthly; intervention collaboration with Student's teacher up to 50 minutes monthly; and drafted a proposed goal to increase Student's socialization in the areas of friendship building/social reciprocity. Parents did not consent to the Manhattan Beach's offer because they did not think the offered services were sufficient to meet Student's needs. Parents asked that Student be provided an ABA-trained aide with "sufficient" supervision, and that Student no longer be eligible as a child with an anxiety disorder. They requested that Student be found eligible under the primary category of autism. Manhattan Beach team members denied Parents' requests.

JUNE 6, 2015 FOURTH GRADE TRANSITION MEETING

48. On June 16, 2015, Parents attended a meeting regarding Student's transition to the fourth grade. Also attending was Ms. Johnson, Ms. Yates, and Student's designated fourth grade teacher. Ms. Johnson prepared notes for the meeting as to how Student was then performing. Ms. Johnson indicated that Student continued to require frontloading her schedule for changes in routine, continued to be rigid on the school yard when not wanting to play what peers wanted to play, sensitive to noise if "not regulated," and continued to have sensitivity to texture and touch to the degree that she had gloves available when she worked with clay, paint, and glue. It was noted that Student continued to require being frontloaded at recess as to who she should play with and what to do during recess and lunch. This demonstrated that Student's needs continued at the same level behaviorally and socially as in the prior two years.

COSTS INCURRED BY PARENTS

49. Parents provided invoices and proof of payment that Autism Partnership provided the social skills group therapy on 27 occasions following the December 10, 2014 IEP meeting. Parents incurred a total of \$4,190.00 in expenses.¹⁴

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA¹⁵

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)¹⁶ 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

¹⁴ Student did not make a claim for reimbursement for the cost of Dr. Johnson's evaluation or ABA services performed by First Steps.

¹⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 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.

DISTRICT'S 2014 MULTIDISCIPLINARY PSYCHOEDUCATIONAL ASSESSMENT WAS NOT APPROPRIATE

5. Assessments are required to determine eligibility, and what type, frequency, and duration of specialized instruction and related services are required. An assessment of a pupil who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).)

6. To assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) Here, there is no dispute that Manhattan Beach complied with this requirement.

7. Reassessments, such as the triennial assessment conducted by Manhattan Beach, must have the same basic requirements applicable to initial assessments. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303; Ed. Code, § 56381, subd. (e).) A pupil must be assessed in all areas related to the suspected disability, prior to the development of an

IEP. (Ed. Code, § 56320, subd. (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related service needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

8. As part of triennial assessments, as with all reassessments, the IEP team and other qualified professionals must review existing assessment data on the child, including teacher and related service-providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305; Ed. Code, § 56381, subd. (b)(1).) Here, there is no dispute that the Manhattan Beach examiners were qualified. Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).)

9. The reassessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

10. Manhattan Beach's triennial assessment was not appropriate as discussed below. Student had long exhibited characteristics of autism: social skills deficits, anxiety, sensory issues, significant adaptability issues, and inflexibility. A 2013 report by Dr. Yin noted that Student's social anxiety caused her to be reluctant to go out in public, rigid play, an inability to enlarge her circle of friends, preoccupation with certain topics (dragons and lizards), and always wearing the same jacket no matter the weather. In 2013, Student was the subject of a comprehensive assessment by Dr. Davidson, which resulted in a diagnosis of autism and her finding that Student qualified for special education under the category of autistic-like behaviors. The IEP team, at the March 28, 2014 meeting, also received reports from Ms. Carmi that Student did not possess skills to engage in reciprocal conversation or play, displayed rigid obsessive behaviors and was non-compliant, which were consistent with a diagnosis of autism spectrum disorder. Student's third grade teacher Ms. Yates reported on October 20, 2014, that Student continued to require guidance in social situations with peers, including finding and making friends, as well as continuing to wear the same jacket no matter the weather. Thus, autism was a suspected area of need. In the 2014 psycho-education assessment, Dr. Ottaway was aware of Ms. Morales' speech and language assessment which found continuing deficits in pragmatic language, including interpretations of and productive use of non-verbal cues, responding to sarcasm/teasing/conflict, responses to winning and losing, appropriate conversation skills, and flexible thinking in social situations. However, Dr. Ottaway administered one standardized measure regarding autism, the GARS, which indicated a "very likely probability of having autism." Student scored in the average range in the two measures administered regarding anxiety. Dr. Ottaway failed to administer the ADOS, which Dr. Johnson opined was "best practice" in such a situation for someone suspected of autism. Dr. Johnson's opinion was not contradicted

by any evidence. Dr. Ottaway's assessment also indicated the same deficits related to autism as earlier assessments and teacher and parental observations. Nevertheless, Dr. Ottaway failed to review various services and goals that could be adopted to address these deficits. Thus, the psycho-education assessment was not appropriate.

