

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SEQUOIA UNION HIGH SCHOOL
DISTRICT.

OAH Case No. 2015020856

SECOND CORRECTED¹ DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on February 18, 2015, naming Sequoia Union High School District. The matter was continued for good cause on March 25, 2015.

Administrative Law Judge Robert G. Martin, Office of Administrative Hearings, State of California, heard this matter on July 13, 14, 15, 16, 20, 21, and 22, in Redwood

¹ The first Corrected Decision made a correction to this decision in the section titled "Prevailing Party," in which Student, rather than District, is now correctly identified as the prevailing party on Issue 2. The original decision in this matter was issued within applicable timelines. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) This Second Corrected Decision makes the same correction to paragraph 2 of the Remedies section.

City, California.

Attorney Kathryn Dobel appeared on behalf of Student. Student's mother and father attended the hearing.

Attorney Kathryn Meola appeared on behalf of District. Deborah Toups, Ph.D., District Director of Special Education, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until August 10, 2015. The parties timely filed written closing arguments, the record was closed, and the matter was submitted for decision on August 10, 2015.

ISSUES²

1. Did District deny Student a free appropriate public education (FAPE) during the 2012-2013 school year, beginning February 18, 2013, by failing to fulfill its child find duties by:

- (a) failing to notify Parents of its obligation to assess and serve Student as a student with special needs residing in its geographical area; and
- (b) failing to identify, locate, and evaluate Student and convene an individualized education program team meeting and make an offer of placement and related services?

2. Did District deny Student a FAPE by failing to timely assess her pursuant to Parents' June 21, 2013 request for special education assessment?

² The issues pled in the complaint have been combined, reorganized and rephrased to conform with the parties' stipulations and 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.)

3. During the 2013-2014 school year including extended school year, did District deny Student a FAPE by committing the following procedural violations:

- (a) failing to offer an "administrative IEP placement" at the start of the school year;
- (b) failing to convene an IEP team meeting within 30 days of the start of the school year;
- (c) failing to make a specific written offer of placement at the November 26, 2013 IEP team meeting; and
- (d) failing to provide Parents a complete written IEP document from the December 10, 2013 IEP team meeting until March 7, 2014?

4. For the 2013-2014 school year and extended school year, did District substantively deny Student a FAPE by:

- (a) failing to offer an appropriate placement that would provide meaningful educational benefit at the December 10, 2013 IEP team meeting; and
- (b) failing to offer and provide in the June 27, 2014 and July 9, 2014 IEP's, an appropriate individualized transitional program and placement including appropriate academic programming and therapeutic services for ESY 2014 following her discharge from Alpine Academy?

5. During the 2014-2015 school year, did District substantively deny Student a FAPE by failing to offer an appropriate individualized program and placement including appropriate academic programming and therapeutic services at the following IEP team meetings:

- (a) June 27, 2014;
- (b) July 9, 2014; and
- (c) January 9, 2015?

6. During the 2014-2015 school year, did District deny Student a FAPE by

failing to implement the agreed-upon elements of the July 9, 2014 IEP?

SUMMARY OF DECISION

Student is a highly intelligent young woman who has been diagnosed with a significant processing disorder that slows the speed with which student processes information, making it extremely difficult for her to produce written work output. Student also has an anxiety disorder which causes Student to experience extreme stress when she is required to produce written work output, and a social phobia. Both of these further impact her ability to access her education. Student was initially found eligible for special education and services under the category of specific learning disability based upon the effect of her processing disorder on her ability to produce written work output, but since 2013 she has been eligible under the category of emotional disturbance, based upon her emotional responses to stress that impact her educational performance.

Student contends that District failed in its obligation to identify, locate, assess, and offer her a FAPE during the 2012-2013 school year while she attended a private high school located within District. Student further contends that District failed to offer her an appropriate placement for the 2013-2104 and 2014-2015 school years that satisfied her advanced academic needs, while addressing her unique disabilities, when she re-enrolled in District after attending private school. Parents seek reimbursement for the costs of parentally-placing Student in a state-certified non-public school and residential treatment program in 2013 -2014, and in a private day school in 2014-2014, due to District's failure to offer Student a FAPE. District contends that District satisfied its obligations towards Student, and that in any event, Parents are not entitled to reimbursement because they failed to provide requisite 10-day notice to District before parentally-placing Student in the non-public school and the private school.

This decision finds that District denied Student a FAPE in the 2013-2014 school

year, supporting reimbursement to Parents of amounts paid in connection with Student's placement in non-public school. However, a balancing of the parties' respective duties and responsibilities finds that each party failed in its obligations to the other, justifying a two-thirds/one-third sharing between District and Parents, respectively, of Parents' reimbursable costs.

FACTUAL FINDINGS

JURISDICTION

1. At the time of hearing, Student was 18 years old,³ and had recently graduated high school with a diploma from Lydian Academy, a private school in Menlo Park, California, where Student's Parents had placed her in September 2014. Prior to her graduation, Student was eligible for special education under the category of emotional disturbance based on a general pervasive mood of unhappiness or depression and inappropriate types of behavior or feelings that adversely affected her educational performance. From May 2013 to July 2014, Student was privately placed in a wilderness program and a residential facility in Utah, but Parents resided within District's boundaries at all times relevant to this matter.

INITIAL ELIGIBILITY FOR SPECIAL EDUCATION IN 2006 BASED ON SPECIFIC

³ Parents held Student's educational rights at time of hearing, but Student does not seek any further special education placement or services, either under an IEP or as compensatory services for any past failures of District to provide Student a FAPE. This matter solely concerns Parents' rights to reimbursement for amounts spent for private placements and psychotherapy services, which are independently enforceable. (See, e.g., *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 526 [127 S. Ct. 1994, 2001-02, 167 L. Ed. 2d 904].)

LEARNING DISABILITY

2. Student attended elementary and middle school in the Menlo Park City School District. In first grade and second grade, her teachers found Student intelligent, creative, possessed of a good sense of humor, introspective, strong-willed, and a deep thinker. They also noticed that she was unusually slow at producing written work; anxious with new people and situations; and would shut down when not comfortable, refusing, for example, to respond at all when her teacher offered to assist her on writing projects.

3. Student continued to have difficulties with work production and anxiety in third grade. Parents, both of whom hold advanced degrees and who at all times have been consistently supportive of Student and actively involved in her education, obtained a private psychological evaluation from Stanford University Medical Center in January 2006 that revealed Student to be a child of superior intelligence, scoring in the 98th percentile, with a severe cognitive deficit in the area of processing speed, where she scored in the fourth percentile.

4. After receiving the Stanford evaluation, Parents requested that Menlo Park assess Student for eligibility for special education. Based on the test data from the Stanford evaluation, and further testing and observation conducted by the school psychologist in his psychoeducational assessment, Menlo Park found Student eligible for special education at her initial IEP in April 2006 under the category of specific learning disability, based on a severe discrepancy between her overall cognitive ability and her performance in written expression. Student also scored poorly in math fluency, having difficulty memorizing and recalling basic math addition, subtraction, multiplication and division tables used in solving higher math problems. Student appeared overwhelmed by tests that required her to quickly and accurately scan, discriminate between, and sequentially order simple visual information and produce

written output. She required constant teacher prompting to stay on task, and it often took her twice as long as her peers to complete a task.

5. In addition to problems with academic output arising from her processing speed deficit, Student struggled in third grade with social and emotional issues. Student was diagnosed with social phobia, and medicated for anxiety. She was very quiet in class, preferring to play with one or two friends, avoided group activities, and worried that others would make fun of her. Testing, and parent, teacher and student rating scales indicated that Student was in the at risk range for internalizing symptoms, poor adaptive skills, depression, and her overall emotional symptoms index. She was in the clinically significant range with respect to her school maladjustment composite index and social anxiety, and was easily overwhelmed by her emotions. Student's psychoeducational assessor considered whether Student should be qualified for special education under the category of emotional disturbance, based on her social phobia and anxiety, but concluded that these conditions, which were being treated by medication and private therapy, did not affect Student's ability to make friends or function in class to a degree that warranted finding Student eligible under the category of emotional disturbance.

ELEMENTARY AND MIDDLE SCHOOL

6. Student attended Menlo Park City School District elementary and middle schools from third through eighth grade (2006-2011). Student's eligibility, placement, services, accommodations, and goals remained substantially similar throughout this time. She remained eligible for special education under the category of a specific learning disability based on her difficulties with written expression. Student was placed each year in a general education class or classes each year, and in third grade through the first half of seventh grade, received between 120 to 240 minutes per week of specialized academic instruction services. These services focused on assisting Student

with work completion and were delivered in a resource specialist program classroom. Student received numerous accommodations. Some were focused on assisting Student with increasing her written work output. Student was given note taking support and a visual task agenda, assistance with breaking large tasks into smaller parts and preparing pre-writing organizers, a set of classbooks for use at home, and access to a calculator and word processing. She was also excused from having to write in cursive form. Other accommodations were offered to allow Student to demonstrate her level of learning through means other than written work output. Teachers were to minimize the amount of copying and repetitive writing required from Student, reduce the amount of writing required in Student's assignments, and to consider alternate modes other than writing to allow Student to demonstrate her knowledge. Student was allowed to dictate portions of homework, assignments, and tests. Student was given goals in staying on task and completing written work independently; memorizing math facts to develop math fluency; typing; and, in 2010, a self-advocacy goal of seeking teacher assistance when frustrated, anxious, unclear on, or unable to complete an assignment. Student was not given any IEP goals or services related to social or emotional needs, but received private therapy and medication for her social phobia and anxiety.

7. Student made sporadic progress on her IEP goals, but met none of them from her initial IEP in April 2006 until fall 2009. Her math fluency and typing goals were dropped from her March 2009 IEP without having been met. In contrast to her limited progress on her IEP goals, and despite her difficulties in producing written output, Student made consistent academic progress, as measured by the California Standardized Testing and Reporting Program given each spring. On those tests, which Student took with accommodations of extra time, extra breaks and encouragement to continue working, Student performed at the highest level (advanced) in English Language Arts and Mathematics in fourth, fifth, and sixth grade, and also in science

when that was tested in fifth grade.

TRANSITION TO MIDDLE SCHOOL

8. In spring 2008, Student's IEP team planned for her transition to middle school and sixth grade. Parents, who were at all times actively involved in developing Student's educational program, were concerned that the transition from elementary school would not go well because Student would be unable to adjust to the increased work expectations of middle school. Parents' custom was to submit a written report to Student's IEP team in advance of each IEP team meeting, to advise the IEP team of Parents' view of Student's progress, Parents' areas of concern, and suggestions. In their report prior to Student's March 2008 IEP team meeting, Parents wrote, "we are concerned that the workload demand and organizational expectations of 6th grade are not realistic given [Student's] processing speed/written output issues nor are they reasonable given her emotional issues." They suggested that Student continue to be pushed to develop skills to increase her written work output, but that the amount of work required be halved, or the time to complete it doubled. An accommodation of "use of alternative modes to written output to demonstrate knowledge" was added to Student's IEP, which already included accommodations of extra time to complete assignments, a reduced homework load, and periodic teacher adjustments of the amount of work expected from Student on writing and projects to accommodate Student's slow written output.

9. In fall 2008, Student transitioned well from elementary to middle school, making progress on IEP goals and academics despite her ongoing struggles to perform on any test or assignment that required written work output under timed conditions. In their report to Student's IEP team in March 2009, Parents noted: "[Student] continues to grow socially; her social anxiety disorder is well managed now. The transition to middle school went very well, and [Student] has taken on school responsibilities much more

willingly than before.” They expressed concern that seventh grade expectations of longer writing assignments on a weekly basis “will be an unreasonably difficult amount of work for [Student] to meet.”

MARCH 2009 PSYCHOEDUCATIONAL ASSESSMENT AND IEP

10. Menlo Park conducted a psychoeducational assessment of Student in March 2009 in preparation for Student’s triennial IEP held on March 9, 2009. This assessment, when Student was in sixth grade, was the last assessment of Student conducted by a school district until November 2013, when Student was in eleventh grade.

11. The results of Student’s March 2009 psychoeducational assessment were substantially similar to the results of her 2006 assessment. The assessor found that Student continued to demonstrate superior cognitive ability despite a severe processing deficit, above average academic performance in all areas except math fluency, and great difficulty completing written work. The assessment did not include a social-emotional evaluation. Student’s IEP team agreed with the assessor’s recommendation that Student continue to receive special education under the category of specific learning disability.

MARCH 2010 IEP AND NOTICE OF PROCEDURAL SAFEGUARDS

12. In her seventh grade year, 2009-2010, Student became increasingly reluctant to access her accommodations, for fear of appearing flawed or different. Nonetheless, she continued to make progress. Student met her IEP goal for work completion, independently completing 75 percent of her classroom tasks in a timely manner. She was able to complete tests without going to the resource specialist program classroom for extra time, and it appeared to her teachers that she was organizing her time well. Over three terms in five classes, Student earned academic grades of nine A’s and four B’s.

13. Student's seventh grade annual IEP team meeting was held on March 9, 2010. In Parents' report to Student's IEP team in March 2010, Parents stated their satisfaction with teacher support and implementation of accommodations, but expressed concern that Student's workload was outstripping her abilities. Student was requiring more support at home, and was struggling to develop academic, life, and counter-anxiety skills needed for independence. "Despite excellent school support, we are concerned [Student] is losing ground. With High School coming, is this a train wreck in progress?" To develop Student's independence, her IEP team gave Student new goals focused on developing her independence and self-advocacy, requiring Student to independently complete her homework and tests as well as classwork, and to self-advocate by asking her teacher for assistance when frustrated, anxious, unclear on an assignment or unable to complete it. Student's services were reduced to 30 minutes per week of specialized academic instruction in the resource specialist program. Student's accommodations remained unchanged, except that she was no longer provided a visual agenda or task cards at her desk, and were stated as:

minimize repetitive copying/problems; needs very supportive teacher – patient; break larger tasks into steps on post-its; use of pre-writing organizers; access to word processing as keyboarding skills improve; use of a calculator for classwork, homework and optional for tests (except state testing); extra set of books at home; alternate homework load; periodic adjustment of expectations on writing and projects (ex. paragraph vs. multi-paragraph) to accommodate slow written output; scribe portions of homework, classwork and longer written tests when needed.; alternative modes to written output to demonstrate knowledge; no cursive

required; extra time on timed writing assignments.

14. Parents gave consent to Student's IEP and received a copy of Special Education Rights of Parents and Children Notice of Procedural Safeguards (Notice of Procedural Safeguards). The notice included a section titled "Children Attending Private School" that explained, among other things: (i) children who are enrolled by their parents in private schools may participate in publicly funded special education programs; (ii) school districts must consult with private schools and with parents to determine the services that will be offered to private school students; (iii) school districts have a clear responsibility to offer FAPE to students with disabilities, but children placed by their parent in private schools do not have the right to receive some or all of the special education and related services necessary to provide FAPE; (iv) if a parent of an individual with exceptional needs who previously received special education and related services under the authority of the school district enrolls the child in a private elementary school or secondary school, without the consent of, or referral by, the local educational agency, the school district is not required to provide special education if the district has made FAPE available to the child; (v) a court or a due process hearing officer may require the school district to reimburse the parent or guardian for the cost of special education and the private school only if the court or due process hearing officer finds that the school district had not made FAPE available to the child in a timely manner prior to that enrollment in the private elementary school or secondary school and that the private placement is appropriate; (vi) reimbursement for private school may be reduced or denied if a parent does not give notice to the school district that parent was rejecting the special education placement proposed by the school district, including stating parental concerns and intent to enroll his or her child in a private school at public expense, either at the child's most recent IEP team meeting, or in writing to the school district at least 10 business days (including holidays) before removing the child

from the public school.

EIGHTH GRADE: DECLINING PERFORMANCE; PLANNING FOR HIGH SCHOOL

15. In the first term of eighth grade in fall 2010, Student earned four A's, a B, and a C. She independently completed 65% of her assignments and continued to make progress on her self-advocacy goal.

16. Anticipating that Student's home school for 2011-2012 would be Menlo-Atherton High School in respondent District, Parents and Student arranged in fall 2010 for Student to shadow another Student who was attending Menlo Atherton. Student visited Menlo Atherton High School in Spring 2011 and found it overwhelming. Student stated to her Parents that day, "I will never set foot in there again."

17. Following Student's visit and adverse reaction to Menlo-Atherton High School, Parents in January 2011 began to consider alternative high school placements for Student.

18. Student's performance began to fall off in the second term of eighth grade, where she earned three A's and three C's, and continued to decline in her third term, with Student ultimately turning in just 10 percent of her work, earning passing C grades only because she was graded solely on the limited work she turned in.

19. At Student's March 9, 2011 IEP, teachers noted that Student was no longer completing work or seeking assistance, and was shutting down, often sitting and doing little or nothing in class. The IEP indicated that Student's social phobia was impacting Student's access to school, and noted Parents' concerns that "out of control" performance anxiety was overwhelming Student to the point where she did nothing, despite her IEP services and accommodations and outside supports including tutoring and therapy, and medication for Student's anxiety. At the IEP team meeting, the Menlo Park school psychologist who had assessed Student in 2006 and 2009, and who was familiar with Student's progress and development, suggested that Menlo Atherton

would not be a good fit for Student, and recommended that, as alternatives, Parents consider District's charter school Summit View and Everest public charter school. Parents by this time were also considering private schools, including Mid-Peninsula High School, a private high school located within District's boundaries.

20. Parents were unaware that non-public school placements could be arranged through an IEP, and did not seek to have Student's placement changed through her IEP. Student's March 2011 IEP does not reflect any discussion of a possible social-emotional assessment for Student, a change in Student's general education class IEP placement to a special education class or non-public school placement, or any significant change to Student's existing services or accommodations. Despite Student's declining performance, her placement, services, and accommodations remained essentially unchanged from her previous IEP. The consent page was missing from the copy of the IEP District later obtained from Menlo Park, but Parents testified credibly at hearing that they attended the March 9, 2011 IEP and gave written consent to it.

2011 ENROLLMENT AT, AND DISENROLLMENT FROM, DISTRICT'S MENLO- ATHERTON HIGH SCHOOL

21. Although they did not intend that Student would attend Menlo-Atherton, Parents on March 17, 2011, completed and returned a District student registration form for ninth grade at Menlo-Atherton High School, that had been provided to Parents by Menlo Park. In completing the form, Parents indicated that Student had received resource specialist program services under an IEP. District prepared a draft class schedule with a suggested list of Student's classes at Menlo-Atherton.

22. On March 25, 2011 Student's middle school resource teacher wrote Parents that a high school transition IEP for Student would be arranged with attendees from District for sometime in April 2011.

23. On or about April 13, 2011, before Student's high school transition IEP

meeting with District was held, Parents delivered a "We Will Not Be Attending" form to District stating that Student would not be attending Menlo-Atherton but would instead be attending Mid-Peninsula High School, a private high school located within District's boundaries. Parents did not state that they were withdrawing Student from special education, but did not thereafter contact District regarding special education for Student until 2013.

24. District did not send Parents a prior written notice that District would not be providing special education placement or services to Student, or any other response to Student's "We Will Not Be Attending" form.

25. On June 23, 2011, Menlo Park sent Student's entire special education file to District's office, with a note that Student would be attending Mid-Peninsula. District forwarded the file to Menlo-Atherton, which in turn on August 8, 2011 forwarded the file to Mid-Peninsula. District did not at that time review Student's special education file, keep a copy of it, or create a separate active file to monitor or provide services to Student as a child with a disability residing in the District.

26. In mid-July, 2011, the San Mateo County Special Education Local Plan Area in which District was a member, updated Student's records to reflect that she was leaving middle school and entering high school, and gave District access to Student's electronic special education files on the Special Education Information System, as Student's district of residence. District did not access those records prior to June 2013.

27. As former District Program specialist Karen Breslow freely and candidly testified at hearing, District's practice with respect to students with IEP's who were parentally-placed in private school was to "not just forget about the student," but to offer to hold annual and triennial IEP's for the student, and to explain to the parents that District was "ready, willing and able" to do so. Under aggressively leading re-direct examination, Ms. Breslow ultimately agreed with counsel's suggestion that District was

not required to offer to hold an annual or triennial IEP to parentally-placed student where the parents had not objected to District's previous offer of FAPE, but her more credible and persuasive testimony was that it was District's practice to do so.

28. In this matter, contrary to District's usual practice, District did not offer to hold annual or triennial IEP's for Student, and had no direct contact with Student until she subsequently re-enrolled in District in June 2013.

HOSPITALIZATION AND JULY 2011 PSYCHOEDUCATIONAL ASSESSMENT

29. On May 23, 2011, Student, who had been having suicidal thoughts, cut herself in the bathroom at home. Student was hospitalized, and placed on a psychiatric hold due to concerns over her suicidal thoughts and incident of self-harm. Student was released on condition of attending an "adolescent care" after-school outpatient program. Student attended for one day and refused to go back, telling her Parents, "I'm never going back. Those kids aren't me and I'm going to fix myself." Student had been seeing a psychotherapist since January 2011 to help her cope with anxiety and depression; Parents now sought the assistance of psychiatrist Takesha Cooper, M.D., to help with medication management.

30. Parents also arranged a private psychoeducational assessment by psychologist John Brentar, Ph.D., in July 2011. Dr. Brentar's findings regarding cognition, academic performance, and processing speed were similar to those of previous examiners. With respect to her social-emotional functioning, he found that Student was highly susceptible to stress overload because she lacked effective coping strategies, and responded to stressful situations with acute anxiety, disorganization, inflexibility, and impulsive behaviors, and by shutting down to maintain control over her behavior and negative thoughts. Because of this, Student had an aversion to complexity and ambiguity, and preferred situations and solutions that were simple, uncomplicated, and clearly defined. Dr. Brentar also noted that Student was highly defensive, with limited

insight into her emotional concerns, and expressed strong disdain for therapy. Dr. Brentar recommended that Mid-Peninsula implement accommodations similar to those in Student's March 201 IEP, that Student continue with psychotherapy, and work with an education specialist to build her executive functioning skills.

NINTH AND TENTH GRADE AT MID-PENINSULA PRIVATE SCHOOL

31. Student began attending ninth grade in general education classes at Mid-Peninsula in fall 2011. Mid-Peninsula offered students small class sizes, individualized attention, and a creative and flexible approach to learning. Mid-Peninsula did not offer any special education goals, classes, teachers, or services, and had no mental health support embedded in its program. To assist Student, Mid-Peninsula implemented an accommodation plan for Student. Student's accommodations were initially limited to extra time to process questions and to complete tests and exams, use of a calculator, and teacher monitoring of Student's assignment book, but were later expanded to include accommodations similar to those in Student's 2010 IEP: providing key lecture points in writing, shortening assignments or breaking them into shorter segments, negotiating alternate assignments, testing in a separate setting, weekly check-in with staff, and use of an electronic reader and smart pen for note taking.

32. Student continued to struggle with work completion, anxiety, and depression. Parents continued to provide private psychotherapy and psychiatric medication. Beginning in November 2011, in addition to sessions with Dr. Cooper, Parents privately paid for Student to see clinical psychologist Jennifer Dyer-Friedman, who remained Student's therapist until March 2013. At hearing, Dr. Dyer Friedman explained that it took her several months to develop a therapeutic relationship with Student because, after years of therapy, Student was initially skeptical of people and suspicious that they would try to tell her what to do. As Dr. Dyer-Friedman explained, Student did not welcome treatment or accommodations, and wanted to understand

how her brain worked so that she could develop her own strategies in order to become self-directed and motivated. Dr. Dyer-Friedman therefore focused her discussions with Student on those issues.

33. In May 2012, based upon her observations and sessions with Student over the prior year, Dr. Cooper recommended that Student receive executive functioning coaching/tutoring from psychologist Raymond Jones, Ph.D., to help student learn skills with organization, task initiation, procrastination, time management, and working memory. Parents also engaged Dr. Jones to help Student.

34. Despite the supportive environment and accommodations at Mid-Peninsula, and private psychotherapy, psychiatric medication, and executive functioning coaching, Student fell more and more behind in work completion in tenth grade, elevating her struggles with anxiety and depression. In December 2012 or January 2013, Dr. Dyer-Friedman recommended that Parents begin working with a consultant to identify an appropriate residential treatment program for Student.

35. In March 2013, Student “made it quite clear” to Dr. Dyer-Friedman that she was “done with therapy” because she had concluded that medication and outpatient therapy were not helping her problems. Student wanted to make changes that would change her experience of life but had no idea what those changes might be.

36. By May 2013 Mid-Peninsula Student was regularly leaving class and hiding. Parents became concerned that Student was exhibiting some of the same behaviors that had preceded her suicide attempt two years previously. Parents decided to remove Student from Mid-Peninsula and place her in a residential wilderness program.

37. During Student’s tenure at Mid-Peninsula, Parents did not contact District regarding Student, nor did Mid-Peninsula. District was not aware of Student, and did not contact Parents or attempt to assess Student or develop IEPs for Student. As part of its

“child find” efforts to identify, locate, assess, and serve students with disabilities residing in the District, District attended and participated in annual meetings in the fall of 2011 and 2012, held by the San Mateo County SELPA for all private schools located in San Mateo County. At these meetings, SELPA representatives provided explanations and handouts to private school representatives to share with parents, explaining district and private school obligations with respect to identifying and locating children with disabilities attending private schools, contact information for district special education departments, public funds available for providing special education and related services to children enrolled in private schools, and a list of free special education training programs offered by the SELPA. District did not otherwise engage in child-find efforts with respect to Mid-Peninsula students.

SECOND NATURE WILDERNESS PROGRAM

38. On May 7, 2013, Parents placed Student in the Second Nature residential wilderness program in Utah. Second Nature’s program was structured around a 60-day wilderness immersion experience designed to teach emotionally troubled adolescents self-awareness of their emotional issues and coping skills to address them. Student was initially overwhelmed by anxiety and a profound insecurity over her ability to complete the program, and was unable to interact with peers, but stabilized in two to three weeks and became an active and well-liked member of her group.

JUNE 2013 RE-ENROLLMENT IN DISTRICT

39. District’s regular school term ended June 6, 2013. On June 21, 2013, Mother delivered to District an address verification form stating that Student was re-entering District, and a letter requesting that District complete a comprehensive assessment in all areas related to suspected disability to determine whether Student was eligible for special education and/or related services. The letter stated that Student had

an IEP with Menlo Park from 2006 through the end of eighth grade in 2011, and had attended private Mid-Peninsula High School in ninth and tenth grade. Parent explained that she was requesting the assessment because, “despite significant interventions within and outside of school,” Student

“struggles significantly to complete academic work, especially written work, she experiences a significant amount of anxiety and panic surrounding completion of academic work; and she has not successfully gone into remission from a major depressive episode which occurred in 8th grade and which is intimately tied to her academic struggles.”

Parent detailed the interventions and accommodations that had already been tried, as well as Student’s processing speed deficit and medical diagnoses of social phobia, generalized anxiety, and depression. Parent identified six of Student’s previous assessors and the areas in which they had assessed Student. Parent did not explain what had happened to Student’s prior IEP at the end of eighth grade in 2011. Mother requested that district provide Parents an assessment plan within 15 days.