11. Manhattan Beach's failure to appropriately assess Student's suspected disability related to autism, and its associated needs, 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.) 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." (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 disability resulted in difficulty communicating, sensory issues, and in social and emotional development, areas, which fall within the purview of an autism assessment. Therefore, Manhattan Beach's failure to appropriately assess Student in autism deprived her of educational benefits, and, accordingly, Manhattan Beach 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.".)

THE DECEMBER 10, 2014 IEP, AS AMENDED, FAILED TO OFFER STUDENT A FAPE

12. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

13. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable

annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum. The goals are based upon the child's present levels of academic achievement and functional performance. The IEP must also include a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, a statement of the special education and related services to be provided to the child, a statement of the program modifications that will be provided for the child, and a statement of individual accommodations for the child related to the taking of state and district-wide assessments. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

14. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).) Although the IDEA does not give a legal right to a proper disability classification, the Ninth Circuit has held that there are legal ramifications which do arise from which disability classification is selected. (*Weissburg v. Lancaster School District* (9th Cir. 2010) 591 F.3d 1255, 1259.)

15. Student's parents or legal guardians are considered necessary members of the IEP team. (34 C.F.R. § 300.321(a)(1); Ed. Code, §§ 56341, subd. (b); 56342.5 [parents must be part of any group that makes placement decisions].) Thus, the parents or legal guardian of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4) Here, Parents were active participants at all of the IEP meetings.

16. An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Distr. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education ... designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.)

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

18. California Code of Regulations, title 5, section 3030, subdivision (b)(1), describes the criteria for determining whether a child qualifies for special education under the category of autism:

Autism means a developmental disability significantly affecting verbal *and* nonverbal communication *and* social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.
(Emphasis added.)

19. The December 10, 2014 IEP, as amended on April 2, 2015, found Student eligible for special education with a primary category of other health impaired (for anxiety disorder) and autism as a secondary category. In describing how Student's

disability affects involvement and progress in general curriculum, the IEP failed to discuss Student's autism. Manhattan Beach team members failed to consider Student's needs due to her autism. Despite knowledge as to Student's need from information Parents provided and Manhattan Beach personnel, the IEP failed to include any goals regarding behavior or in socialization, except for academic goal six, which involved only "novel, unstructured situations." The IEP team was fully aware that Student was still requiring the same level of frontloading to be able to handle her daily schedule and social situations. Student's level of inflexibility, as demonstrated by Student's continuing wearing the same jacket constantly and ability to be independent had not changed. The IEP team had input from Ms. Carmi and Ms. Waks as to Student's needs and what goals she required. For example, Student continued to need to be scripted before each recess for her to socialize. Ms. Carmi and Ms. Waks, as well as Dr. Davidson, had recommended that Student be provided behavior intervention services in the form of a one-to-one ABA-trained aide with supervision. Yet, Manhattan Beach failed to offer services that met Student's demonstrated unique needs related to her autism diagnosis. Rather, Manhattan Beach merely made the same IEP offer as it had previously made, when Student's eligibility was based on the Boone Fetter diagnosis of anxiety, not taking into account subsequent assessment information, and information from Manhattan Beach personnel and Student's private providers as to Student's deficits and lack of progress in areas related to autism.

20. On April 2, 2015, the IEP team reconvened to discuss Dr. Johnson's evaluation. Ms. Cheng, the Manhattan Beach behavior consultant, acknowledged that Student still required a lot of prompting to socialize with peers, and that if not prompted, Student would be alone. Parents presented reports of Student bullying friends when the friends did not want to engage in Student's preferred method of play. Manhattan Beach team members admitted that Student was inconsistent in applying

social skills across school settings. Dr. Johnson presented her evaluation that Student was on the autism spectrum. Dr. Johnson recommended that Student receive an ABA trained aide to teach her social skills, and the drafting of a Behavior Support Plan to deal with Student's very apparent deficits. The Manhattan Beach team members rejected Dr. Johnson's recommendations and amended the December 10, 2014 IEP, by adding two hours per month of behavior consultation services, which were not detailed, by the Manhattan Beach behavior consultant, plus a new goal in the area of friendship building and social reciprocity. However, the evidence established that Student required the services of a trained ABA aide, a Behavior Support Plan, and goals to foster independence, socialization, flexibility, and executive functioning (following instructions, emotional control) based on information in Dr. Johnson's assessment and Student's lack of progress with strategies Manhattan Beach kept repeating in its IEP offers. Although the IEP team adopted Student being autistic as a secondary eligibility category, the Manhattan Beach team members failed to provide services, including an ABA trained aide and social skills therapy, and goals to address the problems related to her autism that she required to make meaningful educational progress. Thus, the December 10, 2014 IEP, as amended on April 2, 2015, failed to provide Student a FAPE because it failed to address Student's deficits caused by her autism.