40. District thereafter did not attempt to contact any of Student’s prior assessors.

41. On June 28, 2013, District’s Director of Special Education, Deborah Toups, Ed.D., responded to Mother explaining that the 15-day timeline for providing Parents an assessment plan was stopped while school was out of session and would resume when the District’s 2013-2014 school year started on August 20, 2013. She explained that the special education department at Menlo-Atherton would conduct the assessment, and that District would conduct a special education assessment of Student even if Student remained enrolled at Mid-Peninsula, so long as Student was made available to District

for the assessments. She requested that Parent give copies of any outside assessments to Menlo-Atherton school psychologist Raymond Rossi "when school starts," so that District could consider them. Ms. Toups advised Mother that Mr. Rossi "will develop the assessment plan and review with you after school starts." Ms. Toups did not suggest that the District could or would have an IEP in place for Student at the start of the 2013-2014 school year.

42. On July 1, 2013, Student registered with District to attend eleventh grade at Menlo-Atherton. Student's health inventory noted health problems of anxiety, panic and depression.

43. On July 10, 2013, psychologist Kevin O'Keefe conducted a psychological evaluation of Student at Second Nature, reporting his results in a July 19, 2013 report. The evaluation was based on interviews of Student and Mother, an adolescent history form prepared by Mother, and a battery of tests: Wechsler Intelligence Scale for Children – IV; Wechsler Individual Achievement Test - Third Edition; Wisconsin Card Sorting Test; Brown Attention-Deficit Disorder Scales; Millon Adolescent Clinical Inventory; Minnesota Multiphasic Personality Inventory – Adolescent; Substance Abuse Subtle Screening Inventory (Adolescent); Rorschach Inkblot Test; Teen Age Sentence Completion Test; Beck Depression Inventory – II.

44. Dr. O'Keefe's findings were consistent with the results of prior psychoeducational evaluations of Student. Dr. O'Keefe found Student to be highly intelligent, but with extremely low processing speed. On academic achievement tests, Student performed at the 98th percentile in reading and written expression, and at the 79th percentile in oral language and math, despite her continued low performance in math fluency (12th percentile). Student suffered from mild depression, severe anxiety, and low esteem, caused at least in part by her concerns over her learning difficulties. Student was socially introverted and experienced considerable social discomfort,

struggling to process information in social settings. Student tended to think about her experience in a highly inflexible manner that resulted in her clinging rigidly to previously held convictions and firmly resisting any reconsideration of her beliefs in light of new information. Dr. O'Keefe believed Student to be closed-minded, rarely changing her opinions and seldom entertaining the possibility of modifying her perspectives on herself or events in her life. He expressed concern that such inflexibility would be difficult to alter and could make progress in psychotherapy move more slowly, and noted that because Student was very protective of herself, she had difficulty engaging in her therapy. Student had worked with many therapists since she was seven years old and said that she had not liked any of them and therefore would not cooperate with them.

45. Dr. O'Keefe recommended that Student be placed in a therapeutic boarding school with a strong academic program following her completion of the Second Nature wilderness program. He believed that Student had become skilled at avoiding her emotional process and presenting a positive façade, and had difficulty engaging in therapy. In his opinion, the environment of a therapeutic boarding school would help Student develop the necessary tools to work through her difficulties in a healthier manner. He recommended that Student receive individual therapy focused on recognizing and learning to manage her emotions, group therapy focused on pushing herself to connect with peers on a meaningful level and learn how to utilize peers as a healthy resource, and family therapy focused on improved communication and helping Student become more self-sufficient and independent.

46. Dr. O'Keefe recommended that Student be placed in smaller classes, with preferential seating and teachers who understood how her learning and emotional struggles were interrelated and could help her avoid giving up easily when faced with challenging tasks. Student should receive extra time on tests, and be pushed to ask

questions and be assertive when information was moving too quickly.

47. On July 18, 2013, Student completed her 10-week wilderness program at Second Nature. Student's therapist at Second Nature, psychologist Coady Schueler, told Parents that Student made progress in the relative stability of the wilderness program. He was extremely concerned that Student might relapse in the areas of depressive symptoms, anxiety, withdrawal, and emotional reactivity if she were to return to her home environment, even with intensive outpatient therapy or school accommodations. He strongly recommended that she go directly to a residential or therapeutic boarding school after completing the Second Nature program. He did not believe that Student had been at risk of causing physical harm to herself at the time she completed the Second Nature program, although he had been concerned during her first eight or nine days in the program.

ENROLLMENT IN ALPINE ACADEMY

48. On July 19, 2013, based on the recommendations of psychologists O'Keefe and Schueler that Student transition from Second Nature to a therapeutic boarding school, Parents unilaterally placed Student in Alpine Academy, a California-certified residential non-public school and residential treatment center in Utah. Parents did not give District any prior notice of this placement. The record does not reflect when Parents told District that Student would not be starting the 2013-2014 school year at a District school.

49. Despite the progress Student had made in the Second Nature wilderness program in developing social relationships and managing her anxiety, Student had difficulty transitioning to Alpine Academy. Student's therapist at Alpine, Colleen Croff, testified regarding Student's transition. Initially, Student was anxious and depressed. She was fragile and emotionally unregulated, and a single innocuous comment could send her into an agitated state for 45 minutes. Student was also rigid and avoided interacting

with her peers at Alpine. Student eventually adjusted to the new environment at Alpine, and made progress on her emotional issues. Her anxiety improved greatly, she learned additional skills to regulate her mood, and her self esteem improved. Student also developed social relationships with peers in her family residence, and one of Alpine's recommendations was that she continue to work on developing relationships outside her home after leaving Alpine.

DEVELOPMENT OF 2013 IEP

50. District classes resumed on August 20, 2013. On September 3, 2013, Mother returned a call from District program specialist Claire Chandler, who had called Parents to arrange a meeting with school psychologist Ray Rossi and dates to assess Student. Mother agreed to meet with Dr. Rossi on September 4, 2013. She told Ms. Chandler that Student was enrolled at Alpine Academy in Utah, but would be returning home for a therapeutic visit the week of October 20, 2013, and that that week would be Parents' preferred dates for District to assess Student. District did not seek earlier dates to assess Student, either by sending a District representative to Utah, or returning Student to the District earlier, because Student did not present a risk of harm to herself or others, and was in a placement that did not appear inappropriate. Parents were not asked to, and did not consent to, an extension of time for District to complete its assessment of Student.

51. On September 4, 2013, Dr. Rossi met with Mother and they together filled out an assessment plan and release of records form for Student that Mother signed at the meeting. The assessment plan called for evaluation of Student in the areas of academic achievement, health, intellectual development, speech and language, motor development, social-emotional development, and occupational therapy.

52. Dr. Rossi met with Student on October 23, 2013, interviewed Parents, and reviewed a narrative of Student's educational and therapeutic history prepared by

Mother at his request. He also reviewed Dr. O’Keefe’s 2013 assessment, Dr. Brentar’s 2011 assessment, the 2009 and 2006 Menlo Park assessments, and treatment reports from Alpine Academy.

53. Dr. Rossi issued his psychoeducational evaluation report on November 15, 2013. His findings were consistent with those of Student’s previous assessors, as he noted: “In some respects, her current functioning hasn’t changed much from the characteristics listed in [Dr. Brentar’s] report of July 2011: she impresses as bright, highly defensive, and with limited insight into her difficulties.” Dr. Rossi noted Student’s continuing struggles since early elementary school with processing speed, executive functioning, anxiety, and depression that adversely affected her academic performance, and her continuing pattern of frustration, becoming overwhelmed by academic demands, and shutting down.

54. Dr. Rossi found that Student continued to have significant difficulties modulating mood and expression of emotions, difficulties managing anger that she directed at herself, difficulties in attention and concentration, and difficulties in interpersonal relationships. She continued to experience episodes of escalating anxiety that caused her to feel overwhelmed and shut down, with occasional emotional outbursts.

55. Dr. Rossi found that Student’s mental health issues affected her ability to complete work, and he recommended that Student be found eligible for special education under the category of emotional disturbance based on a general pervasive mood of unhappiness or depression and inappropriate types of behavior or feelings that adversely affected her educational performance. He recommended that Student’s mental health issues be addressed by individual and group therapy, and access to therapeutic and support services during the school day.

56. Dr. Rossi did not recommend continued eligibility based on specific

learning disability, and explained in a subsequent addendum to his report that Student's performance in written expression on work she was able to complete was at the 98th percentile, consistent with her overall cognitive ability, and that her low written work output did not satisfy the criteria for significant discrepancy between ability and performance. Other assessments completed for Student's IEP found Student was in good health, with medication for anxiety, demonstrated academic skills in the average range, did not demonstrate a disability in speech and language or motor skills. Parents did not challenge the appropriateness of any of District's assessments.

57. On November 19, 2013, Mother wrote Dr. Toups requesting the results of Student's assessments and for an IEP team meeting, noting that District was out of compliance with the Education Code because it had failed to hold an IEP meeting within 60 days of the day Parent signed Student's assessment plan. Dr. Toups responded on November 21, 2013, stating that the EP had been delayed because Student had not been made available for assessment until October 22, 2013. Parents did not agree to extend the 60-day timeline.

58. District provided Parents draft assessment reports on November 22, 2013, and District and Parents agreed to hold an IEP team meeting on November 26, 2013.

NOVEMBER 26, 2013 IEP TEAM MEETING

59. On November 26, 2013, Student's IEP team convened and reviewed Student's assessment results and present levels of performance. The IEP team found that Student qualified for special education services under the category of emotional disturbance, and did not find her eligible under the category of specific learning disability. The team worked on, but did not complete, goals for Student, and District did not make a placement offer. Parents stated that college was Student's eventual goal, but their overriding concern was Student not attempt suicide again as she had in 2011 while attempting to make up the deficiencies in her course credits. The team noted that

Student had earned 88.5 credits towards graduation, and needed an additional 131.5, not counting an unknown number of credits earned at Alpine Academy. The team also noted that Student did not have to complete academically challenging "A-G" courses required for four-year college admission in order to attend community college, and Parents stated that they had adjusted their expectations for Student to include community college and other ways to eventually earn a four-year college degree. The IEP team agreed to meet again on December 10, 2013.

60. On December 5, 2013, Mother emailed District that Student was not ready to be discharged from Alpine Academy, and Parents would be requesting funding for her continued placement at Alpine Academy at the December 10, 2013 IEP team meeting. Mother also stated that Parents were also looking forward to working with District to plan Student's return home.

DECEMBER 10, 2013 IEP TEAM MEETING AND ORAL FAPE OFFER

61. On December 10, 2013, the IEP team reconvened and reviewed a draft IEP document. The draft IEP included a proposed placement, services, and accommodations, and two proposed goals. The team discussed Student's present levels of performance and areas of need, edited the draft's accommodations, and drafted new goals for Student in the areas of work completion, anxiety management, and frustration and anger management. The IEP team did not discuss a full continuum of placement options and did not discuss possible residential placement for Student. Information regarding Student's proposed placement was confusing. A written draft IEP reviewed at the meeting indicated that Student was to be in general education classes at her school of residence for 97 percent of the day, with 3 percent of the day spent in special education. Program specialist Karen Breslow stated District's offer of FAPE, which was described in IEP team meeting notes prepared after the meeting as: "Specialized Academic Instruction in the STARS 2 classroom, augmented by an hour weekly each of Individual,

Group, and Family Counseling, and 30 minutes weekly of Intensive Individualized Services for Behavior Coaching, all through the STARS 2 program. Day Treatment was also offered through the STARS 3 program, for 850 minutes weekly.” Placement for the extended school year was not discussed.

62. As explained at hearing, the District’s STARS program (Successful Transition Achieved with Responsive Support) was a District program for students with mental health needs requiring special education placement and services to help them transition to a general education environment. District offered three different classroom environments within the STARS program, all of which were located within general education schools. STARS 1 was for students who needed a small to moderate amount of support to help them return to a mainstream general education environment. STARS 2 was for students requiring a higher level of support. STARS 3 was an after-school program that offered homework support, family counseling, and direct instruction in social skills reinforced by group activities.

63. At Student’s December 10, 2013 IEP, Parents understood that District’s proposed placement for Student was at Carlmont High School in the STARS 2 program, and not at Student’s school of residence. They understood that the program was for students with emotional issues. Mother asked about the intellectual and behavioral profiles of the students in STARS 2. Ms. Breslow described the students as being of average to superior intelligence, with behaviors that were not unpredictable, explosive, or unsafe. Parents did not understand how the program was structured and how it would work in practice, and they asked to visit the program. Ms. Breslow agreed to arrange for Parents and Student’s therapist to visit the program.

64. Parents stated that they were not ready to accept District’s FAPE offer especially since they had not seen the STARS 2 program. Parents believed that Student was not ready to be moved from Alpine Academy because she needed to finish her

clinical work there, and stated that they would pursue reimbursement from the District for the cost of Alpine Academy. District said that it would complete edits to the draft IEP and send the completed written IEP to Parents. Parents signed the draft IEP participation page, but did not consent to the IEP.

65. On December 13, 2013, Ms. Breslow, Mother, and Student's therapist Dr. Dyer-Smith visited the STARS 2 classroom after the Students had left for the day. Dr. Dyer-Smith was concerned that the instructors did not appear to have much understanding of processing difficulties like those affecting Student, and by their description, it sounded like the students in the STARS 2 class were significantly lower functioning than Student.

66. On December 18, 2013, Parents wrote District:

"to inform you of our intent to continue Student's placement at Alpine Academy. We do not believe that the district's offer of placement in the STARS 2 program constitutes FAPE, nor does it adequately address [Student's] significant safety needs. Please consider this letter our 10-day notice of intent to place [Student] at Alpine Academy and to reserve the right to seek reimbursement for the private placement at a future date."

Parents did not detail their disagreements with the proposed placement, or explain the nature of Student's significant safety needs.

67. A contemporaneous psychiatric progress note from Student's psychiatrist at Alpine Academy, dated December 13, 2013, indicated that Student's mood was normal, she was engaging in no self-harm or aggressive behaviors, and had no thoughts of suicide, homicide, self-harm, or aggression.

JANUARY 21, 2014 WRITTEN FAPE OFFER

68 On January 21, 2014, Ms. Breslow emailed Parents a written copy of Student's IEP that included the offer of placement that the IEP Team had discussed on December 10, 2013. Parents were not responsible for the delay in the completion or transmittal of the written IEP. The copy of Student's IEP sent by District did not include any signature page.

69. District's written offer of placement corrected, clarified, and detailed District's previous oral offer made at the December 10, 2013 IEP team meeting. With respect to placement – the only aspect of the IEP at issue in the Complaint – the January 21, 2014 offer corrected the previous draft IEP's indication that Student would spend 97 percent of her day in general education classes and clarified that Student would spend 90 percent of her day in special education class and 10 percent in general education. District offered Student placement in the STARS 2 program special education class at District's Carlmont High School for the remainder of the 2013-2014 school year, and the 2014 extended school year. Student was offered the following services to be provided in the STARS 2 classroom during the regular school year: (i) 1550 minutes per week individual and group specialized academic instruction; (ii) 30 minutes per month group career awareness counseling; (iii) 50 minutes per week individual counseling; (iv) 50 minutes per week group counseling and guidance ; (v) 50 minutes per week parent counseling; and (vi) 30 minutes per week individual behavior coaching. Additionally, Student would have the opportunity to take an elective drama or art class in the general education environment. District also offered Student 850 minutes weekly of day treatment services in the STARS 3 after-school program at Carlmont. For the extended school year, June 16, 2014, to July 11, 2014, Student was offered the following services to be provided in the STARS 2 classroom: (i) 4 hours per day individual and group specialized academic instruction; (ii) 50 minutes per week individual counseling; (iii) 50

minutes per week group counseling and guidance; (iv) 30 minutes per week intensive individual services; and (v) 50 minutes per week parent counseling.

70. The STARS 2 program at Carlmont was designed to provide a full-day therapeutic milieu for Students of average to above average intellectual ability with more intense emotional needs, and District found it provided a good transition for Students returning from residential treatment. The class of eight to ten students was taught by a teacher with 14 years' experience, with the support of two instructional associates, a full-time behavior coach, a full-time counselor, and a clinical supervisor present 80 percent of the day. The additional STARS 3 after-school program from 3:15 p.m. to 6:00 p.m. at Carlmont was designed to improve student social skills. In addition to offering students snacks, homework support, and family counseling, it taught a social skills curriculum with direct instruction toward specific weekly goals, followed by reinforcing group activity such as art projects, games, or gardening.

71. On or about January 23, 2014, Parent visited the STARS 2 class. Three students were being taught, but only one was participating in the lesson. The lesson was very basic, and Mother did not think that Student would fit in or benefit from the class.

72. On March 1, 2014, the District sent Parents a prior written notice in response to their December 13, 2013 letter. District denied Parents' claim for reimbursement on grounds that Student was already attending Alpine Academy when Parents gave notice, and had failed to satisfy the requirement that they give District 10-days' written notice prior to unilaterally placing Student in a private placement without District's consent. District also denied Parents' request for reimbursement on grounds that District's offer of placement in STARS 2 was reasonably calculated to provide Student an educational benefit.

73. On March 7, 2013, Mother signed the consent page to District's IEP offer to Student that was developed on November 26, 2013 and December 10, 2013, and

presented to Parents in writing on January 21, 2014. Parents agreed to Student's IEP with the exceptions of District's offer of placement, services and goals.

JUNE 27, 2014 IEP TEAM MEETING AND JULY 9, 2014 WRITTEN FAPE OFFER

74. On May 28, 2014, Parents wrote District that they expected Student to be ready to transition home from Alpine Academy on July 17, 2014. They requested that Student's IEP team reconvene to update Student's academic needs and determine an appropriate local placement for Student for the 2014-2015 school year. Parents stated their understanding that Student would need "a socially appropriate, small classroom environment at a school that has comprehensive academics and in which appropriate accommodations and support can be provided for her to have continued success in school."

75. On June 27, 2014, Student's IEP team reconvened to discuss Student's upcoming transition. Parents, Student's attorney Ms. Breslow, District's attorney, Student's house supervisor, house teacher, classroom teacher, counselor from Alpine Academy, and Alpine's academic director attended the meeting. Alpine staff explained that Student had made significant progress in the past year, and was now managing her own studies and working on peer relationships and conversation skills. At first, Student had needed to be closely monitored, and Alpine staff had to constantly adjust her program. After her year at Alpine, this was no longer true, and Student in recent months had been able to tolerate staff changes and still continue to make progress. Student's counselor reported that Student would not access her counseling when she first arrived at Alpine Academy, but had learned to accept counseling. She was much less argumentative and defensive, was using every hour of available therapy, was open, accepted feedback and immediately followed up with suggestions, although still needing much therapist prompting. Student's counselor felt that Student was ready to return home. She recommended that Student be supported by individual counseling to

maintain her improved coping skills, and that she be involved in community activities to address her social anxiety needs. Student recognized her need to develop better social skills, but found that work to be particularly scary because it tended to trigger her social anxiety, contributing to her level of depression, and in turn to limited functioning overall.

76. Parents stated that they believed that Student's next school setting should be Lydian Academy, a private school close to Student's home teaching college-preparation courses in a one-on-one non-classroom setting. The IEP team discussed a number of other placement options, and Parents agreed to observe District's STARS 1 classroom at Woodside High School. STARS 1 was intended for students needing a moderate amount of support to transition to a general education environment, as opposed to the intensive support offered in the STARS 2 program that District had proposed for Student for the prior school year. The IEP team agreed to reconvene after Parents' observation.

77. Later on June 27, 2014, following the IEP team meeting, Parents gave District 10-day written notice of their intent to place Student in extended school year classes at Lydian Academy, to retain the services of a transitional therapeutic support organization such as Coyote Coast, Vive, or Homeward Bound, and to seek reimbursement from District. Parents explained that they gave the notice because Student would be coming home on July 17, 2014, and would need support at that time. Parents did not know whether any of District's options would be appropriate, and in any case it appeared that a District placement would not be available until the fall of 2014.

78. On July 1, 2014, District responded with a prior written notice dated July 1, 2014. District rejected Parents' request for reimbursement for Lydian Academy on grounds that Lydian was not a non-public school certified by the State of California to serve special education students. District rejected Parents' request for private

therapeutic support on grounds that District could provide such support, and would provide five hours of such support to Student with a licensed clinician from July 21, 2014, to August 15, 2014.

79. On July 9, 2014, the IEP team reconvened. Mother reported that she had observed the STARS 1 class at Woodside and liked the instructor. The team discussed a number of placement options for Student, including the STARS 1 program, Palo Alto Preparatory School, or independent study at a District high school or Canada Community College. Dr. Toups reminded the team that Student had until the age of 22 to complete her diploma, and suggested that the primary focus should be on meeting Student's emotional needs before requiring her to take a full academic course load.

80. Following discussion, District made the following offer of FAPE: extended school year services of six hours of individual therapy, and three additional hours of family therapy as needed; placement in the STARS 1 special day class at Woodside the 2014-2015 school year; 60 minutes per week of individual counseling; 60 minutes per week of group counseling and guidance; and 60 minutes per month of family therapy (with the option to adjust up as needed).

81. The STARS 1 class at Woodside was located in a suite of rooms in a general education high school, and was designed to offer a supportive therapeutic environment to help highly intelligent students with social-emotional needs develop skills to mainstream into general education classes. The class was taught by Kevin Gage, a credentialed teacher with 15 years' experience as the lead teacher in high school classes for students with emotional disturbances. The STARS 1 class had 15 students, taught by Mr. Gage and supported by two full-time teaching associates, a full-time behavior specialist, a full-time therapist providing individual and group therapy, and two part-time support staff. Students were required to attend at least one mainstream class per day, and were encouraged to attend more as their skills developed. All classes

taught by Mr. Gage in the STARS 1 classroom were “core curriculum” classes counting towards high school graduation, but they did not count as “A-G” classes needed to enroll in four year colleges.

82. On July 11, 2014, Parents consented to District’s FAPE offer with exceptions, agreeing that Student would participate in the Stars 1 program beginning on August 19, 2014, on a trial basis until an IEP meeting to be held in the first week of September. Additionally, to keep Student from regressing on her transition home, Parents gave notice that they would be enrolling Student in a class at Lydian Academy on immediate return home. Parents reserved the right to seek reimbursement for this course, which they characterized as an extended school year class.

83. Because Student had frequently been unable to benefit from therapy because of a failure to connect with her therapist, Parents decided they needed a back-up plan in case the therapist provided by District did not work out. Parents met with Alexis Miller, a licensed Marriage and Family Therapist and clinical supervisor for Vive, and Student’s former therapist, Jennifer Dyer-Friedman, Ph.D., and made arrangements for Student to meet with them, also.

STUDENT’S TRANSITION HOME IN JULY 2014

84. Student returned home on July 21, 2014. District had arranged for Student to receive therapy sessions from Jennifer Smith, a therapist employed by Beacon School, a non-public agency. Student met with Ms. Smith on July 22, 24, and 31, and August 7, 2014. Student found Ms. Smith to be pleasant, but did not find the sessions helpful in a therapeutic sense. Student complained that too much time was spent on intake paperwork on Student’s developmental, medical, and family histories. On August 18, 2014, without explanation, Ms. Smith failed to meet with Student and Mother at the STARS 1 classroom to introduce Student to the STARS 1 therapist. After that, Parents did not contact Ms. Smith again to arrange further sessions. Although Student and Parents

were unaware at the time, Ms. Smith was not a licensed therapist, but instead a registered marriage and family intern working under the supervision of a licensed clinician. Ms. Smith had a bachelor of arts degree in psychology, a master of arts degree in counseling psychology/marriage and family therapy, and four years' experience providing individual and family therapy.

85. In contrast to her experience with Ms. Smith, Student formed a connection with Vive therapist Alexis Miller in their first trial meeting. Ms. Miller met with Student in public places such as coffee shops as a means of working on Student's social phobia and anxiety. Sessions were informal conversations, and involved drawing Student out regarding interpersonal issues such as Student being upset by a teacher wanting Student to approach a subject in a way that Student didn't like. Ms. Miller did not have a copy of Student's IEP, and did not know or work towards the specific goals set for Student in the IEP. Ms. Miller's therapy sessions with Student ended in March 2015.

STARS 1 PROGRAM

86. Student attended the STARS 1 program on the first day of school, August 19, 2014. Student thereafter attended the STARS 1 program for seven school days. Her last day of attendance was August 29, 2014. Student's class schedule called for her to take English, life skills, and two study skills periods with Mr. Gage in the STARS 1 class, and animation and human biology in mainstream general education classes. Student told her Parents that the mainstream classes were intellectually engaging, but with over 30 students in each classroom, Student was overwhelmed and stressed, so much so that her hands shook to the point that she would drop her pencil. Student did not feel that the mainstreaming supports from the STARS 1 program were sufficient to help her cope with the stress of those classes. Student also reported that, although Mr. Gage's class was calm, the other Students were functioning below her level, and Student was bored and frustrated. Parents became concerned that Student was starting to show signs of

anxiety and depression before she withdrew from the STARS 1 program.

87. Student had earned 85.5 course credits during four quarters at Alpine Academy, and needed 36 additional credits during the 2014-2015 school year to graduate high school. Had Student completed her first quarter classes in the STARS 1 program, she would have earned 22.5 credits and would have needed 13.5 credits to graduate. Apparently miscalculating the credits required, or not understanding that classes with Mr. Gage counted as core curriculum, Student and Parents concluded that Student would have to take three mainstream classes in future quarters, a mainstream course load that Student did not feel she could handle.

88. On September 3, 2014, Student's parents sent a letter to the District indicating that they were placing Student at Lydian Academy "effective immediately" and were continuing therapeutic services with Vive for Student's emotional well-being and safety. Parents stated that they would seek reimbursement from District for both the Lydian placement and the Vive therapy services.

89. On October 7, Dr. Toups responded to Student's parents denying their request to fund Lydian Academy on grounds that District had offered Student a FAPE and District could not fund Student's placement at Lydian because it was not a certified non-public school.

JANUARY 9, 2015 IEP MEETING AND FAPE OFFER

90. On January 9, 2015, the IEP team reconvened and discussed Student's then-current progress at Lydian academy and discussed a transition plan in the event that Student returned to the District. The IEP team indicated that the District's offer of placement continued to be Woodside High School in the STARS 1 program with the supports and services listed on the July 9, 2014 IEP. Parents indicated that they would continue to place Student at Lydian Academy and provide her with individual therapy that was not available as part of Lydian's program.

91. Student filed her complaint in this matter on February 18, 2015.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁴

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as "educational

benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student carried the burden of persuasion.

ISSUES 1(A) & (B): DISTRICT'S CHILD FIND OBLIGATIONS WHILE STUDENT WAS PARENTALLY-PLACED IN PRIVATE SCHOOL AT MID-PENINSULA

5. Student contends that District denied Student a FAPE, from February 18, 2013, to the end of the 2012-2013 school year by failing to conduct appropriate actions to notify Parents of District's obligations to identify, locate, and evaluate Student as a parentally-placed student with a disability while Student was in private school at Mid-Peninsula, and by failing to assess Student and make Student an offer of FAPE. District contends that it complied with its obligations generally to seek out Student based on her status as a parentally-placed private-school student potentially having a disability;

that Parents were in any event aware of District's obligation to provide FAPE to Student based on Parents' participation in Student's previous IEP's; and that District had no obligation arising from Student's previous IEP to assess Student or make her an offer of FAPE, after Parents disenrolled Student from District's schools in 2011 placed her in private school at Mid-Peninsula.