21. Student meets the special education eligibility category of autism. Student has been assessed three times since November 2013 by Drs. Davidson, Ottaway, and Johnson. In all three assessment reports, the assessors determined that Student meets the autism eligibility category for special education. Student continues to demonstrate deficits in pragmatic language, including her inability to engage in reciprocal conversation, be anxious during social interactions, and an inability to understand the perspective of others. Student continues to be unable to engage in social interaction at recess without being frontloaded or scripted as to who to approach and what to say.

Student continues to be rigid and inflexible in her interests, play, and as to schedule changes. Student continues to have serious sensory issues as she is sensitive to texture evidenced by her need to use gloves while working with clay, glue, and paint, sensitivity to noise, and wearing her coat constantly no matter the weather.

22. Based upon the foregoing, Manhattan Beach's failure to provide Student an IEP that included goals and services to address Student's autism denied her a FAPE.

REMEDIES

23. 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*).)

24. 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 Manhattan Beach's assessment and IEP's were not appropriate, which denied Student a FAPE. It is therefore equitable to order that Manhattan Beach provide Student compensatory education and reimbursement for educational expenses.

25. As discussed above, Student's deficits are in social-awareness, social communication, restricted patterns of interest, sensory, and behavioral inflexibility. It is clear that the Manhattan Beach programs have not been able to make any progress in these areas as demonstrated that Student continues to require the same level of frontloading after two years and continues to have the same level of deficit. Dr. Johnson, Ms. Waks, and Ms. Carmi recommended that Student requires ABA interventions at school to teach her the skills necessary to alleviate her deficits caused by her autism. It is important for Student to make meaningful education progress that she receive a one-to-one ABA-trained aide for 390 minutes per day with supervision of 12 hours per

month. As compensatory education, Manhattan Beach shall provide such ABA services through a certified non-public agency, such as First Steps, for a period of one year, to ensure that the services to be provided to Student be coordinated with the ABA program she is receiving after school so that the skills taught be consistent and generalized across all environments.

ORDER

1. Manhattan Beach shall amend the December 10, 2014 IEP document, to indicate that Student's primary special education category is autism.
2. Manhattan Beach shall provide Student a one-to-one ABA-trained aide for 390 minutes per day, and supervision for such aide for 12 hours per month, from a certified non-public agency such as First Steps, for a period of one year.
3. Within 30 school days of this Decision, Manhattan Beach shall convene an IEP team meeting for the purpose of adopting goals pursuant to those recommended by Dr. Helena Johnson in her March 9, 2015 evaluation report.
4. Within 45 calendar days of this Decision, Manhattan Beach shall reimburse Student's parents for the cost incurred in providing Student with social skills services from Autism Partnership, for \$4,190.00. Within 10 calendar days of this decision, Manhattan Beach shall inform Student if further documentation is needed for payment beyond the documents in Student's exhibit binder.

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 both issues heard and decided.

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).)

DATE: November 25, 2015

/s/

ROBERT HELFAND

Administrative Law Judge

Office of Administrative Hearings

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

MANHATTAN BEACH UNIFIED
SCHOOL DISTRICT,

Plaintiff,

vs.

KRISTOPHER BOYER and LEAH
BOYER, on their own behalf and on
behalf of minor student, A.B., and A.B.,
a minor,

Defendants.

CASE NO. 2:16-cv-01236-MWF-PJW

JUDGMENT

The Hon. Michael W. Fitzgerald

Having received notice that the Parties have reached a settlement, and having reviewed the Parties' Stipulation regarding same, and which provide for this Court to enter a judgment,

IT IS ORDERED AND ADJUDGED that the November 25, 2015, decision rendered by the Office of Administrative Hearings ("OAH") in Case No. 2015040532 is hereby **VACATED**.

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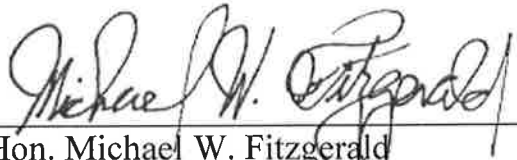
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1 **IT IS FURTHER ORDERED AND ADJUDGED** that, except as otherwise
2 agreed to by the parties hereto, each party shall bear its own attorneys' fees and
3 costs in connection with this action.

4 **IT IS SO ORDERED AND ADJUDGED.**

5
6 Dated:

7 August 30, 2016


8 Hon. Michael W. Fitzgerald
9 United States District Judge

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