Applicable Law

DUTY TO LOCATE, IDENTIFY, AND ASSESS PARENTALLY-PLACED PRIVATE SCHOOL CHILDREN WHO HAVE DISABILITIES AND MAY BE IN NEED OF SPECIAL EDUCATION AND RELATED SERVICES

6. The IDEA places an affirmative, ongoing duty on the state and school districts to locate, identify, and evaluate all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a) (2006).)⁶ This duty is commonly referred to as "child find." California law specifically incorporates child find in Education Code section 56301, subdivision (a).⁷ A school district must actively and systematically seek out all individuals with exceptional needs residing in the district, from birth to 21 years of age, including children who are not enrolled in public school programs. (Ed. Code, § 56300.) The child find duty is not dependent on any request by the parent for special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and

⁶ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

⁷ Instead of the term "evaluate," which is found in the IDEA, the Education Code uses the term "assess."

the Education Code. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1196. ("*Cari Rae S.*"); *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

7. In addition to the duty to seek out children who reside in the district and who may be in need of special education, school districts must also locate, identify, and assess private school children with disabilities who do not reside in the district, but who have been enrolled by their parents in private schools located within the district. (Ed. Code, §§ 56170, 56171; 34 C.F.R. § 300.130.) This child find responsibility also includes the responsibility to reassess children with disabilities in private schools. (United States Department of Education, Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46593 (August 14, 2006) ("Comments to 2006 IDEA Regulations").)⁸

⁸ Parentally-placed private school children with disabilities do not have individual rights to the same special education and related services that they would receive if enrolled in a public school, but they may receive services in private school based upon an equitable apportionment of available special education funds, made by the district in which the private school is located. (34 C.F.R. §§ 300.132 and 300.133.) To ensure that parentally-placed private school children can participate equitably in services that a school district may provide to children who attend private school in the district, and to obtain an accurate count of those children, a school district is required to locate, identify, and assess all children attending private schools located in the district who have disabilities and may be in need of special education and related services. (34 C.F.R. § 300.131; Ed. Code § 56171; Office of Special Education Programs, *Letter to Eig*, January 28, 2009, 52 IDELR 136 (hereafter

8. Neither the IDEA nor the Education Code specify which activities are sufficient to meet a district's child find obligation towards students who either reside in, or attend private schools in, the district, and there is no requirement that a district directly notify every household within its boundaries about child find. *Ibid.* However, a district's child find activities for parentally-placed private school children must be similar to those it undertakes for its public school children, and must be completed in a time period comparable to that for students attending public school in the district. (34 C.F.R. § 300.131(c) & (e); Ed. Code, § 56301, subds. (c)(1) & (3).) "Similar" child find activities would generally include, but are not limited to, such activities as widely distributing informational brochures, providing regular public service announcements, staffing exhibits at community activities, and creating direct liaisons with private schools. (Comments to 2006 IDEA Regulations, *supra*, 71 Fed. Reg. 46593.)

9. To help implement child find, all school districts are required to either constitute, or join, a SELPA (Ed. Code § 56195.1, subds. (a), (b) and (d)), and each SELPA is required to establish written policies and procedures for use by its constituent local agencies for a continuous child find policy. (Ed. Code § 56301, subd. (d)(1).) School districts must hold timely and meaningful consultations with private school representatives and representatives of parents of parentally-placed private school children with disabilities regarding the child find process, including how parentally-placed private school children suspected of having a disability can participate equitably in special education and related services; how parents, teachers, and private school officials will be informed of the process; and the resources the school district has available to private school students with disabilities. (34 C.F.R. § 300.134.) When the timely and meaningful consultation has occurred, the district must obtain a written

Letter to Fig.)

affirmation that it has occurred signed by the representatives of the participating private schools. (34 C.F.R. § 300.135.) Private school representatives may file a compliance complaint with the state if a district fails to consult (34 C.F.R. § 300.140 (c)), but parents have no standing to request a due process hearing based upon a district's violation of the "meaningful consultation meeting" requirements (34 C.F.R. § 300.140 (a).) However, evidence of the information and materials shared at these meetings may be relevant as to whether a school district has met its child find obligations.

10. In *Rowley*, the Supreme Court emphasized the importance of adherence to the procedural aspects of the IDEA. The court stated:

"...we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...as it did upon the measurement of the resulting IEP against a substantive standard." (*Rowley*, 458 U.S. at pp. 206-207.)

11. A procedural error, including a failure to engage in appropriate child find activities, does not automatically mean that FAPE was denied. A procedural violation denies a child a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 *superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.)

(*Target Range*.) Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

12. OAH has jurisdiction to hear due process claims arising under the IDEA. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029. Jurisdiction extends to procedural violations that infringe on the parents' opportunity to participate in the IEP decision making process for their children. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23, supra*, 960 F.2d 1479, 1484.)

DUTY TO HOLD IEP MEETING AND OFFER FAPE TO PARENTALLY-PLACED STUDENTS ELIGIBLE FOR SPECIAL EDUCATION

13. Absent a statutory exception, the IDEA mandates that a district offer a FAPE to *all* students who reside in it. States must ensure that "[a] free appropriate public education is available to *all* children with disability residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A) (emphasis added).

14. In order to provide a FAPE, a school district must develop an IEP that is reasonably calculated to provide an eligible disabled child with an educational benefit. (*Rowley, supra*, 458 U.S. at pp. 206-207.) The district must review the child's IEP at least once a year in order to determine whether the student's annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, §

56341.1, subd. (d).) A parent's failure to cooperate in the development of the IEP does not negate this duty. (*Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055; 20 U.S.C. § 414(d)(2)(A); 34 C.F.R. § 300.323(a) (*Anchorage*).) [School districts "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (Id. at p. 5, citing *Target Range, supra*, 960 F.2d 1479, 1485)].)

15. Even when parents have already decided to place their child in private school, the school district is not excused from obtaining their participation in the IEP process. In *D.B. ex rel. Roberts v. Santa Monica-Malibu Unified Sch. Dist.* (9th Cir. 2015) 606 F. App'x 359, 360-361, the school district held an IEP team meeting to determine student's placement and services for the following school year without parents, who were unavailable and had already decided student would not be attending a district school. The court found that the failure to include parents in the IEP team meeting was a procedural violation that denied the Student a FAPE in the following school year. ["Furthermore, even if D.B.'s parents already had decided to enroll D.B. at the Westview School, their exclusion was not permissible. *See Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir.2012) ('[T]he IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the educational agency.')." *D.B., supra*, 606 F. App'x 359 at p. 361.]

16. For students parentally-placed in private schools, not yet found eligible for special education, child find is the responsibility of the school district in which the private school is situated. (Education Code, §56171; 34 C.F.R. § 300.131.) When a privately-placed child with a disability potentially in need of special education is located and identified, the district where the school is located must assess the child and hold an IEP team meeting to determine whether the child qualifies for special education. (Ibid.; Comments to 2006 IDEA Regulations, *supra*, 71 Fed. Reg. 46593.) If the child is found to

qualify for special education, the district where the school is located must offer the child special education services in the private school in accordance with its proportional share obligations, through an individualized services plan. (Education Code, §56172, subds. (a) & (e); 34 C.F.R. § 300.132; Comments to 2006 IDEA Regulations, *supra*, 71 Fed . Reg. 46593.) In addition, the district where the school is located must provide the parents a copy of the notice of procedural safeguards advising parents of the Student's right to a FAPE, not limited by proportional share constraints, if the student attends public school. (Comments to 2006 IDEA Regulations, *supra*, 71 Fed . Reg. 46593; 34 C.F.R. §300.504(a).) The district where the private school is located may send the results of its evaluation and eligibility determination to the student's district of residence after receiving parental consent to do so. (Comments to 2006 IDEA Regulations, *supra*, 71 Fed . Reg. 46592; 34 C.F.R. §300.622(b)(3).) The student's district of residence is then responsible for making an offer of FAPE to the child so that the parents can make an informed decision regarding their child's education. (Comments to 2006 IDEA Regulations, *supra*, 71 Fed . Reg. 46593; 34 C.F.R. §300.201.) The Comments to 2006 IDEA Regulations state that the district of residence is not required to make an offer of FAPE to a privately-placed student if the parent "makes clear his or her intention to keep the student enrolled in[private school]," but do not explain the statutory or regulatory basis for this conclusion, or define what the parents must do to "make clear" their intention to keep the student in private school. (Comments to 2006 IDEA Regulations, *supra*, 71 Fed . Reg. 46593.)

17. Parents of a child placed in private school with an existing IEP, or found eligible for special education while in private school, may choose to revoke consent in writing for the provision of special education and related services to their child. If they do this, and the child's district of residence gives prior written notice that it will not continue to provide special education and related services to the child, the district will

not be considered to be in violation of the requirement to make FAPE available to the child because of its failure to provide the child with further special education and related services, and is not required to convene further IEP meetings or develop further IEP's. (Ed. Code, § 56346, subd. (d); 34 C.F.R. § 300.300 (b)(4).) If the parents do not revoke consent in writing, the district in which the student resides must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher. ((20 U.S.C. § 1412(a)(3)(A) and (a)(4); *Dep't of Educ. v. M.F. ex rel. R.F.*, (D. Hawaii 2011) 840 F. Supp. 2d 1214, 1228-30, clarified on denial of reconsideration, (D. Hawaii 2012) 2012 WL 639141 [rejecting public agency's argument that the student's disenrollment from public education, without a written revocation of consent to special education services, excused the agency from preparing further IEP's until the parents subsequently requested services]; *Woods v. Northport Pub. Sch.* (6th Cir. 2012) 487 F. App'x 968, 979-80 ["It is residency, rather than enrollment, that triggers a district's IDEA obligations."].) Upon receipt of an offer of a FAPE, parents of a child in private school have two options: (1) accept the offer of a FAPE and enroll their student in the public school, or (2) keep their child in private school and receive "proportional share" services, if any, provided to the student pursuant to 20 U.S.C. § 1412(a)(10) and 34 C.F.R. §§ 300.130–300.144. (*D.C. v. Wolfire* (D.D.C. 2014) 10 F. Supp. 3d 89, 92.)

18. To determine whether a particular IEP has offered a FAPE, the Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of a school district cannot "be judged exclusively by hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

19. After a child has been deemed eligible for special education,

reassessments may be performed if warranted by the child's educational needs or the child's need for related services, or requested by a child's parents or teacher. (Ed. Code, § 56381, subd. (a)(1); 34 C.F.R. 300.303(a).) Unless the parents and the child's district of residence agree to the contrary, reassessments must not occur more than once a year, or more than three years apart. (Ed. Code, § 56381, subd. (a)(2); 34 C.F.R. 300.303(b).)

20. In *Rowley, supra*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-06.) The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City Sch. Dist.* (2007), 550 U.S. 516, 524 [127 S. Ct. 1994] 2d 904 (2007).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) A school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 238-239 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

21. Notwithstanding the importance of the IDEA's procedural safeguards, a procedural violation is not automatically a FAPE denial. A procedural violation results in liability for 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. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

22. A district's violation of its obligation to assess a student is a procedural violation of the IDEA and the Education Code (*Park v. Anaheim, supra*, 464 F.3d 1025 at pp. 1031-1033), and the failure to provide a parent information related to the

assessment of his or her child may significantly impede the parent's opportunity to participate in the decision-making process and result in liability. *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 892-895 held that a failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award. In *M.M. v. Lafayette Sch. Dist.* (9th Cir. 2014) 767 F.3d 842, 856, a district's failure to provide parents assessment data showing their child's lack of progress in district's response to intervention program, left the parents, "struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the ISP [individualized services plan], and thus unable to properly advocate for changes to his IEP." The court concluded that the failure to provide the assessment data prevented the parents from meaningfully participating in the IEP process and denied their child a FAPE.

Analysis

23. District was put on notice on March 17, 2011, that Student was a child with a disability in need of special education and residing in District, when Student gave District a student registration form indicating that Student had received resource specialist program services under an IEP while enrolled in elementary and middle school in Menlo Park City School District. District lost track of Student after Parents delivered a "We Will Not Be Attending" form to District on April 13, 2011, that stated that Student would not be attending public school in District, but would instead be attending Mid-Peninsula High School, a private high school located within District's boundaries. Neither receipt of Student's special education file from Menlo Park June 2011, nor the availability of Student's electronic special education files on the Special Education Information System commencing in July 2011, caused District to take note of Student. District remained unaware of Student for over two years, until Parents re-enrolled

Student in District on June 21, 2013.

24. Despite being unaware of Student specifically, District undertook activities to satisfy its general obligation under Education Code sections 56170, 56171 and 56301, subds. (c)(1) & (3) to seek out children with disabilities enrolled in private schools within District. District attended and participated in annual meetings in the fall of 2011 and 2012, held by the San Mateo County SELPA for all private schools located in San Mateo County. At these meetings, SELPA representatives provided explanations and handouts to private school representatives to share with parents, explaining district and private school obligations with respect to identifying and locating children with disabilities attending private schools, contact information for district special education departments, public funds available for providing special education and related services to children enrolled in private schools, and a list of free special education training programs offered by the SELPA. These child find activities corresponded to child find activities identified by the United States Department of Education in its Comments to 2006 IDEA Regulations as appropriate for locating students with disabilities attending private schools in a district, and Student did not prove a procedural violation.

25. Even if District's general child find activities at private schools located within the District had been insufficient, that procedural violation alone would not have deprived Student of a FAPE, because Student had already been "found." Student had participated in special education since 2006, and Parents had received copies of the Notice of Procedural Safeguards at least as recently as Student's 2010 IEP. Parents therefore were aware of, or should have been aware of, District's clear responsibility to offer Student a FAPE if Parents re-enrolled Student in public school, and Student's right to equitable participation in special education while enrolled in private school.

26. On the other hand, District's failure to satisfy its specific obligations to Student as a child residing in District and in need of special education did constitute a

procedural violation, and did deprive Student of a FAPE. Student always resided within District's boundaries, and became District's responsibility as a special education student in mid-July 2011, when she passed from middle school to high school. Student's registration form provided to District in April 2011, her hard copy special education file delivered to District in June 2011, and her electronic special education files made available to District in mid-July 2011 all identified Student as a Student with a disability in need of special education.

27. The "We Will Not Be Attending" form that Parents delivered to District on or about April 13, 2011, did not revoke consent in writing for the provision of special education and related services to Student. It merely stated that Student would be attending private school at Mid-Peninsula High School, rather than public school at Menlo-Atherton, and District did not give Parents any required prior written notice that District would not continue to provide special education and related services to Student. Although Parents disenrolled Student from District's Menlo-Atherton High School, Student's residency in District, not enrollment, established District's obligation to make FAPE available to Student. Parents also did not "make clear" their intention to keep Student enrolled in private school so as to relieve District of its obligation to make an offer of FAPE to Student. Although the term "make clear" is not defined, it must require a more definite act than the mere continuance of enrollment in private school. Otherwise, the act of enrollment itself would be sufficient to relieve a student's district of residence of its obligation to offer the student a FAPE, and the required further evidence of clear parental intention called for in the Comments to 2006 IDEA Regulations would be unnecessary. Here, District had no contact with Student or her Parents from April 2011 to June 2013, and Parents therefore had no opportunity during that time to make clear an intention to keep Student in private school.

28. District therefore had an obligation to at least offer to assess Student, hold

IEP's and make an offer of FAPE, an obligation that was not dependent on any request by Parents for special education testing or services. District's general practice with respect to students with IEP's who were parentally-placed in private school was to "not just forget about the student," but to offer to hold annual and triennial IEP's for the student, and to explain to the parents that District was "ready, willing and able" to do so. That did not occur here. Within the time period relevant to this case – from February 18, 2013, forward – no IEP for Student had been developed in two years as of March 2013, and no assessments of Student had been done since Student's last triennial assessments and IEP in March 2009.

29. In spring 2013, Student was falling more and more behind in work completion, and was struggling with anxiety and depression. By May 2013 Student was regularly leaving class and hiding, and Parents were concerned that Student was exhibiting some of the same behaviors that had preceded her suicide attempt two years previously. District's failure to offer to conduct assessments and hold an annual or triennial IEP during this time when Student was experiencing significant difficulty accessing her education significantly impeded Parents from participating in Student's educational decision-making process. Parents did not have current assessments of Student or know the goals, services, and educational program that the District would offer if Student were to return to public school. Such information in spring 2013 might have led Parents to agree to Student's placement in public school. Such information would also have permitted District to have an IEP in place for Student at the start of the 2013-2014 school year, instead of putting off development of an IEP until assessments could be completed in November 2013. District's failure from February 18, 2013, to the end of the 2012-2013 school year to assess Student and review the assessments in an IEP, and make an offer of FAPE to Student, significantly impeded Parents' opportunity to participate in the decision-making process and denied Student a FAPE.

ISSUE 2: DISTRICT'S OBLIGATION TO TIMELY ASSESS STUDENT PURSUANT TO PARENTS' JUNE 21, 2013 REQUEST

30. Student contends that District denied Student a FAPE by failing to timely assess her pursuant to Parents' June 21, 2013 request for special education assessment, because District failed to complete assessments and hold an IEP to discuss them before November 26, 2013. District contends that its assessment was timely because the usual timelines for assessment were extended by the days between regular school sessions, and by Student's unavailability for assessment while she was out of state attending Alpine Academy.

Applicable Law

31. When a district agrees to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a) ; 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).) The district then has 60 calendar days from the date it receives the parent's written consent for assessment to complete the assessments and develop an IEP required as a result of the assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a); 56344, subd. (a).) The 60-day time period excludes "days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays." (*Ibid.*) The 60-day time period also does not apply if the parent of a child repeatedly fails or refuses to produce the child for the assessment. (Ed. Code, § 56302.1, subd. (b)(2).)]

Analysis

32. District's regular school term ended June 6, 2013, and resumed on August 20, 2013. When Parents on June 21, 2013, requested that District complete a comprehensive assessment in all areas related to suspected disability to determine whether Student was eligible for special education and/or related services, District correctly responded that the 15-day timeline for providing Parents an assessment plan was stopped while school was out of session and would resume when the District's 2013-2014 school year started on August 20, 2013.

33. District timely provided Parents an assessment plan for Student 15 days into the new school year, on September 4, 2013, and Mother signed it that day. Parents' written consent to the assessment plan triggered the 60-day timeline for District to complete its assessments of Student and develop an IEP for Student. The 60-day deadline for District to complete the assessments and develop an IEP was thus November 3, 2013.

34. Parents were not asked to, and did not, agree in writing to extend the time to complete Student's assessments and develop an IEP, nor did they repeatedly fail or refuse to produce Student for assessment so as to give rise to an exception to the usual timeline. Parents merely stated on September 3, 2013, that their preferred days for District to assess Student were the week of October 20, 2013, when Student would be returning home for a therapeutic visit. District did not seek earlier dates to assess Student, either by sending a District representative to Utah, or returning Student to the District earlier, because Student did not present a risk of harm to herself or others, and was in a placement that did not appear inappropriate.

35. District's IEP held on November 26, 2013, was held 23 days after the 60-day deadline. District's failure to hold Student's IEP within the 60-day timeline set by Education Code section 56043, subdivisions (c) & (f)(1), was a procedural violation of the

IDEA. However, not every procedural violation results in a substantive denial of FAPE, and Student had the burden of demonstrating that the 23-day in completing the assessment and holding an IEP team meeting interfered with Parent's right to participate in the decision making process, impeded the provision of a FAPE, or resulted in a deprivation of educational benefit to Student.

36. Here, while the assessments completed by District were not timely, the delay did not deprive Parents of new information concerning the nature of Student's unique needs. In particular, the findings in Dr. Rossi's psychoeducational assessment of Student were consistent with those of previous assessments of Student, including the July 19, 2013 private assessment by psychologist Kevin O'Keefe. Dr. Rossi found student to be highly intelligent, with her ability to complete work affected by a severe processing disorder. He noted Student's continuing struggles since early elementary school with processing speed, executive functioning, anxiety, and depression that adversely affected her academic performance; and her continuing pattern of frustration, becoming overwhelmed by academic demands, and shutting down. He found that Student continued to have significant difficulties modulating mood and expression of emotions, difficulties managing anger that she directed at herself, difficulties in attention and concentration, and difficulties in interpersonal relationships. She continued to experience episodes of escalating anxiety that caused her to feel overwhelmed and shut down, with occasional emotional outbursts.

37. Although Dr. Rossi's findings concerning Student's profile were not news, his recommendations reflected a change from those in prior school district assessments of Student. First, he recommended that Student's eligibility category be changed from specific learning disability arising from her processing disorder to emotional disturbance arising from her emotional issues. Second, he recommended that, instead of receiving classroom accommodations for her difficulties in completing work, Student should

receive individual and group therapy, and access to therapeutic and support services during the school day, to address her mental health issues.

38. This information, when considered by Student's IEP team, ultimately led to a significant change in the placement and services offered to Student, as compared to prior FAPE offers that Student had received at Menlo Park City School District. The delay in providing this information to Parents and Student's IEP thus did impede the provision of FAPE to Student and resulted in a deprivation of educational benefit.

ISSUES 3 (A) & (B): DISTRICT'S OBLIGATION TO OFFER STUDENT AN "ADMINISTRATIVE IEP PLACEMENT" AT THE START OF THE 2013-2014 SCHOOL YEAR AND HOLD AN IEP TEAM MEETING WITHIN 30 DAYS.

39. Student contends that District denied Student a FAPE by failing to offer Student an "administrative IEP placement" at the start of the school year, and by failing to convene an IEP team meeting within 30 days of the start of the school year. District contends that District was not obligated to have an IEP in place for Student at the start of the 2013-2014 school year because: (i) Student's 2011 disenrollment from District's Menlo-Atherton High School excused District from preparing further IEP's until Parents' June 21, 2013 request that District assess Student, and District therefore had no knowledge of Student's needs; (ii) Student's IEP team could not have met prior to District completing its assessments in November 2013; (iii) Student's then-most recent 2011 IEP would have been wholly inappropriate for Student at the start of the 2013-2014 school year; (iv) Parents had not consented to District implementing special education services at the start of the 2013-2014 school year; and (v) Parents placed Student at Alpine Academy prior to the start of the 2013-2014 school year.

Applicable Law

40. A school district must have an IEP in place at the beginning of each school

year for each child with exceptional needs residing within the district. (Ed. Code, § 56344, subd. (c); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a) (2006).)

41. When a student with an IEP transfers, during the same academic year, from one district to another in the same SELPA, the new district must provide the student a FAPE, including special education and related services “comparable” to those described in the student’s last existing approved IEP, unless parents and district agree to develop a new IEP. (Ed. Code, § 56325, subd.(a)(2); 20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R., § 300.323(e).) If the student has transferred to the new district from a district not within the new district’s SELPA within the same academic year, the new district may implement special education and related services comparable to those in the existing IEP for no more than 30 days, by which time the district must either adopt the previously approved IEP, or develop, adopt, and implement a new IEP that is consistent with federal and state law. (Ed. Code, §§ 56325, subd. (a)(1); 56043, subd. (m)(1).)

42. An IEP team meeting requested by a parent shall be held within 30 calendar days, not counting days between the pupil’s regular school sessions, terms, or days of school vacation in excess of five school days, from the date of receipt of the parent’s written request. (Ed. Code, §§ 56343.5; 56043, subd. (l).)

43. The IDEA, its implementing regulations, and the Education Code, are silent on the specific procedure by which a district is to provide FAPE to a child with a disability who moves into the district during the summer. In its Comments to 2006 IDEA Regulations, the United States Department of Education addressed whether it needed to clarify the regulations regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The Department of Education stated that the IDEA, (20 U.S.C. § 1414(d)(2)(a)), is clear that each school district must have an IEP in place for a child at the beginning of the school year. Therefore, “if a child’s IEP from the previous public agency was developed (or reviewed and revised) at or after the

end of a school year for implementation during the next school year, the new public agency could decide to adopt and implement that IEP, unless the new public agency determines that an evaluation is needed. Otherwise, the newly designated IEP Team for the child in the new public agency could develop, adopt, and implement a new IEP for the child that meets the applicable requirements in §§ 300.320 through 300.324.”

(Comments to 2006 IDEA Regulations, *supra*, 46682.) The new district is not required to implement a former district’s IEP or give the student services that are “comparable” to those offered by a former district; however, the IEP must be reasonably calculated to provide the student a FAPE based on the information available to the district. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

44. When parents and district disagree on the appropriate placement for a transferring student, providing services in accordance with the Student’s previously implemented IEP pending further assessments effectuates the statute’s purpose of minimizing disruption to the student while the parents and the receiving school district resolve disagreements about proper placement. (*A.M. ex rel. Marshall v. Monrovia Unified Sch. Dist.* (9th Cir. 2010) 627 F.3d 773, 778-780.)

45. The failure to provide a transferring student an adequate IEP at the start of the school year is a procedural violation that is not cured by a district’s promise to amend the IEP at a later date well into the school year. (*Cleveland Heights-University Heights City School Dist. v. Boss* (6th Cir. 1998), 144 F.3d 391, 398.)

Analysis

46. When Mother requested that District assess Student on June 23, 2013, her letter indicated that Student had had an IEP in 2011. However, as discussed above, District was already on notice, since the time of Student’s previous enrollment in the District in March of 2011, that Student was a child with a disability in need of special

education and residing in District. District therefore had an obligation to have an IEP in place for the start of the 2013-2014 school year that was reasonably calculated to provide Student a FAPE based on the information available to District concerning Student and her unique needs.

47. The information concerning Student that was reasonably available to District as of June 21, 2013, included the information in Parents' letter concerning Student's emotional and academic difficulties; that Student "struggles significantly to complete academic work, especially written work, she experiences a significant amount of anxiety and panic surrounding completion of academic work; and she has not successfully gone into remission from a major depressive episode which occurred in 8th grade and which is intimately tied to her academic struggles." It also included a description of the interventions and accommodations that had already been tried, as well as Student's processing speed deficit and medical diagnoses of social phobia, generalized anxiety, and depression. Parents also identified six of Student's previous assessors and the areas in which they had assessed Student. Additionally, District had access to Student's electronic special education files on the Special Education Information System.

48. District did not seek Parents' consent to contact any of District's prior assessors or take other steps to put an IEP in place for Student by the start of the 2013-2014 school year. Ms. Toups' June 28, 2013 letter to Mother instead advised Parents to give copies of any outside assessments to school psychologist Raymond Rossi "when school starts," so that District could consider them at that time. Ms. Toups advised Parent that Mr. Rossi "will develop the assessment plan and review with you after school starts." Ms. Toups did not suggest that the District could or would have an IEP in place for Student at the start of the 2013-2014 school year.

49. Although the IDEA and Education Code expressly do not require school

districts to work on assessment plans or assessments during the days between regular school sessions, there is no similar express exemption for the preparation of IEP's for students with disabilities who enroll in the district during the summer. To the contrary, the Comments to 2006 IDEA Regulations are firm that an IEP must be in place, and suggest that, in the absence of an acceptable existing IEP, "the newly designated IEP Team for the child in the new public agency could develop, adopt, and implement a new IEP for the child that meets the applicable requirements in §§ 300.320 through 300.324."

50. District thus committed a procedural violation of the IDEA and Education Code when it failed to have an IEP in place for Student at the start of the 2013-2014 school year. The complete absence of an IEP offer with appropriate goals, placement, services, and accommodations significantly impeded, and therefore denied, Student's right to a FAPE by putting Student in a position of starting the 2013-2014 school year with no appropriate placement or services whatsoever. The equity of this outcome in light of the difficulty or impossibility of convening an IEP team to develop an IEP for Student during the summer may be factored into the calculation of remedies.

51. Under Education Code, section 56325 subdivision (a)(1), a school district is only required to hold an IEP team meeting within 30 days after a student transfers to a new school district, within the same academic year, from a different district not within the new district's SELPA; or when an IEP team meeting is requested by a parent. Neither of these triggers applies in this case, because Student did not transfer to a new district within an academic year, but instead re-enrolled between academic years, and Parents requested assessments to be completed and reviewed in 60 days, rather than an immediate IEP team meeting. District did not violate the IDEA or Education Code by failing to hold an IEP meeting for Student in the first 30 days of the 2013-2014 school year.

ISSUES 3(C) & (D): DISTRICT'S OBLIGATION TO MAKE A SPECIFIC WRITTEN FAPE

OFFER AT STUDENT'S NOVEMBER 26, 2013 IEP TEAM MEETING, AND TO PROVIDE PARENTS A COMPLETE WRITTEN IEP DOCUMENT

52. Student contends that District denied Student a FAPE at Student's November 26, 2013 IEP by failing to make a specific written offer of placement to Student, and continued to deny Student a FAPE by failing to provide Parents a complete written IEP document from the December 10, 2013 IEP team meeting until March 7, 2014. District admits that it made no offer of placement prior to an oral offer of placement on December 10, 2013, but contends that Parents were able to adequately assess and reject the December 10, 2013 oral offer. District also contends that it provided Parents a written offer of FAPE on January 21, 2014, and that, in any event, Parents rejected any District offer of placement on December 5, 2013, when Parents told District that Student was not ready to be discharged from Alpine Academy.

Applicable Law

53. An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: (i) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); (ii) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); (iii) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed.

Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and (iv) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

54. The parents 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 FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

55. Meaningful parental participation also requires that the IEP document fulfill the IDEA's explicit requirement of written prior notice to parents when a school district proposes, or refuses, to initiate or change the educational placement of a disabled child. (See 20 U.S.C. § 1415(b)(1)(C).)

56. The procedural requirement of a formal, written IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) A formal written offer is therefore more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*) A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more

prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (See *Union, supra*, 15 F.3d at p. 1526.)

57. A school district may not dispense with this procedural requirement as an empty gesture if parents indicate that they will not accept the offer. “[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate education placement by arguing that a disabled child’s parents expressed unwillingness to accept that placement.” (*Union, supra*, 15 F.3d at p. 1526.) The IDEA does not make a district’s duties contingent on parental cooperation with, or acquiescence in, the district’s preferred course of action. (See *Anchorage, supra*, 689 F.3d 1047, 1055.)

58. Failure to provide parents a formal written IEP offer is not a per se denial of FAPE and may be excused as harmless error where parents participated fully in the IEP process, understood the placement and services being offered by the district, and the written offer was not significantly delayed. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 461 (*J.W. v. Fresno*) [District failed to make formal written IEP offer prior to start of new school year, but presented such an offer to parents three days after the start of the new school year.]

59. The IDEA mandates that the “location” of services be identified in an educational placement. (20 U.S.C. § 1414(d)(1)(A)(i)(VII).) California’s implementing regulations define a “specific educational placement” as “that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs.” (Cal. Code Regs., tit. 5, § 3042, subd. (a).) A school district “must ensure that.[t]he child’s placement...[i]s as close as possible to the child’s home.” (34 C.F.R. § 300.116(b)(3).) The school district “must ensure that...[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” (34 C.F.R. § 300.116(c).)

Analysis

60. It is undisputed that District did not provide Parents with a formal, written IEP offer prior to January 21, 2014, when District Program Specialist Karen Breslow emailed Parents a written IEP offer. This IEP offer was complete except for the signature page, which Parents received on March 7, 2014.

61. The January 21, 2014 written offer of FAPE was more detailed than the oral offer made to parents at the December 10, 2013 IEP team meeting and differed in some significant respects. The oral offer on December 10, 2013, was "Specialized Academic Instruction in the STARS 2 classroom, augmented by an hour weekly each of Individual, Group, and Family Counseling, and 30 minutes weekly of Intensive Individualized Services for Behavior Coaching, all through the STARS 2 program. Day Treatment was also offered through the STARS 3 program, for 850 minutes weekly." Placement for the extended school year was not discussed. The written offer on January 21, 2014, was placement in the STARS 2 classroom during the regular school year with : (i) 1550 minutes per week individual and group specialized academic instruction; (ii) 30 minutes per month group career awareness counseling; (iii) 50 minutes per week individual counseling; (iv) 50 minutes per week group counseling and guidance ; (v) 50 minutes per week parent counseling; and (vi) 30 minutes per week individual behavior coaching. Where the draft IEP reviewed at the December 10, 2013 meeting erroneously indicated that Student would spend 97 percent of her day in general education classes, the written offer on January 21, 2014, clarified that Student would spend just 10 percent of her day in general education classes, in elective drama or art class. District also offered Student 850 minutes weekly of day treatment services in the STARS 3 after school program at Carlmont. The written offer included extended school year services not offered on December 10, 2014.

62. Overall, District's January 21, 2014 written offer differed materially from

the oral offer made on December 10, 2014. It was also delayed by almost six weeks. As a result, District's failure to provide Parents a formal written offer on December 10, 2013, cannot be excused as harmless error under the rationale of *J.W. v Fresno, supra*. Parents could not have understood District's FAPE offer on December 10, 2013, because it was not fully articulated and was materially modified when reduced to writing. Further, the written offer was delayed by far longer than the three days found to be immaterial in *J.W. v Fresno*.

63. District's failure to provide a formal written IEP offer on December 10, 2013, is therefore subject to the admonition in *Union, supra*, that the requirement of a formal written offer should be vigorously enforced. District's failure to provide such an offer on December 10, 2013, impeded Parents' ability to meaningfully participate in the decision-making process and thereby denied Student a FAPE.

ISSUES 4(A), (B), AND 5(A), (B) & (C): APPROPRIATENESS OF DISTRICT'S OFFERS OF PLACEMENT AND SERVICES

64. Student contends that District substantively denied Student a FAPE: (i) at Student's December 10, 2013 IEP Team Meeting IEP by failing to offer Student an appropriate placement; (ii) at Student's June 27, 2014 and July 9, 2014 IEP team meetings by failing to offer and provide an appropriate individualized transitional program and placement, including appropriate academic programming and therapeutic services for the extended school year in 2014 following Student's discharge from Alpine Academy, and for the 2014-2015 school year; and (iii) at Student's January 9, 2015 IEP team meeting by failing to offer and provide an appropriate individualized program and placement, including appropriate academic programming and therapeutic services. District contends that all of its offers of FAPE were appropriate and reasonably calculated to provide Student an educational benefit.

Applicable Law

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

66. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an "education...designed according to the parent's desires," citing *Rowley, supra*, 458 U.S. at p. 207].) (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

67. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) No

one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others.

68. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Gregory K. v. Longview School Dist., supra*, 811 F.2d at 1314.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.) *Rowley* requires a school district to provide a disabled child with access to education; it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley, supra*, 458 U.S. at p. 200.)

69. An IEP meets the *Rowley* standard and is substantively adequate if the plan is likely to produce progression, not regression, and is likely to produce more than trivial advancement such that the door of public education is opened for the disabled child. (*D.F. v. Ramapo Central School Dist.* (2nd Cir. 2005) 430 F.3d 595, 598.) The IEP must be reasonably calculated to enable the child to receive educational benefit in light of the child's intellectual potential. (*R.E. v. New York City Dept. of Educ.* (S.D.N.Y. 2011) 785 F.Supp.2d 28, 42.) An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21.) Instead, "The 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 in that program." (*Thompson R2-J*

School v. Luke P. (10th Cir. 2008) 540 F.3d 1143, 1155.)

70. To provide eligible students a FAPE, a school district must ensure that “To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled.” (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. §300.114 (2006); Ed. Code, § 56342, subd. (b).) This “least restrictive environment” provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 (*Rachel H.*) The December 9, 2009 IEP satisfied the requirement that a student receiving special education services be placed in the least restrictive environment.

71. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; (*Rachel H., supra*, 14 F.3d 1398, 1404).) These considerations are discussed separately below.

Analysis

DECEMBER 10, 2013 IEP TEAM MEETING

72. Because Student prevailed in Issues 3(a) & (c), and proved that District’s procedural violations resulted in a substantive denial of FAPE with respect to this IEP offer, there is no need to address Student’s remaining substantive argument that the offer failed to provide Student an appropriate placement. (See *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 895.)

DISTRICT IEP OFFERS ON JUNE 27, 2014, JULY 9, 2014, AND JANUARY 9, 2015

73. District's IEP developed for Student on June 27, 2014, and July 9, 2014, and offered to Student on July 9, 2014, and January 9, 2015, was reasonably calculated to offer Student a FAPE in the least restrictive environment. The offer built logically on the substantial progress Student had made over the prior year in residential placement at Alpine Academy, on the emotional issues that were the basis for her eligibility for special education.

74. When Parents wrote District on May 28, 2014, to request an IEP for Student's transition home and for the 2014-2015 school year, they stated that Student would need "a socially appropriate, small classroom environment at a school that has comprehensive academics and in which appropriate accommodations and support can be provided for her to have continued success in school."

75. Student's IEP team meeting on June 27, 2014, to discuss Student's return home consisted mostly of staff and counselors from Alpine Academy. They reported that Student was now managing her own studies and working on peer relationships and conversation skills. She had become more tolerant of changes in her environment, and was able to tolerate staff changes at Alpine and still continue to make progress. Student had learned to accept counseling. She was much less argumentative and defensive, was using every hour of available therapy, was open, accepted feedback and immediately followed up with suggestions, although still needing much therapist prompting. Student's counselor felt that Student was ready to return home.

76. Student's Alpine Academy counselor recommended that Student be supported by individual counseling to maintain her improved coping skills, and that she be involved in community activities to address her social anxiety needs. Student recognized her need to develop better social skills, but found that work to be particularly scary because it tended to trigger her social anxiety, contributing to her level

of depression, and, in turn, to limited functioning overall.

77. District's offer of FAPE made on July 9, 2014, was appropriate for Student and the proposed program corresponded to the recommendations of her counselors at Alpine. The STARS 1 class at Woodside was designed to offer a supportive therapeutic environment to help highly intelligent students with social-emotional needs develop skills to mainstream into general education classes. It was located in a separate suite of rooms in a general education high school, and was taught by a credentialed teacher, Kevin Gage, with 15 years' experience as the lead teacher in high school classes for students with emotional disturbances. The class was small, as recommended, with just 15 students, taught by Mr. Gage and supported by two full-time teaching associates, a full-time behavior specialist, a full-time therapist providing individual and group therapy, and two part-time support staff. The class offered Student an opportunity to develop skills to help overcome her emotional issues of social phobia, anxiety and depression in a controlled and therapeutic environment. Student would be required to attend just one mainstream class per day, and would be encouraged to attend more as her coping skills developed. All classes taught by Mr. Gage in the STARS 1 classroom were "core curriculum" classes counting towards high school graduation.

78. Although Mr. Gage's classes did not count as "A-G" classes needed to enroll in four year colleges, Student's IEP team had previously discussed Student's academic goals at her November 26, 2013 IEP Team meeting, and had noted at that time that Student did not have to complete academically challenging "A-G" courses required for four-year college admission in order to attend community college. Parents stated that they had adjusted their expectations for Student to include community college and other ways to eventually earn a four-year college degree. Also, as District emphasized at Student's July 9, 2014 IEP team meeting, Student did not have to complete her high school course load in one year, but had the option to continue

working on her courses for graduation, as well as her skills for addressing her emotional issues, until she turned 22.

79. Student's objections to the STARS 1 program, based on the seven days she attended the program before withdrawing from it, were that her classes in the STARS 1 classroom were calm but boring and therefore frustrating, and her mainstream animation and human biology classes in the general education environment were intellectually stimulating but overwhelming and stressful to her. Student did not feel that the mainstreaming supports from the STARS 1 program were sufficient to help her cope with the stress of those classes. Student also objected to the STARS 1 program based on the expectation that she would need to take three mainstream courses in future quarters to graduate high school at the end of the 2014-2015 school year, a mainstream course load that Student did not feel she could handle. Parents became concerned that Student was starting to show signs of anxiety and depression.

80. Student's initial negative reaction to the STARS 1 program was consistent with, if less drastic than, her previous reactions to the new environments at the Second Nature wilderness program and Alpine Academy. At each of those transitions, Student had initially experienced extreme stress, anxiety, depression, and emotional dysregulation, but eventually recovered, learned skills to help her cope with her emotional issues, and made progress. At hearing, Mr. Gage and school psychologist Rodney Aho each testified persuasively that the seven days that Student devoted to the STARS 1 program was insufficient for Student to reasonably gauge whether she would be able to make progress in the program. Each also testified credibly and persuasively that they had seen other students with profiles similar to Student make progress in the program.

81. Parents' and Student's concerns over her ability to earn sufficient credits for graduation in the STARS 1 program was apparently based on a miscalculation of the

number of credits s she would need. With her credits from Alpine Academy, Student needed 36 additional credits during the 2014-2015 school year to graduate high school. Had Student completed her first quarter classes in the STARS 1 program, she would have earned 22.5 credits and would have needed just 13.5 credits to graduate.

82. Parents preferred program at Lydian Academy which offered teaching in a one-on-one mode that appeared calculated to accommodate Student's social phobia and work completion anxiety by limiting Student's social interaction, and tightly controlling the pace of her learning and the amount of written output required, rather than teaching Student skills to address these emotional issues. While this program was strongly preferred by Parents, parental preference, although important, is not the determining factor in selecting an appropriate placement. A school district has the right to select the program for a special education student, as long as that program is able to meet the student's needs. The IDEA gives parents a critical voice in educational decisions affecting their children, but it does not give them the final word. The evidence in this matter indicates that Student could have made significant educational progress in the STARS 1 program. Even assuming that Lydian Academy might have been able to maximize Student's academic performance, *Rowley* is clear that a school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child.

ISSUE 6: FAILURE TO IMPLEMENT JULY 9, 2014 IEP OFFER

83. Student contends District denied Student a FAPE by failing to implement District's agreement in Student's July 9, 2014 IEP to provide Student six hours of individual therapy, in addition to three hours of family therapy, with the option to 'mix and match' family and individual within the nine hours for summer, because District failed to provide an appropriately qualified and licensed clinician to provide Student therapy, and failed to deliver the therapeutic services in an appropriate manner from

which Student could obtain therapeutic benefit. District contends that the therapist whom District provided through a non-public agency justifiably met with Student just four times instead of six due to scheduling conflicts and the short amount of time between the implementation of the FAPE offer and the start of school, and that Student in any event offered no evidence that Student or Student's family wanted additional counseling.

Applicable Law

84. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) The IDEA requires that an IEP contain a projected date for the beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7) ; Ed. Code, § 56345, subd. (a)(7).)

85. The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.)

86. The IDEA requires that special education and related services be provided by qualified personnel. (20 U.S.C. § 1412(a)(14)(A).) The IDEA defines the term "qualified personnel" as personnel who are appropriately and adequately prepared and trained,

and who possess the content knowledge and skills to serve children with disabilities. (*Id.*; 34 C.F.R. § 300.156(a).) Paraprofessionals may assist in the provision of special education and related services if they are “appropriately trained and supervised, in accordance with State law, regulation, or written policy ...” (20 U.S.C. § 1412(a)(14)(B)(iii).) A paraprofessional means an “educational aide, special education aide, special education assistant, teacher associate, teacher assistant, teacher aide, pupil service aide, library aide, child development aide, child development assistant, and physical education aide.” (Ed. Code, § 44392, subd. (e).)

87. Mental health services is defined as mental health assessments and the following services when delineated on an IEP in accordance with Section 7572(d) of the Government Code: psychotherapy as defined in Section 2903 of the Business and Professions Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management.

88. Psychotherapy within the meaning of the Business and Professions Code means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness, or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive. (See Bus. & Prof. Code, § 2903.)

89. Qualified mental health professional included the following licensed practitioners of the healing arts: a psychiatrist; psychologist; clinical social worker; marriage, family and child counselor; registered nurse; and mental health rehabilitation specialist. (See former Cal. Code Regs, tit. 2, § 60020, subd. (j).) While registered with the licensing board of jurisdiction for the purpose of acquiring the experience required for licensure, persons employed or under contract to provide mental health services as clinical social workers, marriage and family therapists, or professional clinical counselors

are exempted from the requirement that they be licensed. (Welfare and Institutions Code, § 5751.2, subd. (c).)

90. A district has discretion to choose which qualified provider it will use to provide related services to a student, and is not required to use a particular provider or company because of parental preference. (*N.R. v. San Ramon Valley Unified School District* (N.D.Cal. 2007) 2007 WL 216323; *Slama ex rel. Slama v. Independent School District No. 2580* (D.Minn. 2003) 259 F.Supp.2d 880, 885.)

91. When a school district does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have "... materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 815.) There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn*, supra, 502 F.3d 811, 820-822.) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569, p. 7.)

Analysis

92. Student claims that she was denied a FAPE because the six hours of transitional "individual therapy" that she was to receive pursuant to her July 9, 2014 IEP was delivered by Ms. Smith, who was a registered marriage and family intern working under the supervision of a licensed clinician, but not herself a licensed clinician, because Student did not perceive a therapeutic benefit from her sessions with Ms. Smith, and because Ms. Smith missed one of her sessions with Student without explanation.

93. Ms. Smith's testimony established that she was qualified to provide therapy to Student. Ms. Smith was a registered marriage and family intern working

under the supervision of a licensed Beacon School clinician. Ms. Smith had a bachelor of arts degree in psychology, a master of arts degree in counseling psychology/marriage and family therapy, and four years' experience providing individual and family therapy. Her then-current employment was as a clinician providing individual, group and family therapy to high school students placed in a therapeutic classroom. Student's perception that she obtained no therapeutic benefit from her sessions with Ms. Smith was consistent with Student's history of resistance to therapy and difficulty establishing a therapeutic relationship with most therapists. Parents in fact anticipated this possibility and arranged for two other therapists, Dr. Dyer-Friedman and Ms. Miller, to be available in summer 2014 for sessions with Student. Student has cited no authority that requires a school district to offer a student who is resistant to therapy multiple qualified therapists until one is found with whom the student forms an immediate therapeutic connection.

94. Ms. Smith should not have missed her appointment with Student and Mother to introduce Student to the therapist for the STARS 1 program. However, this single incident is a minor discrepancy between the services provided to Student and those required by the IEP, and does not constitute a denial of FAPE.

REMEDIES

1. Student prevailed on Issues 1(b), 2, 3(a), 3(c) and 3(d). District prevailed on issues 1(a), 3(b), 4(b), 5(a), 5(b), 5(c), and 6. Issue 4(a) was not decided. As a remedy with respect to the issues on which Student prevailed, Student requests that District reimburse Parents for costs they incurred to: (i) privately-place Student at Alpine Academy, including tuition, room and board, therapy and related transportation including transportation for family visits and therapy. District disagrees, and contends that Student is not entitled to reimbursement because Parents failed to give the required 10-day notice to District of their intention to privately-place Student at Alpine Academy, and because Parents repeatedly rejected District's offer of placement for the

2013-2014 school year, even rejecting the offer before it was made.

Applicable Law

2. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra*, 557 U.S. 230, 244, n. 11.)

3. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id.*, *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*).) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have

accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

4. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (Ed. Code, §56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S.Ct. 36, 1126 L.Ed.2d 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

5. Reimbursement may be reduced or denied if, at the most recent IEP team meeting the parents attended prior to removing the child, the parents did not inform the IEP team they were rejecting the proposed placement, and state their concerns and intent to enroll their child in a private school at public expense; or at least 10 business days prior to the removal of the child, the parents did not give written notice to the public agency of this information. (Ed. Code, § 56176; 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(e).) Reimbursement may also be reduced or denied if, prior to the parents' removal of the child, the public agency provided the required notice to the

parents of its intent to evaluate the child, including a statement of the purpose of the evaluation that was appropriate and reasonable, but the parents did not make the child available for the evaluation. (20 U.S.C. § 1412(a)(10)(C)(iii)(II); 34 C.F.R. § 300.148(e).)

6. Reimbursement must not be denied for parents' failure to provide the required notice if the school prevented them from providing notice, the district did not comply with its notice requirements, or compliance with the notice requirement "would likely result in physical harm to the child." (Ed. Code, §56177 (a); 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb), (cc); 34 C.F.R. § 300.148(e)(1)(ii), (iii).) The cost of reimbursement may, in the discretion of the ALJ, not be reduced for failure to provide the required notice if compliance with the notice requirement "would likely result in serious emotional harm to the child." (Ed. Code, §56177 (b); 20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb); 34 C.F.R. § 300.148(e)(1).)

7. Reimbursement may also be reduced or denied if the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that a parent who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement "forfeit[ed] their claim for reimbursement." In *Patricia P.* reimbursement was denied where the parent had enrolled the child in a private school in another state and at most offered to allow an evaluation by district personnel if the district personnel traveled to the out-of-state placement. (*Ibid.*)

8. Here, Parents did not give District 10-day notice that they would be privately-placing Student at Alpine Academy on July 19, 2013. Parents placed Student at Alpine based on the advice of psychologists O'Keefe and Schueler, both of whom recommended that Student transition from her Second Nature wilderness program into a therapeutic boarding school. Dr. Schuler, who was Student's therapist at Second

Nature, believed that Student might relapse into depressive symptoms, anxiety, withdrawal, and emotional reactivity if she were to return to her home environment. Dr. O'Keefe, who had assessed Student, believed that a therapeutic boarding school would help Student develop necessary skills to work through her emotional issues in a healthy manner. Alpine Academy is a non-public school certified by the State of California to treat emotionally-disturbed adolescents, and District, which invited members of Alpine's staff to participate in her June 27, 2014 IEP, did not contend that it failed to address Student's needs and provide educational benefit.

9. The statutory notice provisions are intended to give a district a reasonable opportunity to respond to parents' concerns before parents exercise their right to unilateral placement. Here, Parents did not provide notice or opportunity to District in accordance with this policy. Although Mother's June 21, 2013 letter seeking a district assessment of Student expressed some urgency in specifically requesting an assessment plan within 15 days, it did not state that Student was attending an out-of-state residential training program and would need to transition home or to an alternative placement on July 19, 2013. When Dr. Toups advised Parents on June 28, 2013, that the assessment process would not begin until after the start of the 2013-2014 school year, Parents did not object. Instead, Parents continued to complete paperwork to re-enroll Student in District, and District had no notice of Parents' intent to privately-place Student until after they had done so. If Parents had expressly stated their concern that Student needed to have a transitional placement from her wilderness program set up before July 19, 2013, it is likely that District would have been alerted to the need to act immediately, and Parents and District would have had a conversation about Student's placement for 2013-2014 before Student's enrollment at Alpine.

10. Mitigating against total denial of Parents' request for reimbursement are District's failure to offer to have any IEP in place for Student for the start of the 2013-

2014 school year, District's clear indication to Parents that it would not begin the process of developing an IEP until after the start of the 2013-2014 school year, and the likelihood that District would not be offering Student an IEP until well into the 2013-2014 school year, which is what ultimately happened. Further reason not to deny Parents' reimbursement is the fact that District's failure to have any IEP in place for Student in spring 2013 is largely attributable to District having simply lost track of Student between April 13, 2011, when Parents gave District notice that Student would be enrolling in private Mid-Peninsula High School, and June 21, 2013, when Mother contacted District to arrange an assessment. If District had followed its usual practices of maintaining contact with Students with disabilities residing in the District but enrolled in private school, offering to hold annual and triennial IEP's for Student, and explaining to the parents that District was "ready, willing and able" to do so, it is reasonable to surmise that Parents, who paid for many private assessments of their daughter, would have accepted District's offer. If District had conducted such assessments, and made IEP offers to Student, Parents would have had information allowing them to make informed choices between keeping Student in private school and enrolling her in District, and much of the last-minute decision-making that characterized Parents' interactions with District might have been avoided.

11. Also, although it is impossible to know the outcome of a conversation between District and Parents if Parents had alerted the District to the need to act before July 19, 2013, District's subsequent conduct suggests that it would not have resulted in a timely offer of FAPE for the 2013-2014 school year. After District learned of Student's placement at Alpine, it did not attempt to make a FAPE offer to Student based on Dr. O'Keefe's private assessment of Student provided to District by Parents, or to accelerate Dr. Rossi's assessment by assessing Student at Alpine or requesting that Student return to the District earlier than October 22, 2013. Ultimately District did not give Parents a

written offer of FAPE before January 21, 2014.

12. Weighing the equities and determining an appropriate reduction of Parents' reimbursement requires balancing the parties' respective duties and responsibilities. District was (i) obligated to make an offer of FAPE to Student while Student was privately-placed at Mid-Peninsula High School; (ii) have an IEP in place for Student at the start of the 2013-2014; and (iii) provide Student a timely written IEP offer following Parents' request for assessment. Failing to do so, District significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE, as well as impeding Student's right to a FAPE.

13. Parents were statutorily required to provide District with timely notice at least 10 days before privately-placing Student at Alpine Academy. Parents did not do so. They also could have called District's attention to their specific concern that Student would need to transition from a residential wilderness program on July 19, 2013, and did not. This denied District the opportunity to address Parents' concerns before private placement, as contemplated by IDEA. Both parties failed to meet their respective obligations, but District's failure had more impact on Parents' participation in the IEP process than Parents' failure had on District's. A reimbursement reduction of one-third properly reflects each party's culpability.

14. For Student's placement at Alpine Academy, Parents request total reimbursement of \$114,657.93 paid by them for tuition (\$107,744.00), Parents' travel (\$5106.33) and Student's travel (\$1,807,60). These costs are documented in the record. Two-thirds of the costs Parents incurred for Student's year at Alpine Academy is \$76,438.62, which is the sum that District shall reimburse Parents.

ORDER

1. District will reimburse Parents the sum of \$76,438.62 within 60 days of the date of this Decision.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues 1(b), 2, 3(a), 3(c), and 3(d). District prevailed on Issues 1(a), 3(b), 4(b), 5(a), 5(b), 5(c), and 6. Issue 4(a) was not reached, because doing so was made unnecessary by the decision with respect to Issues 3(a) & (c).

RIGHT TO APPEAL

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

DATED: September 28, 2015

/s/

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings