

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

LEMON GROVE SCHOOL DISTRICT,

OAH Case No. 2015050337

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LEMON GROVE SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

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OAH Case No. 2015090042

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on April 24, 2015, naming the Lemon Grove School District. On May 13, 2015, OAH granted Student's motion to amend his complaint. District filed a complaint on August 28, 2015, naming Student. On September 2, 2015, OAH granted the parties' joint request to consolidate the two cases and designated Student's case as the primary case.

Administrative Law Judge Darrell Lepkowsky heard this matter in Lemon Grove, California, on October 19, 20, 27, and 29, 2015, and November 6, and 9, 2015.

Erin Minelli and Matthew Storey, Attorneys at Law, appeared on behalf of Student. Student's mother was present on all hearing days. Student's father was present for parts of the hearing. Student did not attend the hearing.

Deborah R.G. Cesario, Attorney at Law, appeared on behalf of District. Eric Mora, District's Director of Special Education, appeared for the first two days of hearing. Dr. Bobbie Burkett, District's Director of Student Support Services and its former Director of Special Education, appeared as District representative for the remainder of the hearing.

The record closed on December 7, 2015, upon receipt of written closing briefs from the parties.

## ISSUES<sup>1</sup>

### STUDENT'S ISSUES:

1. Did District deny Student a free appropriate public education by failing to make an appropriate, specific offer of placement on or after December 2014?
2. Did District deny Student a FAPE with regard to the January 23, 2015 individualized education program team meeting, by:
  - a. Failing to offer a specific non-public school placement; and
  - b. Failing timely to provide Student with a copy of the January 23, 2015 IEP document and meeting notes?
3. Did District's April 26, 2015 offer of placement at Sierra Academy, a non-public school, deny Student a FAPE, because:
  - a. District predetermined its offer of placement at Sierra;

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<sup>1</sup> The issues were clarified by the parties at hearing and formalized in Joint Exhibit 1. In his written closing argument, Student withdrew his issues numbered 2(ii) and 4(a) (incorrectly identified as issue 4(c) in Student's written closing argument) in Joint Exhibit 1. Code of Civil Procedure, section 581, subdivision (e), provides that after the commencement of a trial, a complaint or portions of it may only be dismissed with prejudice, unless the opposing party agrees otherwise. Therefore, the issues defined in Joint Exhibit 1 as Student's issues 2 (ii) and 4(a) are dismissed with prejudice and are not addressed in this Decision.

The ALJ has re-numbered and re-worded the issues for the sake of uniformity and clarity. The ALJ has authority to reword and re-organize 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.)

- b. District made the offer through correspondence between its attorney and Student's attorney instead of at an IEP team meeting; and,
  - c. District failed to convene an IEP team meeting to discuss Student's placement subsequent to making the offer of placement?
4. Did District deny Student a FAPE at the May 20, 2015 IEP team meeting, by:
- a. Failing to have a non-public school representative from Sierra present; and,
  - b. Denying Student's parents the opportunity to meaningfully participate in the meeting?
5. Did District deny Student a FAPE by failing to conduct a vision therapy assessment at any time after the December 15, 2014 IEP team meeting?
6. Did District deny Student a FAPE from December 15, 2014, to the present, by failing to make an appropriate and/or sufficient offer of occupational therapy, speech and language therapy, or vision therapy services?

#### DISTRICT'S ISSUES:

7. Did District offer Student a FAPE in the least restrictive environment in the triennial IEP dated December 15, 2014, as amended on January 23, 2015, and May 20, 2015?
8. Does the settlement agreement between the parties, executed on February 28, 2014, and March 3, 2014, limit or otherwise preclude any remedy to which Student might otherwise be entitled for prevailing on any issue brought in this case?

#### SUMMARY OF DECISION

This matter involves a series of IEP team meetings held to determine Student's placement and services subsequent to a settlement agreement between the parties. Student contends that District violated his right to a FAPE in several ways during the IEP

process and failed to offer related services that met his unique needs. District contends that its IEP offer provided Student with a FAPE. District alternatively contends that the terms of the parties' settlement agreement, as well as the conduct of Parents in refusing a non-confidential settlement offer of tuition reimbursement, should limit or preclude any award of a remedy to which Student might otherwise be entitled.

This Decision holds that District denied Student a FAPE by its delay in offering a specific non-public school placement for Student. In all other aspects, Student failed to prove that any other alleged violations occurred or constituted a denial of FAPE.

With regard to District's issues, this Decision holds that, other than the delay in offering a non-public school placement for Student, District's IEP offers provided Student a FAPE. This Decision also holds that neither the settlement agreement between the parties, nor Parents' conduct, preclude the award of a remedy to Student. Student is therefore entitled to reimbursement for educational costs arising from District's failure to offer a specific non-public school placement for him in a timely fashion.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student was an 11-year-old boy who lived with his parents within District's boundaries at all relevant times. He was eligible for special education since preschool, first as a child with a speech and language impairment. Due to Student's significant attention deficits, other health impaired later became his primary eligibility category. At the time of the hearing, Student's primary eligibility was identified as specific learning disability due to his extreme dyslexia and significant processing deficits. Other health impaired remained as a secondary basis for special education eligibility. Student was in

the sixth grade and attended the NewBridge<sup>2</sup> School, a non-public school approximately 25 miles from his home, where Student's parents privately placed him, beginning in the extended school year of 2015.

2. Student experienced learning deficits throughout his educational career. These difficulties included speech and language deficits and visual motor delays. District addressed these areas of deficit through speech and language services and occupational therapy, respectively. District also placed Student in a structured special day class, with a lower teacher to pupil ratio than what was available in a general education classroom.

#### PARTIES' SETTLEMENT AGREEMENT

3. Despite District's provision of special day class placements and related services, Student's parents did not believe he had demonstrated anticipated progress academically, behaviorally, or socially. By the fall of 2013, when Student began fourth grade, his parents became concerned about his lack of progress and the difficulties he had at school. Parents believed that he had regressed academically, that Student was not reading, or writing, and that Student did not want to go to school. Student also had some significant maladaptive behaviors at school. He had staring spells and was refusing to do schoolwork. He was fidgety, would roll on the floor, did not pay attention, and he did not engage with his teacher.

4. At the beginning of October 2013, Parents decided to unilaterally remove him from his District school and to enroll him at Banyan Tree Foundations Academy, a non-public school. Parents believed that District was not providing Student with appropriate services and had failed to appropriately address his reading and attentional difficulties. Parents had already obtained a tutor for Student, but it had not helped. Student was still reading at kindergarten level and struggled with writing.

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<sup>2</sup> The school spells NewBridge as one word.

5. On March 3, 2104, a few months after Parents unilaterally placed Student at Banyan Tree, Parents and District entered into a settlement agreement. In the settlement, District agreed to reimburse Parents for tuition they had already paid at Banyan Tree, as well as to set up an account for reimbursable expenses for tuition and transportation costs between the date of the settlement agreement and December 19, 2014. The settlement agreement included a paragraph directing Parents how to obtain reimbursement from District.

6. The settlement agreement included a provision for District to conduct Student's triennial assessments during the fall of 2014. District agreed to convene Student's triennial IEP team meeting on a mutually convenient date sometime between October 19, 2014, and December 19, 2014. District agreed it would conduct the triennial assessments prior to convening the triennial IEP team meeting.

7. As part of Parents' obligations, the settlement agreement included a paragraph which stated: "Parents understand and agree that the reimbursement, placement and services described above in Paragraph 2.A. will not be stay put in the event of a dispute, and that stay put will instead be the educational program and placement in a District mild-to-moderate special day class ("SDC") at or near the Student's home school." In effect, under the terms of the settlement, District would not be required to fund Student's placement at Banyan Tree if Parents did not consent in full to the triennial IEP. If Parents chose to continue Student's enrollment at Banyan Tree beyond the date of the triennial IEP, the terms of the settlement required Parents to fund the cost at their own expense.

8. The settlement agreement also included a provision stating that if the triennial IEP team meeting was not timely convened due to circumstances entirely within District's control, that Student could bring a due process hearing claim against District that it had not timely convened the triennial IEP meeting to make an offer of FAPE to

Student. The provision further stated that District understood and agreed that a finding by OAH, or other court of competent jurisdiction, holding that the triennial IEP team meeting was within District's control would entitle Parents to seek full reimbursement for maintaining Student at Banyan Tree, until such time as District made an offer of FAPE for any period on or after December 20, 2014.

9. The settlement agreement further stated that if the IEP team meeting was not timely convened due to circumstances outside of District's control, then Student was precluded from bringing any claims against District for untimely holding the IEP team meeting and/or the delay in offering Student a FAPE, on or before, December 19, 2014.

#### BANYAN TREE FOUNDATIONS ACADEMY

10. Banyan Tree was located about 14 miles from Student's home. Nanci Engle, a special education teacher who also was trained as a speech-language pathologist, was the school's founder and director. She was directly involved with Student's education when he began attending Banyan Tree in October 2013. She assisted Banyan Tree staff in processing Student's admission and in re-writing some of the goals from his Lemon Grove IEP, so the goals were more appropriate for the non-public school setting.

11. Banyan Tree staff assessed Student's academic ability when he began attending the school. Although Student was in the fourth grade, he was reading at a kindergarten level. He could only read approximately 25 sight words. He had a great deal of difficulty with sound/symbol combinations and sequencing of letters and words. He could not read simple consonant/vowel/consonant words. Student had difficulty manipulating sounds in words, blending sounds, spelling, and all aspects of writing. Student was academically stronger in math, although he was still far below grade level. He was able to do basic addition and subtraction.



12. Banyan Tree had two primary instructional models. One was a group program, where students received instruction in a small group setting. Banyan Tree charged school districts \$165 a day per student for its group program. The second instructional model was based on individual instruction where a teacher worked one-on-one with a student throughout the instructional day. Banyan Tree charged school districts \$265 a day for its individual program, which included speech and language and occupational therapy services.

13. Based upon Banyan Tree's assessments of Student and the significant deficits in his reading and writing abilities, Ms. Engle determined that Student required individual instruction, and would typically bill for the individual instruction model. However, she became aware of the settlement agreement between District and Parents, and knew that there was a limited amount of reimbursement for tuition permitted by the settlement's terms. The amount would not cover tuition for Student at the individual rate over the period covered in the settlement. Ms. Engle, as director of Banyan Tree, therefore made the decision to only charge Parents the group rate for Student's tuition during calendar year 2014, even though Banyan Tree provided him with one-on-one instruction during the entire time he attended.

14. As discussed in more detail below, District declined to continue funding Banyan Tree after the expiration of the settlement agreement on December 19, 2014. Because Student had no place to go to receive instruction after December 19, 2014, Ms. Engle offered to continue Student's attendance at the school without requiring Parents to pay the tuition up front. She informed them that she would bill them for the daily individual tuition rate of \$265 a day, but would wait until Parents were able to resolve issues with District regarding reimbursement for the tuition.

15. Student remained at Banyan Tree until the end of the 2014-2015 school year, on or about June 10, 2015. As of the time of the hearing, Parents owed Banyan

Tree tuition fees of \$27,030. Parents also incurred transportation expenses of \$1,604.67, for one round trip in driving Student from home to Banyan Tree each day he attended school, from January 5, 2015, to June 10, 2015.

#### Progress through December 2014

16. There is a dispute between the parties as to whether Student made any academic progress at Banyan Tree during the almost two school years he was enrolled, from October 2013, to June 2015. Banyan Tree charted Student's progress through initial assessments when he began attending the school, and with mastery tests that were part of the curriculum it used with Student. Banyan Tree administered several standardized academic assessments on November 8, 2013, soon after Student began attending, and again on September 25, 2014, after he had been there more than a year. It also administered curriculum based progress tests.

17. Banyan Tree's assessments indicated some growth by Student in reading, and perhaps up to a year's growth in math. Banyan Tree addressed Student's needs in auditory attention, sensory integration, calming, eye tracking, eye-hand coordination, primitive reflexes, and visual problem solving. By December 1, 2014, Student demonstrated progress in all motor areas. Based on other interventions utilized by Banyan Tree, Student also demonstrated some improvement in phonemic awareness on the assessments done by Banyan Tree.

18. Banyan Tree used a program with Student during the extended school year of 2014, called Processing and Cognitive Enhancement. The program addressed memory, attention and focus, sustained attention, divided attention, and auditory processing and phonemic awareness. Student did not complete the entire program, but showed some improvement on phonological processing and word attack.

19. Ms. Engle, and Melissa McGowan, a Banyan Tree teacher and administrator<sup>3</sup> who provided direct instruction to Student, both believed that Student demonstrated progress from October 2013, to December 2014, even if the progress was slow. They believed that his performance in class and his daily assessments were a truer measure of his progress and that his standardized assessment scores did not reflect what he was able to do on a daily basis if given structure, sensory breaks, and prompting. However, as discussed below, District assessments indicated Student did not retain what he was taught.

#### Academic Progress Based on District's December 2014 Educational Neuropsychological Assessment

20. District administered an educational neuropsychological assessment to Student in December 2014, pursuant to the settlement agreement between the parties, and as part of Student's triennial assessment. The academic portion of the assessment was conducted by Leanne Gattegno, a specialized academic instruction teacher who had taught special education for 10 years, all with District.

21. Ms. Gattegno administered one standardized academic assessment that included subtests in basic reading skills, reading comprehension, written expression, and mathematics calculations. Student scored in the first percentile or less in every area except the subtest of writing samples.<sup>4</sup>

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<sup>3</sup> Ms. McGowan was a credentialed special education teacher with 10 years' experience teaching special needs children, particularly those with dyslexia.

<sup>4</sup> Student's knowledge of science was in the 70th percentile, his knowledge of social science was in the 25th percentile, and his knowledge of humanities was in the 13th percentile.

22. Ms. Gattegno also assessed Student in the areas of reading, math, written language, oral language, sound symbol, decoding, reading fluency, and oral fluency. Student scored in the low average range in the oral language and oral fluency composite portions of the test. He scored in the third percentile in the decoding composite section, and in the second percentile in the sound symbol portion of the test. However, his composite scores in every other section, including mathematics, were in the first percentile or less.

23. Ms. Gattegno compared Student's scores from her academic testing of him in December 2014, with District's assessment of him in 2012, and Banyan Tree's November 2013 assessment. Student showed no improvement when the scores of these tests were compared. Ms. Gattegno's testing showed no improvement in Student's basic reading scores. Her testing indicated that Student had actually regressed in the area of written language. He remained at the beginning first grade level in reading even after the intensive one-on-one reading instruction provided by Banyan Tree.

24. Student also failed to demonstrate any growth in reading when District compared his 2012 levels of performance with Banyan Tree's December 2014 progress report. District's testing of Student in 2012 indicated that Student was reading at a first grade level, which was congruent with Banyan Tree's 2014 assessment.

25. Overall, in comparing District's 2012 assessments, the assessments Banyan Tree did in 2014, and District's 2014 assessments, Student demonstrated very little progress in reading or writing from October 2013 to December 2014, despite the individualized educational program provided by Banyan Tree.

#### Academic Progress from January 2015 to June 2015

26. Neither Banyan Tree nor District administered any standardized assessments to Student between January and June 2015. Ms. McGowan acknowledged that Student had academic difficulties the entire time she worked with him, from March

2014, until he left Banyan Tree in June 2015. Student struggled to get basic instruction. His processing difficulties caused him great frustration. Although Ms. McGowan did not administer any standardized tests, she informally assessed Student. She felt that Student's schoolwork and his advancement in his reading curriculum demonstrated that he had improved during the time she taught him.

27. Although Student demonstrated some short term progress at Banyan Tree, he was not retaining the skills, particularly in reading and writing. Student stopped attending school at Banyan Tree at the end of the 2014-2015 school year. Thereafter, his parents enrolled him at The NewBridge School, beginning with the extended school year of 2015.

28. NewBridge was a nonpublic school that specialized in providing instruction to children with dyslexia and other language-based disabilities, and for those with attention deficit challenges. The curriculum included various reading programs. The teachers were all credentialed and experts in dyslexia, as well as other specific learning disabilities. The Director of NewBridge was Steven Mayo. He ran the school for 20 years. Mr. Mayo had a master's degree, a regular education teaching credential and a special education teaching credential. He had 30 years of experience working with special education students.

29. NewBridge did informal assessments of Student when he first began attending school. Mr. Mayo was one of the NewBridge teachers who worked directly with Student. Student was profoundly dyslexic and had significant problems with memory. He had broad general knowledge on a variety of subjects, but was severely delayed in all areas of reading, spelling, phonics, and writing. Student had very little phonemic awareness when he started at NewBridge. He could not identify the sounds of the alphabet or what letter made each sound. He could not decode words. Student's

reading and writing were at a kindergarten level when NewBridge assessed Student in early July, 2015.

30. The evidence therefore indicates that Student did not retain the reading and writing skills that Banyan Tree worked on during the almost two school years Student was enrolled there.

#### Non-Academic Progress at Banyan Tree

31. While Student did not demonstrate more than minimal progress in reading and writing while at Banyan Tree, he did make significant social and emotional strides. Prior to starting at Banyan Tree, Student experienced extreme frustration when attempting schoolwork. He had staring spells at school, did not want to go to school, was anxious, would not do his assignments, was fidgety, sometimes rolled on the floor, and would not engage with his teacher.

32. The first few months Student attended Banyan Tree, his social and emotional behavior was similar to what it had been while still enrolled at District. Student frequently closed his eyes, stared into space, changed the topic the teacher was on and tried to discuss something unrelated to the task at hand. He would ask for frequent breaks and leave the classroom. Student would break into tears several times a day. When lessons became too challenging for him, Student would tell his teachers "I'm dumb," or "I'm stupid." Student would not want to attempt a task he perceived as too difficult. He was anxious and frustrated and had very little self-esteem.

33. Student's emotional and social well-being improved and stabilized during the almost two years he spent at Banyan Tree. By December of 2014, he stopped feeling as anxious at school and was willing to attempt his schoolwork. He had less need to leave the schoolroom. Student's crying episodes decreased, first to one or two times a week. By the time he left Banyan Tree in June 2015, Student only rarely cried in class. He began to look forward to going to school. Student's relationship with his peers

improved as well. Although Student's academic progress at Banyan Tree was incremental, he reaped significant non-academic benefits from his time at that school.

## DISTRICT'S NOVEMBER/DECEMBER 2014 TRIENNIAL ASSESSMENT

### Educational Neuropsychological Assessment

34. In preparation for his December 19, 2014 IEP team meeting, and in accord with the settlement agreement, District conducted a thorough triennial assessment of Student.

35. District school psychologist Charlette Martin and District special education teacher Ms. Gattegno administered the educational neuropsychological assessment, along with District program specialist Lori Tan, who conducted an observation of Student at Banyan Tree. The assessment consisted of a review of all of Student's educational records to which District had access; observations of Student at school and during the assessment process; interviews with Student's mother; the administration of several standardized tests to assess Student's cognitive abilities, academic achievement, processing abilities, and visual-motor abilities; and the administration of rating scales to Student's mother and to Student. District also sent the rating scales, which comprise an assessment called the Behavior Assessment System for Children-2, to Banyan Tree. However, Banyan Tree did not return its responses to Ms. Martin during the assessment period.

36. Student does not dispute the validity or the results of the academic achievement and cognition portions of Ms. Martin and Ms. Gattegno's assessments. However, Student disputes the manner in which District addressed his visual processing deficits.

37. Most of the standardized assessments Ms. Martin administered contained subsections that assessed sensorimotor, attention, and processing capabilities.

Sensorimotor functions encompass a person's ability to process visual, auditory, kinesthetic, and olfactory information. A deficit in the functioning of any of these areas can affect a child's learning capabilities as well as how the child is able to regulate his or her behavior. On the Delis-Kaplan Executive Function System test, Student's percentile score was lowest in visual scanning, where he only scored in the first percentile. On the Wechsler Intelligence Scale for Children-IV, Student's scores in coding and symbol search placed him below the first percentile.

38. The Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition was administered to Student by District occupational therapist Ellen Carrido. Student's scores on the visual perception portion of this assessment were below the first percentile. Overall, Student demonstrated difficulty with multiple sensorimotor tasks on all assessments that assessed this area.

39. Another area assessed by Ms. Martin was Student's visual-spatial capacity, which measured his ability to make visual discriminations, locate objects in space, and construct objects. Student demonstrated deficits in his visual scanning and tracking abilities, scoring in the first percentile on the visual scanning subtest of the Delis-Kaplan assessment.

40. The composite scores of the Wechsler Intelligence Scale indicated Student's full scale intelligence quotient. Student scored in the average range on the verbal comprehension and perceptual reasoning components of the assessment. However, his full scale intelligence quotient was low in comparison to the scores in those areas because his scores for working memory and processing speed were below the first percentile. This indicated that Student's processing difficulties were interfering with his overall ability to retain information.

41. The results of the educational neuropsychological assessment indicated that Student presented with significant difficulties with processing phonological



information, as well as difficulty with visual scanning and tracking. The results of the assessment, as well as Student's history of difficulty in learning to read, indicated that Student was dyslexic. The test results also confirmed Student's difficulty manipulating auditory information, particularly as work became more demanding. Student presented with processing deficits in the areas of auditory working memory, phonological processing, speed of processing visual information, visual scanning and tracking, and attention, which impacted his educational performance.

42. The portions of District's educational neuropsychological assessment that addressed processing issues effectively identified all of Student's visual processing deficits.

#### Speech and Language Assessment

43. District Speech and Language Pathologist Stefanie Suzuki administered a speech and language assessment to Student in November 2015.<sup>5</sup> The intent of her assessment was to examine Student's present levels of functioning in the areas of speech and language, and to determine if Student required speech and language therapy to access his education.

44. Ms. Suzuki's assessment was comprised of her review of Student's educational records then available to District; the administration of several standardized testing instruments; interviews with Student's teacher and mother; and the administration of informal measures in the areas of voice, fluency, and articulation. She tested Student at Banyan Tree over four sessions.

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<sup>5</sup> Ms. Suzuki had a master's degree in speech pathology and audiology. She had a license in speech and language pathology from the State of California, and a national certification as well. She had worked as a speech language pathologist since 2000, and employed by District since 2009.

45. Although Student's last IEP from District included speech and language therapy as a related service, Banyan Tree did not provide any speech and language services to him during the almost two school years Student was enrolled there, although it imbedded speech and language therapy in its instruction to Student. However, Banyan Tree did administer a speech and language assessment to Student in September 2014, about two months before Ms. Suzuki conducted her own assessment. The assessment included standardized tests. The results indicated that Student's oral expression and total language abilities were in the average range, as was his narrative comprehension. Student had difficulty retelling and completing stories and verbally sharing information given to him. Although Student's articulation skills had improved significantly since District had assessed his speech and language two years before, he still had difficulty producing a "t/h" sound.

46. The results Ms. Suzuki obtained on her assessment were similar to those obtained by Banyan Tree. Student had the same difficulty producing the "t/h" sound as he had when tested by Banyan Tree. He had the same difficulty understanding the logical relationship between words and in retaining information given in sentences. He had difficulty recalling detail from stories. Based upon these deficits, Ms. Suzuki found that Student was eligible for speech and language therapy as a related service.

#### Occupational Therapy Assessment

47. District Occupational Therapist Ellen Garrido<sup>6</sup> assessed Student's occupational therapy needs in October and November 2014 as part of District's triennial assessment. Banyan Tree did not provide Student with occupational therapy services and did not assess him in that area. Banyan Tree did address occupational therapy indirectly with Student through its regular curriculum.

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<sup>6</sup> Ms. Garrido no longer works for District and did not testify at the hearing.

48. Ms. Garrido's assessment consisted of a review of Student's records, observations of him at Banyan Tree, the administration of several standardized tests, and the gathering of information from Student's mother and teacher through the use of questionnaires.

49. Ms. Garrido assessed Student in the areas of motor skills, sensory processing needs, visual perception, and visual-motor coordination. On the Bruininks Test of Motor Proficiency, which tests fine motor control and manual coordination, Student scored below average in each area tested.

50. On the Print Tool, a test used to measure a student's handwriting abilities, Student scored below expectations for his age on this test.

51. Sensory processing involves the brain's ability to organize and make sense of different kinds of sensation entering the brain at the same time. A person's sensory processing capacity affects his or her ability to learn and perform complex adaptive behaviors.

52. Ms. Garrido administered the Sensory Processing Measure to Student. This test gathers information about a child's behavior, coordination, and participation at school, at home, and in the community. The test looks at social participation, vision, hearing, touch, body awareness, balance and motion, planning and ideas, and a child's total sensory systems. The test is based on questionnaires, which Ms. Garrido gave to Student's mother and a teacher at Banyan Tree. The responses from Student's teacher indicated that Student had some problems with vision and planning at school, but that he performed in the typical range in all other areas.

53. The Developmental Test of Visual Perception consists of five subtests that measure interrelated visual perception and visual motor abilities in the areas of eye-hand coordination, copying, figure-ground ability, visual closure, and form constancy. The test generates a general visual perception index measure. A child who scores low

generally has visual perception problems, fine motor disturbances, and/or difficulty coordinating hand movements to vision. The Developmental Test also generates a motor-reduced visual perception quotient, considered to be the purest measure of visual perception, and a visual-motor integration quotient. The latter quotient demonstrates a child's visual perceptual skills through the performance of complex eye-hand coordination tasks. On this test, Student scored in the very poor range in general visual perception and visual motor integration, and in the poor range for motor-reduced visual perception.

54. Ms. Garrido also administered the Beery Buktenica Developmental Test to Student. The test consists of subtests in the areas of visual motor integration, visual perception, and motor coordination. The visual motor integration subtest requires the child to use both visual and motor systems through imitating and copying simple to complex shapes. The visual perception portion requires the child to match forms to examples. The motor coordination portion requires the child to draw lines within a targeted area. Student's score in visual motor integration was in the eighth percentile, which was in the low range. His score in visual perception was just below the first percentile, in the very low range. His score in motor coordination was in the first percentile, also in the very low range.

55. Ms. Garrido also administered the Word Sentence Copying Test to Student. Student's score for copying put him below the level of a second grade student.

56. As a result of Student's low scores in visual motor integration and visual perception, Ms. Garrido found that Student qualified for occupational therapy services to address his deficits in those areas.

57. For each assessment administered, District assessors took into consideration Student's primary language and his racial and ethnic background in selecting the tests and evaluation procedures to use. The standardized tests were all

norm-referenced, were administered according to standard procedures and the test publisher's protocols, and were used for the purpose defined by the tests' publishers. There is no evidence that any of the tests were biased, or that any environmental, cultural or economic factors affected Student's results on the assessment.

#### DECEMBER 15, 2014 IEP TEAM MEETING

58. After completing its triennial assessment, District sent a notice of IEP team meeting to Parents. District convened the meeting on December 15, 2014, four days before the deadline to hold the meeting required by the parties' settlement agreement. In addition to Parents, the IEP team members consisted of Student's advocate, Dr. Sara Frampton; Ms. Gattegno; Ms. Martin; a general education teacher; Heidi Bergener, a District school principal who attended as District's administrative representative; Ms. Suzuki; a speech language pathologist from Banyan Tree; Ms. Garrido; an adaptive physical education teacher; Ms. Tan; Ms. Engle and Ms. McGowan from Banyan Tree; and District's legal counsel. All required IEP team members were present. The meeting lasted about two hours. It is not clear from the record why District waited until the end of the period covered by the parties' settlement to assess Student and convene his triennial IEP team meeting. Parents recorded this meeting as they did with every meeting at issue in this case.

59. District provided Parents a copy of their procedural safeguards. District assessors then discussed the assessments each had completed in preparation for Student's triennial. There were several in-depth discussions about the test results, but no real disagreement regarding the testing among the team members.

60. The primary concern expressed by Dr. Frampton at this meeting was for Student's IEP team to determine a placement for him. Dr. Frampton, as Parents' representative, asked District to continue funding Banyan Tree after December 19, 2014, the date funding ended through the settlement agreement, if the IEP team was not able

to complete Student's IEP by that date. District team members would not commit to continue the funding for Banyan Tree.

61. The IEP team only had enough time during the December 15, 2015 meeting to discuss the results of some of Student's assessments. There was no time to review Ms. Suzuki's speech and language assessment. There was no time to review Student's present levels of performance, to develop goals, to determine his need for related services, or to discuss and determine a placement for him.

62. Dr. Frampton requested that District convene a second IEP team meeting as soon as possible because Student would not have a District-provided school placement after December 19, 2014. The parties' settlement agreement stated that a District special day class would be Student's stay put placement in the event that Parents' disagreed with the placement offered by District as a result of the triennial IEP team process. However, that provision did not come into play as of the December 15, 2014 meeting, because District did not offer a placement at that time. In response to Dr. Frampton's concern about Student's placement and the need for continued funding at Banyan Tree, none of the District IEP team members stated that Student needed to re-enroll at District. No one from the District IEP team stated or suggested that a District special day class was available for Student, nor did any District IEP member identify a District school where he should enroll while his triennial IEP was being developed. At hearing, Dr. Burkett, who was then District's director of special education, acknowledged that there was no stay put placement for Student as of the time of the December 15, 2014 IEP team meeting. Dr. Burkett was a candid and forthright witness, who readily responded to questions even when the answers might not advance District's legal positions.

63. During this IEP team meeting, Dr. Frampton and District's legal counsel informally discussed possible non-public schools that the team could consider for

Student. NewBridge was one of the schools they discussed. Dr. Frampton contacted NewBridge after the December 15 meeting, and Parents went to tour the school. Dr. Frampton and Parents were favorably impressed with NewBridge and felt it would be the ideal educational environment for Student. However, NewBridge did not have any space open at the time. Dr. Burkett, who was not at the December 15 meeting, but who was informed of what had been discussed, also went to NewBridge to discuss placement for Student. NewBridge staff informed her that they were unsure of when space would be available for Student.

64. On December 20, 2014, District's legal counsel wrote to Student's representatives confirming that it was District's position that it did not cause any delay in holding Student's IEP team meeting and that the settlement agreement between the parties specified that District would not be responsible for continued funding of Banyan Tree after December 19, 2014. District did not indicate to which District school or classroom, if any, Student should report to after the winter break. Although District took the position that it was not responsible for continued funding of Student's placement at Banyan Tree, it did not identify or offer him an alternative placement pending development of his new IEP. Student remained at Banyan Tree, with Banyan Tree temporarily waiving tuition charges for him.

#### JANUARY 23, 2015 IEP TEAM MEETING

65. There was some difficulty arranging a second IEP team meeting to continue development of Student's IEP. District went on a two-week winter break after December 19, 2015 and did not suggest meeting during that time. Parents and their advocate were unclear as to who was representing Parents and to whom District should send the IEP meeting notice. Student's legal counsel confirmed his firm's representation of Parents and Student on December 30, 2014. He also requested that District continue to fund Banyan Tree, given the lack of a placement offer from District.

66. On January 8, 2015, District sent an IEP team meeting notice to Parents through their legal counsel, setting the next meeting for January 23, 2015. District did not respond to Student's request for continued funding of Banyan Tree. Parents agreed to the meeting date.

67. District convened a continued IEP team meeting on January 23, 2015. In addition to Parents, Dr. Frampton, and Parents' legal counsel, the team members consisted of Ms. Gattegno; Ms. Martin; a District education specialist; a District general education teacher; Ms. Bergener; Ms. Suzuki; a District adaptive physical education teacher; Ms. Tan; District's legal counsel; Ms. Engle and Ms. McGowan from Banyan Tree; and Dr. Burkett, who appeared as District administrative representative and who headed the meeting. All required IEP team members were present.

68. Ms. Suzuki reviewed her speech and language assessment. Banyan Tree staff, which had not provided progress reports previously to District, presented copies of the reports at this meeting.

69. After reviewing the results of all District assessments and Banyan Tree progress reports, Student's IEP team determined that his eligibility category for special education would be changed to specific learning disability, based upon the results of Ms. Martin's assessment. The team also agreed that Student had significant impairments based upon his deficits in attention. District team members and the Banyan Tree staff agreed that, although Student qualified for speech and language therapy as a related service, Student's attention issues were much more pronounced than his speech deficits. Therefore, the team opted to list other health impaired rather than speech and language impaired as a secondary special education eligibility category.

70. The team also agreed that Student had areas of need in language (including phonological awareness and articulation); academics (including decoding, reading comprehension, spelling, written expression, and math calculation and problem



solving); fine motor; and behavior (including self-regulation, self-esteem, and organization.)

71. Dr. Frampton had brought a report of Student's present levels of performance with her to the meeting. Banyan Tree staff had written the report. Banyan Tree also provided proposed goals based upon Student's present levels of performance. District IEP team members also proposed goals for Student based on his unique needs. The team discussed the proposed goals, and discussed accommodations and modifications that would address Student's needs in the classroom. However, the goals were not finalized during the meeting because of a lack of time. District team members informed Parents they would revise the goals based on the new information from Banyan Tree and forward the proposed revisions to them when completed.

72. The IEP team then moved to discussing an appropriate placement for Student. All members of the team agreed that neither a general education classroom nor a special day classroom at a District school would meet Student's needs. The team agreed that Student required small group instruction in a structured setting, with a low student to teacher ratio, in a setting that provided no distractions, with intensive reading support to address Student's dyslexia, to make progress.

73. District therefore offered Student placement at a non-public school. However, District staff steadfastly believed that Banyan Tree was not an appropriate placement. Dr. Burkett and Ms. Martin emphasized Student's lack of academic progress at the school, based upon the results of District's assessments. District staff further pointed to Banyan Tree's educational model, which did not include classroom instruction, and lacked peer interaction that Student needed. Ms. Engle, Banyan Tree's director, agreed that Student needed to be in a classroom.

74. Dr. Frampton and Parents believed that it would benefit Student to remain at Banyan Tree through the end of the 2014-2015 school year, rather than force him to

transfer to a new school environment in the middle of the year. They proposed that Student then transfer to NewBridge for the next school year.

75. District IEP team members would not agree to continue Student at Banyan Tree because of their concern with his lack of progress. As discussed above, their concern was valid when viewed from an academic perspective. However, District had no alternative school to propose at the January 23, 2015 IEP team meeting. Since the IEP team had not determined prior to the meeting that Student required a non-public school placement, District team members had not investigated possible placements. Dr. Burkett informed Parents and their representatives that District would investigate other possible non-public placements and let Parents know what school District would propose as soon as it had the information.

76. Although District members did not suggest possible non-public school placements during the meeting, and did not ask for recommendations from other team members, Dr. Frampton informed District that she did not want Student placed at Sierra Academy, a non-public school. Dr. Frampton did not give specifics as to why she did not want it considered and other IEP team members did not question her about why she was opposed to placing Student there.

77. The IEP team also reviewed Student's need for related services. The team agreed Student required speech and language therapy and occupational therapy. District offered Student speech and language services of at least 50 minutes a week. District stated that it would convene another IEP team meeting 30 days after Student began attending the as yet undetermined non-public school. District staff hoped the non-public school staff would be able to give input as to Student's needs after providing him instruction for a month. Dr. Frampton agreed that Student required 50 to 60 minutes a week of speech and language therapy, and agreed that a 30-day review was the correct way to proceed.

78. District offered Student 30 minutes per week of occupational therapy services, to also be re-evaluated 30 days after Student began attending a new non-public school. Dr. Frampton agreed with the amount of occupational therapy services offered.

79. District informed Parents that it would revise Student's present levels of performance and goals based on the newly-received information from Banyan Tree. District also told Parents and their representatives that it would research other non-public school placements and inform them of the school once it had been researched. Parents again requested that District continue funding Banyan Tree. District, again, declined to do so.

80. District did not provide Parents with a copy of the IEP document at the end of the January 23 meeting. There was no complete document at that time, as the goals discussed had been written on a board and not inputted into a hard copy. Also, District still intended to revise Student's present levels and goals based upon the new information Banyan Tree had not provided until the January 23 meeting. District staff said they would provide the IEP draft to Parents and their representatives shortly after the meeting.

81. On January 24, 2015, Student, through legal counsel, made a written request for a copy of the draft IEP and IEP meeting notes. District did not have a full draft done at that time. District did not provide a completed IEP document to Student until April 26, 2015.

82. At the January 23, 2015 IEP team meeting, District again did not offer to enroll Student at a District school while it investigated a possible placement for him. District did not offer any school or classroom that Student could attend in the interim. Although District made an offer for a non-public school placement at the January 23, 2015 IEP team meeting, it did not have a school yet in mind and it still did not have a

school placement for Student to attend. At hearing, Dr. Burkett candidly acknowledged that had Banyan Tree dis-enrolled Student at any time, District would have had to immediately find a placement for him. However, as of the January 23, 2015 IEP team meeting, Student's educational placement was in limbo. He remained at Banyan Tree, with Banyan Tree continuing to temporarily waive tuition payments.

#### DISTRICT'S OFFER OF PLACEMENT AT SIERRA ACADEMY

83. Parents and District were engaged in settlement discussions concerning Student's placement and other aspects of the IEP process, beginning sometime around the first IEP team meeting on December 15, 2014. The discussions were conducted through the parties' respective legal counsel and continued after the January 23, 2015 IEP team meeting. At hearing, Dr. Burkett candidly acknowledged that because District was so involved in attempting to settle the differences between the parties, she postponed investigating non-public school placements for Student.

84. However, after about four months, Student's representatives ceased engaging in the ongoing settlement discussions. Dr. Burkett thereafter began investigating schools. The normal process for a school district to offer a non-public school placement is to first determine, with all IEP team members, whether a child requires such a placement. Once the IEP team makes that decision, the school district begins contacting schools and reviewing their programs to determine if any would be a match for the child in question. Sometimes, as did Dr. Burkett, district staff will speak with special education directors or staff from other school districts to get recommendations. Once a school or several schools have been determined to potentially meet a child's needs, and have openings, the school district gives the name to the child's parents and asks permission to send information about the child and the child's needs to the school or schools. A school district cannot send the information to the non-public school until the child's parents have agreed to a non-public school

placement and have given permission to have their child's personal information sent to the school.

85. In accord with these procedures, Dr. Burkett asked other special education directors for recommendations of schools. She then called various schools, including Sierra Academy, which she knew educated children with learning disabilities, among other handicapping conditions. The Director of Sierra Academy was Brandi Eagling. Ms. Eagling eventually confirmed space availability for Student at Sierra.

86. Dr. Burkett did not forward Student's information to Sierra because Parents had not formally agreed to a non-public school placement and had not given permission for District to provide Student's information to any non-public schools.

87. District's legal counsel wrote to Student's legal counsel on April 26, 2015, offering to implement Student's IEP at Sierra. The letter confirmed that there was an immediate opening for Student at the school and that Student could start after his Parents consented in writing to District's offer of placement.

88. In its April 26 letter, District also agreed to reimburse Parents for tuition at Banyan Tree subject to proof and documentation of attendance. Parents later declined the offer, stating through legal counsel that it was unclear what type of documentation District would require or how Parents would be reimbursed. These concerns were disingenuous as Parents had earlier provided documentation for reimbursement of tuition and mileage under the terms of the settlement agreement between the parties and were thus aware of District's procedures for reimbursement.

89. District also included a copy of the IEP document developed at the December 15, 2014, and January 23, 2015 IEP team meetings. The IEP document District provided included goals discussed at the January 23 meeting, and revised by District staff based upon their review of Banyan Tree's progress report, description of Student's present levels of performance, and suggestions for goals.

90. On May 6, 2015, District's legal counsel wrote again to Student's counsel asking for any revisions Student and his representatives were proposing for Student's IEP. District reiterated its offer of placement at Sierra. District encouraged Parents to tour Sierra at their earliest convenience, and offered its assistance in facilitating their visit. District also included a notice of an IEP team meeting, which it proposed convening on May 20, 2015. District selected the date to accommodate Dr. Frampton's schedule.

91. Parents did not contact District to coordinate a tour of Sierra or to discuss the placement. Instead, they arranged to visit Sierra on their own. Sierra staff gave Parents a tour of the school sometime in May 2015, before the scheduled IEP team meeting. Parents viewed classrooms and the occupational therapy room. Sierra staff answered questions about the enrollment process. They told Parents that Sierra staff first had to review a child's IEP to see if Sierra could meet the child's needs. Then, the child would do a two-day trial run at the school, to see how the child fit in and responded to the school's program. After the trial enrollment, Sierra staff would do a review and make a decision as to whether a place would be offered to the child, assuming space was available. It generally took from two to six weeks for a child to go through this process.

92. Mother did not like what she observed at Sierra. She was especially concerned because the students attending school there had a variety of disabilities. She did not believe that Sierra could address Student's severe dyslexia. Mother preferred NewBridge because it focused on children with learning disabilities, in particular dyslexia, Student's primary area of need. Mother felt that NewBridge would offer Student a better chance of success.

93. However, despite Mother's concerns, Sierra was an appropriate placement for Student that would be able to provide him with a FAPE. It was a certified non-public school serving children with a variety of disabilities, including dyslexia. It had reading

specialists on staff who could provide reading intervention programs to Student, and had professionals who could provide the related services he needed. At hearing, Student stipulated that Sierra could provide him with a FAPE.

94. Mother did not give Sierra a copy of the IEP District had provided on April 26, 2015, because she did not believe it was a complete document. She and her representatives were reviewing the document and intended to discuss it at the pending May 2015 IEP team meeting.

#### MAY 20, 2015 IEP TEAM MEETING

95. District convened the IEP meeting requested by Parents on May 20, 2015. Student's IEP team consisted of Parents, their attorneys, and Dr. Frampton; Dr. Burkett; Ms. Bergener; Ms. Suzuki; Ms. Martin; Ms. Gattegno; a District special education teacher; a District general education teacher; a District adaptive physical education teacher; District Occupational Therapist Ruby Amestoy; and District's legal counsel.

96. District did not invite a representative from Sierra to attend the meeting. District did not do so because Parents had not yet agreed to place Student at Sierra. Ms. Eagling, Sierra's director, explained at hearing that Sierra does not attend IEP meetings unless a child has already enrolled at the school. Since Student had not yet enrolled at Sierra, or even started the process to be considered for enrollment, Sierra would not have accepted an invitation to attend the May 20 IEP team meeting. In any case, as discussed below, Parents and their advocate had already determined that Sierra was not an appropriate placement for Student and, therefore, they were not going to accept District's offer of placement there.

97. District had approximately two hours to dedicate to the meeting because some of its IEP team members had other meetings to attend that afternoon. However, in spite of the time constraint, the parties were able to discuss all issues of concern to Parents. When the meeting adjourned, Parents did not request District to convene a

continued IEP team meeting and did not indicate that they still had concerns that District did not have time to address.

98. The IEP document District sent to Parents on April 26, 2015, contained some errors that the team agreed to revise. For example, the document did not indicate the change to specific learning disability as Student's primary category for special education eligibility, and did not indicate other health impaired as the secondary category. District also agreed to add concerns that Parents had raised at the previous meeting.

99. The IEP team also reviewed Student's goals. While many of them were retained as written in the April 26 document, several were modified, a goal in self-esteem was added, and one goal was deleted, in response to suggestions by Dr. Frampton. Additionally, the IEP team agreed to make some changes to the supplementary aids and services offered to Student.

100. After making the additions and modifications suggested by Dr. Frampton, District made the following offer of placement and services to Student: placement at a non-public school, with round-trip transportation; speech and language therapy twice a week, for 25 minutes a session; occupational therapy services 30 minutes a week; and social work services of 1,200 minutes a year.

101. District clarified that it was offering Student extended school year placement, with 30 minutes a week each of speech and language and occupational therapy services.

102. District reiterated that it was offering placement at Sierra, which had an immediate opening for Student, and was closer to his home than NewBridge, which would not have an opening for Student until the beginning of its extended school year.

103. Dr. Frampton again requested District to fund Banyan Tree through the end of the school year, as less than three weeks remained to the end of the year, and



then place Student at NewBridge. Dr. Frampton also rejected Sierra as a placement because she felt that it would not meet Student's needs. Sierra enrolled some children who had behavioral and emotional issues, which Student did not have. Dr. Frampton believed that NewBridge, with its emphasis on addressing dyslexia, would be better equipped to meet Student's needs. However, Sierra had reading specialists on staff who provided reading interventions for children, like Student, who had dyslexia and other learning disabilities. At hearing, Student stipulated that Sierra would have been able to provide him with a FAPE, even if it might not have been as ideal as was NewBridge.

#### EVENTS AFTER THE MAY 20, 2015 IEP TEAM MEETING

104. Beginning with its April 26, 2015 letter, and continuing through several months of correspondence between the parties, District made what it called a "non-confidential" offer of settlement to Parents. District offered to reimburse Parents for Student's tuition at Banyan Tree and for any out-of-pocket expenses Parents incurred to provide Student with speech and language therapy or occupational therapy, beginning January 2015, and continuing through the end of the 2014-2015 school year. District stated that this non-confidential settlement offer was not contingent upon Parents signing a settlement agreement. Parents rejected the offer.

105. During the May 20, 2015 IEP team meeting, Dr. Frampton rejected District's offer of placement at Sierra. Parents, following her recommendations, decided instead to unilaterally place Student at NewBridge.

106. Student enrolled at NewBridge on or about July 1, 2015, for the extended school year. As of the hearing, Student remained enrolled there. Parents paid \$2,250 for Student's extended school year tuition. They were billed \$1,825 a month for tuition for the regular school year.

107. NewBridge also provided Student with related services and normally charged extra for them. However, NewBridge neglected to include any of the charges for related services in its bills to Parents.

108. Samples of Student's schoolwork from NewBridge and informal assessments done at the school indicated that Student had made some academic progress in the few months he had been there. He also made social progress in the classroom setting, where he was educated with peers after having received only one-on-one instruction from Banyan Tree for almost two years.

#### DISTRICT'S OFFER OF RELATED SERVICES

##### Need for Vision Therapy Assessment and Services

109. Soon after Student began school at Banyan Tree in October 2013, Banyan Tree staff observed that reading and writing were difficult for him. They believed that Student's difficulties were due to his weakness in tracking with his eyes what he was reading and writing. Banyan Tree administered some tests to Student to assess its concerns. It administered the Test of Visual-Perceptual Skills. On this test, Student scored at or near the average percentile in all but two subtests. He scored in the second percentile on the visual discrimination subtest and in the first percentile on the visual sequential memory subtest. However, the visual sequential memory subtest score was not accurate because Student was guessing answers for most of that portion of the test. Banyan Tree also administered the Jordan Left-Right Reversal Test. Student had little or no errors when writing letters and numbers for that test, but had many errors when writing words.

110. Based upon what it saw as deficits in Student's visual perceptual skills, Banyan Tree recommended that Parents have Student assessed by an optometrist who

specialized in vision therapy. In the settlement agreement between the parties, District had declined to assess Student in this area or fund vision therapy sessions.

111. Parents had Student assessed by Dr. Carl Hillier, who has been a licensed optometrist since 1982. Dr. Hillier specializes in assessing for and providing vision therapy. In his practice, he treats functional disabilities of the vision system and helps people develop visual skills to interact in the environment and to extract information from what they read.

112. Dr. Hillier testified that vision therapy is research-based. He acknowledged that there is a controversy between optometrists and some medically trained ophthalmologists as to the efficacy of vision therapy. District attempted to discredit vision therapy as a viable related service by questioning Dr. Hillier about research studies on the subject, which he was not readily able to address. In its closing brief, District argues that school districts are only required to provide vision therapy where a child has issues with what is termed “front end” vision problems that affect how outside visual information makes it through the eyes into the brain.

113. District did not offer any expert testimony to counter Dr. Hillier’s testimony regarding the efficacy of vision therapy per se.

114. Dr. Hillier first assessed Student in early January 2014. He used several tests that measured Student’s eye health and vision, and looked at the internal and external aspects of each of Student’s eyes. The tests determined how clearly Student was able to see. Student had slightly blurred vision. He had a moderate amount of farsightedness and astigmatism, both of which are treated by prescribing eye glasses.

115. Dr. Hillier also analyzed Student’s eye movement control, which is necessary for reading performance and visual processing speed. Dr. Hillier used the Developmental Eye Movement Test to assess Student’s tracking of what he was reading. Student scored in the first percentile in tracking speed, tracking accuracy, and

automaticity. Automaticity is the ability to rapidly and automatically name numbers. Dr. Hillier found that Student's weak ability in tracking was the main reason Student read slowly and lost his place when reading.

116. Dr. Hillier also found that Student had difficulty moving his focus from far to near and in staying focused while engaged in activities such as reading.

117. Dr. Hillier also administered a series of visual processing tests to Student. These consisted of the Visual Auditory Digit Span Test, the Dyslexia Screening Test, the Test of Silent Word Reading Fluency, an Inventory of Piagetian Developmental Tasks, and the Beery-Buktenica. The Beery-Buktenica is the same test that District and Banyan Tree had used to assess Student's processing abilities. The other tests used by Dr. Hillier were similar to the many processing subtests utilized by District in its November/December 2014 triennial assessment.

118. Student's scores on the processing tests administered by Dr. Hillier were commensurate with the scores District had obtained for Student, although Student scored somewhat better on Dr. Hillier's administration of the Beery-Buktenica than he did when District assessed him almost a year later.

119. Dr. Hillier determined that while Student's eyesight was not significantly impacted, Student had visual difficulties with visual acuity, eye movement control, focusing, eye teaming ability, visual-motor integration, and automaticity. He also found that Student had delays in his perceptual ability to come to logical conclusions about what he saw.

120. In addition to recommending some classroom accommodations and modifications Dr. Hillier recommended that Student receive vision therapy services once a week for 32 to 40 weeks. Parents contracted with Dr. Hillier to provide this therapy. As of the hearing in this matter, Student had received approximately 48 vision therapy sessions. Dr. Hillier believed that Student would benefit from even more sessions.

121. However, insufficient evidence exists that District should have funded a separate vision therapy assessment of Student at the time it administered the triennial assessment. District included vision processing and sensorimotor subtests in most of the standardized tests it administered. Ms. Garrido administered the full Beery-Buktenica to Student, the same test Dr. Hillier utilized to assess Student's visual processing needs. The other tests District used assessed the same areas of processing as did Dr. Hillier's tests. Furthermore, Dr. Hillier had assessed Student as late as September 2014, and then again in March and May 2015. There is no evidence that further information regarding Student's vision processing was needed given the extent of vision processing assessments and testing done by Banyan Tree, Dr. Hillier, and District at or around the time of District's triennial assessment.

122. When asked at hearing if Student needed to be re-assessed in December 2014 for his vision needs, Dr. Hillier stated there was no reason to re-assess Student at that time. In other words, all information necessary about Student's processing needs was available from Dr. Hillier's assessments as well as from District's triennial assessment.

123. There is also very little evidence to support a finding that Student would benefit from any additional vision therapy. In fact, the evidence demonstrated that he did not show more than de minimus benefit from the sessions he already received. In September 2014, Dr. Hillier re-administered the same processing tests he had given Student in January 2014. He administered those same tests in March and May 2015 as well.

124. On the Developmental Eye Movement Test, Student's scores on all aspects of that test were in the first percentile in September 2014, and May 2015, just as they had been a year and a half earlier when Dr. Hillier first assessed him. On Dr. Hillier's first administration of the Beery-Buktenica, Student scored in the ninth percentile overall.

However, on Dr. Hillier's second administration of this test, Student's score decreased to the fourth percentile. On the third administration of this test in May 2015, Student's score had decreased substantially to below the first percentile. While Student showed improvement in visual discrimination on the Test of Visual Perceptual Skills, District was not aware of the improvement. Dr. Hillier first administered the test in March 2015. He did not re-administer the test until June 2015, after the last IEP team meeting at issue in this case. Therefore, District was not aware of any improvement in the area of visual discrimination at the time it declined to provide Student with vision therapy. Student's score on the dyslexia screening test went from a kindergarten level to a second grade level between January and September 2014, but regressed to the first grade level when Dr. Hillier re-administered the test in May 2015. Student's scores on Dr. Hillier's other tests showed the same de minimus progress.

125. Another problem with Dr. Hillier's testing concerned his administration of the Test of Visual Perceptual Skills. Rather than use the protocols developed by the test publisher, Dr. Hillier used a form he developed. Failure to use the protocols is not best-practice when administering standardized tests. Additionally, Dr. Hillier used Student's raw scores instead of Student's percentile rankings in an attempt to demonstrate that Student had shown progress on the Developmental Eye Movement Test, even though the use of percentiles to determine progress is required by the test publisher.

126. In his May 2015 assessment report, Dr. Hillier acknowledged that Student continued to have significant difficulties with processing, and with decoding and encoding written language. Student demonstrated those same continued difficulties when he was assessed by NewBridge when he started attending school there in July 2015. Mr. Mayo, the NewBridge director, noted the same tracking difficulties Banyan Tree had noted almost two years earlier.

127. Dr. Hillier also failed to address whether Student required vision therapy to benefit from his education. Dr. Hillier never observed Student at school. He did not review Student's schoolwork and did not review any of the testing done by District or Banyan Tree to determine whether vision therapy was having a positive impact on Student's educational progress. The only time Dr. Hillier discussed Student's progress at school with Parents was when they initially contacted him. He did not review Student's academic progress, or lack of it, in preparing his reports, when arriving at his recommendations, or as a basis for his opinions. Finally, Dr. Hillier failed to address whether any of the little progress Student did make was attributable in any way to the many sensorimotor and processing interventions Banyan Tree utilized with Student during the almost two years he attended school there.

128. Dr. Hillier downplayed Student's lack of progress on his own testing during his testimony. Despite 48 sessions of vision therapy, Student's processing skills remained nearly the same or, in some cases, had regressed.

129. For these reasons, Dr. Hillier's reports, opinions, and recommendations were not persuasive. There is thus no convincing evidence that Student's visual processing needs, which were adequately assessed by District in its triennial assessment, cannot be addressed by a school psychologist or a school occupational therapist using traditional methods that work on improving children's visual and auditory processing deficits.

#### Occupational Therapy and Speech and Language Therapy

130. As discussed above, District offered Student 30 minutes a week of occupational therapy and two, 25-minute sessions a week of speech and language therapy. Student contends that District's offers of occupational therapy and speech and language therapy were inadequate to meet his needs.

131. However, Student offered no documentary or testimonial evidence that District's proposed amount of services failed to meet his needs. District, on the other hand, presented testimony from Ms. Suzuki, the speech and language pathologist who assessed Student, and Ruby Amestoy, one of its occupational therapists, that Student's needs would be met by the amount of services District offered.

132. In his closing brief, Student veers away from arguing the adequacy of District's offers of occupational therapy and speech and language services, and instead appears to argue for the first time that District predetermined the amount of services it was offering. Student did not raise this as an issue in his due process complaint and cannot raise it for the first time here. However, even had predetermination of related services been properly raised, there is no evidence in the record to support this contention. Ms. Suzuki and Ms. Garrido did comprehensive assessments to determine Student's needs in the areas of speech and language and occupational therapy, respectively. At each of the three IEP team meetings at issue, Student's full IEP team, including Parents and their advocate, fully discussed the amount and type of related services Student required. Student did not present any information to the IEP team that contradicted the recommendations for services made by Ms. Suzuki and Ms. Garrido. Dr. Frampton, on Parents' behalf, actively engaged in the discussions regarding related services, and agreed to the amounts suggested by District. There is no evidence that Parents, through their representatives, were not active participants in the discussions and decisions regarding occupational therapy and speech and language therapy for Student.

#### PARENTS' OUT OF POCKET EXPENSES

133. Parents introduced several financial documents at hearing showing the expenses they had incurred in placing Student at Banyan Tree and NewBridge, as well as expenses incurred for vision therapy provided by Dr. Hillier. Banyan Tree continued



billing Parents for Student's attendance there from the beginning of January 2015, to June 10, 2015. Ms. Engle confirmed that the entire bill, which totaled \$27,030, remained outstanding. She confirmed that she had an oral agreement with Parents that they owed the money. Parents also provided Student's daily attendance logs from Banyan and mileage logs to support their claim for mileage reimbursement for transporting Student to and from Banyan Tree. The total amount of mileage reimbursement claimed is \$1,604.67. Parents therefore adequately proved the amount of money they have expended or that they owe for the cost of maintaining Student at Banyan Tree.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA <sup>7</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) <sup>8</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a 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).)

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<sup>7</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>8</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP 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); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. 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, the *Rowley* court decided that the FAPE requirement of the IDEA was met when a child received access to an education that was reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative

changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student has the burden of persuasion as to the issues designated “Student’s Issues,” since they were the subject of Student’s Amended Complaint, and District has the burden of persuasion as the issues designated “District’s Issues,” since they were the subject of District’s Complaint.

5. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized

education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

### Student's Issues

#### DISTRICT'S OFFER OF PLACEMENT IN STUDENT'S 2014/2015 TRIENNIAL IEP (ISSUES 1, 2, 3, AND 4)

6. Student's disputes with the IEP offered him by District in this case are primarily procedural in nature. Student has stipulated that District's offer of placement at Sierra was appropriate, and does not dispute the present levels of performance described in this IEP, his goals, or the accommodations and modifications the IEP provides. With the exception of related services, as discussed below, Student does not contend that District's offer did not substantively offer him a FAPE. Rather, Student contends that District's offer of placement was not timely, was not specific, was made outside of an IEP team meeting, and predetermined. Student alleges that District committed other procedural violations by failing to convene an IEP team meeting after it offered to place him at Sierra, by failing to have a representative of Sierra present at the May 20, 2015 IEP team meeting, and by denying Parents the right to meaningfully participate in that meeting. District responds that it has procedurally provided Student a FAPE in all regards.

7. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) (*Target Range.*) Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA,

but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural error may be held harmless. (*M.L. v. Fed. Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

#### Requirement of a Clear and Coherent IEP Offer

8. In *Union School Dist. v. Smith* (1994) 15 F.3d 1519, cert. denied, 513 U.S. 965 (*Union*), the Ninth Circuit held that a school district is required by the IDEA to make a clear written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a

formal, specific offer from a school district will greatly assist parents in “present[ing] complaints with respect to any matter relating to the ... educational placement of the child.” (*Union School Dist. v. Smith, supra*, 15 F.3d at p. 1526, quoting 20 U.S.C. § 1415(b)(1)(E).)

9. *Union* itself involved a District’s failure to produce a formal written offer at all. However, numerous judicial decisions invalidate IEP’s that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D. Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Mill Valley Elem. School Dist. v. Eastin* (N.D. Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Educ.* (D. Hawai’i, May 9, 2011, No. 10–00381) 2011 WL 1833207, pp. 1, 7-8.) One District Court described the requirement of a clear offer succinctly: *Union* requires “a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal.” (*Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108.)

District Failed to Make Student an Appropriate, Specific Offer of Placement between December 20, 2014, and April 26, 2015 (Issues 1 and 2(a))

10. The settlement agreement between the parties required District to assess Student and convene his triennial IEP team meeting between October 19, 2014, and December 19, 2014. Neither party put on any evidence addressing why District waited until November 2014 to begin to assess Student or why the triennial IEP team meeting was not convened until December 15, 2014, just four days before the end of the period specified in the settlement. Whatever the reasons, the parties had a significant amount

of information to review to develop Student's IEP. District had administered a comprehensive assessment. Student had not attended a District school for over a year, and therefore some of the information the IEP team would have to review would have to be provided by Banyan Tree.

11. There is no evidence that District did anything affirmatively to stall or otherwise delay the IEP process at the December 15 meeting. However, the meeting was only set to last for about two hours. By the end of the two hours, the IEP team had not even finished reviewing all of District's assessments. The team had yet to review District's speech and language assessment, Student's present levels of performance, discuss and develop goals, or discuss placement, services, or accommodations.

12. Although the parties' settlement contemplated that District would make an offer of placement for Student by December 19, 2014, District was not able to make an offer at the end of the December 15 meeting. Parents were necessarily concerned about where that left Student. District's responsibility for paying Student's tuition at Banyan Tree would end as of December 19, yet District offered no alternative placement. Dr. Frampton and Parents asked District to continue funding Banyan Tree in the interim. District declined to do so, citing the termination of its obligations under the settlement agreement.

13. Dr. Frampton also asked District to continue the IEP team meeting as soon as possible so that Student's placement could be resolved. District agreed that it would, but did not give a date at the end of the December 15 meeting. District did not make an attempt to hold another meeting between December 15 and December 19. It also did not make an effort to schedule the continued meeting during its winter break. Instead, it contemplated holding the meeting after the start of the New Year, when school resumed. District did try to arrange a meeting for early January 2015; its efforts somewhat stymied by Student's failure to clearly identify who his legal representative

was and with whom District should communicate. The continued IEP team meeting therefore did not occur until January 23, 2015.

14. However, even assuming that District had been able to convene the meeting just after the winter break, during the first week of January, District still failed to address where Student was supposed to attend school while his IEP was finalized. It could not and therefore did not offer a placement at the end of the December 15, 2014 IEP team meeting. Neither at the meeting, nor any time before the January 23, 2015 continuation meeting, did it offer a temporary placement to Student. It did not suggest that Student return to a special day class at a District school or suggest that Student enroll in any other District program. Dr. Burkett acknowledged that at the time of the December 15, 2014, and January 23, 2015 IEP team meetings, there was, in fact, no stay put placement for Student. Although the settlement agreement between the parties stated that a District special day class would be Student's stay put that provision was not applicable unless District had made an offer of placement that Parents refused. Since District did not make a placement offer at the December 15 meeting, there was nothing for Parents to refuse and therefore no dispute between the parties at that time. Therefore, Dr. Burkett was correct that there was no stay put placement for Student.

15. In its closing brief, District argues that the settlement states that Student's stay put would be a District mild-to-moderate special day class. Even assuming that the provision was put into play because of the delay in developing Student's IEP, District never offered that placement or suggested that Student enroll in school. As stated above, Parents were never directed to enroll Student in a special day class and were never informed of what school or classroom was available for Student. The issue simply was not discussed. Instead, Parents were left to fend for themselves by continuing to fund a very expensive non-public school.



16. District also contends that even assuming it failed to properly offer a placement at the December 15, 2014 IEP team meeting, the procedural violation was minimal because District offered to place Student at Sierra slightly one month after the December 15 meeting. District's argument is not supported by the facts. On January 23, 2015, when District reconvened the IEP team meeting, Student's IEP team finished reviewing District's assessments, reviewed information provided by Banyan Tree on Student's present levels and progress, reviewed goals, and discussed placement. All members of Student's IEP team agreed that Student required a non-public school placement and that is the placement District offered at the end of the meeting. However, contrary to what District states in its closing brief, District did not offer to place Student at Sierra at that time. District did not have a school to offer. Instead, Dr. Burkett informed the IEP team that she would investigate schools and, once she had identified a possible appropriate placement, inform Parents and their representatives.

17. Student argues that District's failure to identify a specific non-public school at the January 23, 2015 IEP team meeting, violated the principles defined by the Ninth Circuit in *Union*. There is a split among the circuit courts as to whether an IEP must identify the school in which a district plans to place a student. (See, for example, *A.K. v. Alexandria City Sch. Bd.* (4th Cir. 2007) 484 F.3d 672, 680 (finding that identifying a specific school signifies that a district has carefully considered and selected a school that will meet the student's unique needs) and *T.Y. v. N.Y.C. Dep't of Educ.* (2nd Cir. 2009) 584 F. 3d 412, 419-420 (location of services refers to the type of environment that is the appropriate place for the provision of education and services to a student and does not refer to a specific school).) The Ninth Circuit has not adopted the Fourth Circuit's position that a specific school must be identified. In an unpublished case, cited by District in its brief, the Ninth Circuit sided with the Second Circuit and affirmed a district court decision finding that a school district is not required to identify a specific

school in its IEP offer. (*Marcus I. v Dep't of Educ., State of Hawaii* (9th Cir. 2014) 583 Fed.Appx 753, 2014 WL 3610722.)

18. The reasoning of the Second Circuit is persuasive. There are a number of administrative and logistical reasons why a school district may not want to identify a specific school as a placement. In the case of a district placement, such as a special day class, the district may not know at the time of the IEP team meeting where space is available for the student or even where the special day class will be located if the IEP decision is before the start of a new school year. In the case of a non-public school placement, the school district will likely not know if a given school has space for the student or even if the school will accept the student. The district can suggest a non-public school placement but it cannot force the school to enroll the student.

19. For these reasons, District did not commit a procedural violation by failing to identify a specific school in the January 23, 2015 IEP. It identified Student's placement as a non-public school, which put Parents on notice as to the specific type and location of placement that it was offering.

20. However, the inquiry in this case does not stop there. The problem is that District did not immediately locate a school for Student and start the process to enroll him. District IEP team members did not believe that Banyan Tree had met Student's needs and therefore declined to offer it as a prospective placement. NewBridge did not have space available for Student. Dr. Burkett therefore had to locate an alternative school.

21. Unfortunately, District was sidelined by the parties' ongoing settlement discussions. District mistakenly concentrated solely on trying to settle the case rather than simultaneously investigating an alternative placement for Student. District did not begin to investigate a potential school until Student's representatives ceased settlement discussions. Dr. Burkett then spoke with other special education directors and

researched schools. She spoke with staff associated with Sierra and determined that it had space available for a child with Student's needs and that it could meet those needs. In a letter dated April 26, 2015, District offered Sierra as a placement for Student, and offered to facilitate Parents' observations at the school.

22. Therefore, contrary to District's statement in its closing brief, the offer of Sierra did not come a month after the December 15, 2014 IEP team meeting; rather, it came over four months after the meeting. During that time, Student was in limbo. District declined to pay for Banyan Tree, but failed to offer him an alternative placement at a District School. Nor did it have an alternative non-public school to offer.

23. As stated above, school districts are required to offer children found eligible for special education and related services a *free appropriate public education*. The emphasis here is on *free* and *public*. It is supposed to be an education available at no charge to an eligible child's parents. District here lost sight of the fact that for at least four months, it failed to offer Student a placement, appropriate or otherwise, forcing Parents to pay for an education for which District was legally responsible. This is not a situation where parents decide to reject a district-offered placement in lieu of their choice of school. Here, District offered no placement. Parents had no choice but to continue Student's enrollment at Banyan Tree, which graciously offered to retain Student at the school without requiring Parents to make ongoing tuition payments. As Dr. Burkett acknowledged during her testimony, had Banyan Tree expelled Student, District would have been forced to scramble to find a placement for him. That is what it should have been doing beginning with the December 15, 2014 IEP team meeting.

24. District's argument that the settlement agreement identified Student's stay put placement as a special day class is even less persuasive in the context of the January 23, 2015 IEP team meeting. At that time, Student's entire IEP team, including all District members, agreed that a special day class was not appropriate for Student and that he

required the support and structure that a non-public school would provide. As of January 23, 2015, there was no dispute that the special day class in which Student had been enrolled a year and a half earlier was not appropriate for him. As of January 23, 2015, District was required to provide Student with placement at a non-public school. Its delay in identifying and offering Student a non-public school denied him a FAPE. The delay caused Student a loss of educational benefit because Student had no publically funded placement to attend.

25. Student has proven by a preponderance of the evidence that District denied him a FAPE from December 15, 2014, to April 26, 2015, when District made its offer of Sierra.

January 24, 2015 Request for IEP and IEP Meeting Notes (Issue 2(b))

26. Student argued that he was not timely provided copies of the January 23, 2015 IEP document and the IEP team meeting notes when his attorney requested them by letter dated January 24, 2015. District acknowledges that it did not provide the documents until April 26, 2015, but contends that Student failed to demonstrate that he suffered any substantive harm or that Parents' ability to participate in Student's IEP process was impeded by the delay in receipt of the documents.

27. Education Code section 56504 states in relevant part that, "[t]he parent shall have the right and opportunity to examine all school records of his or her child and to receive copies...within five business days after the request is made by the parent, either orally or in writing." Education Code section 49061(b) states that a "pupil record means any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means."

28. In this case, District was not able to provide Student with a copy of the January 23, 2015 IEP document, when requested by Student on January 24, because it did not exist at that time. District did not create the IEP document because it was waiting to incorporate information provided by Banyan Tree into Student's present levels of performance, and to finalize Student's goals. There is no evidence in the record that indicates exactly when District actually created the IEP document that it provided to Student on April 26, 2015. It was Student's burden to prove when the document first came into existence and that it was not provided within five days of that date. He has failed to meet his burden in that regard.

29. However, meeting notes existed and the failure to provide them when requested was a procedural violation. As stated above, a procedural violation does not constitute a denial of FAPE unless it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or deprived the Student educational benefits. Here, Student has failed to demonstrate that District's delay in providing the meeting notes meet any of those criteria. Although he argues in his closing brief that Parents' right to participate in the IEP process was impeded, there is simply no evidence of that. Parents, their advocate, and their attorney all attended and participated in the January 23, 2015 IEP team meeting. They were aware of what was discussed and what District had offered. Additionally, Parents had recorded the meeting, which was better evidence of what had transpired at the meeting than the meeting notes could be. Student has therefore not met his burden of proof on this issue.

#### District Did Not Predetermine Its Offer of Placement at Sierra and Was Not Required to Make the Offer at an IEP Team Meeting (Issues 3(a) and 3(b))

30. Student contends that District was required to discuss possible non-public school placements with Parents as part of the IEP process. He therefore contends that

District's offer of Sierra, unilaterally made by District and presented in correspondence between the parties' attorneys instead of at an IEP team meeting, constituted a procedural violation of the IDEA. District contends that it did not predetermine the placement for Student and was not, in any case, required to engage in discussions about the school at an IEP team meeting.

31. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F. 2d 840, 857-859.) (*Deal*). To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, 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 Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns were considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.)

32. However, an IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139 [IDEA did not provide for an "education . . . designed according to the parent's desires."].) Rather, the relevant question in considering whether there has been predetermination is

whether the school district came to the IEP meeting with an open mind. (*Deal, supra*, 392 F.3d at 858; *Doyle v. Arlington County School Bd.* (1982) 806 F.Supp. 1253, 1262.)

33. Student did not demonstrate that District predetermined his placement at Sierra. First, this Decision has already found that District was not required to identify a specific non-public school in Student's IEP. Student has provided no legal authority for his contention that a district cannot unilaterally identify an appropriate non-public school placement or that a student's parents must be involved in the determining which non-public school a district will offer. Certainly, a parent's input and suggestions as to schools must be considered. District here considered Student's request for placement at NewBridge. However, that school was initially unavailable and could not be offered. District later determined that Sierra would meet Student's needs, a fact to which Student has stipulated. District was not required to offer Parents' preferred placement. District engaged in a thorough discussion of Student's placement needs with Parents and their representatives at the January 23, 2015 IEP team meeting. There is no evidence that Parents' participation in that discussion was hindered in any way. The decision to offer a non-public school was mutually arrived at by all IEP team members. There is no evidence that District predetermined Student's placement.

34. Student also contends that it was a procedural violation for District to make the offer of Sierra outside of an IEP team meeting. This Decision has already found that District was not required to identify the non-public school on the IEP document. This Decision has also found that District's unilateral identification of a non-public school did not constitute predetermination of Student's placement and that Parents were active participants in determining that Student required a non-public school placement. Student has failed to provide any legal authority for his position that IEP offers cannot be made by a party's attorney or representative, and that they must always be made during an IEP team meeting. If such were the case, a student would not be able

to reject or accept an IEP offer by way of correspondence but would instead be confined to accepting or rejecting IEP offers only through the IEP document. There is no authority that supports that proposition.

35. District did not predetermine Student's placement by unilaterally offering Sierra in a letter from its legal counsel to legal counsel for Student.

Failure to Convene an IEP Team Meeting After Offering Placement at Sierra  
(Issue 3(c))

36. Student contends that District was required to convene an IEP team meeting to discuss placement after making its offer of Sierra in its April 26, 2015 letter. Student offers no legal authority for this contention. From District's perspective, the IEP process was concluded once it made its offer of placement. It was then incumbent on Parents to accept or reject, in whole or in part, District's offer.

37. However, even assuming that it was a procedural violation not to have immediately offered to convene an IEP team meeting, Student has failed to show that the procedural violation rose to a level of a denial of FAPE. On April 28, 2015, two days after receiving District's offer of Sierra, Student asked District to convene another IEP team meeting. District did so on May 20, 2015. It is disingenuous to argue that District failed to convene a meeting when Student immediately requested one himself, and District immediately moved to make sure that the meeting took place in a timely fashion at a date and time mutually agreeable to all parties.

38. Student has therefore failed to meet his burden of proof on this issue.

Failure to Have a Representative from Sierra at the May 20, 2015 IEP Team Meeting (Issue 4(a))

39. Student contends that District committed a procedural violation by failing to ensure that a representative from Sierra attended the May 20, 2015 IEP team meeting. Student contends that the absence of a representative prevented Parents from



obtaining information about the school so that they could make an informed decision as to whether they should consent to Student's placement there. District responds that it was not required to have a representative present. In the alternative, District contends that the procedural violation did not rise to the level of a denial of FAPE.

40. The Code of Federal Regulations states, in pertinent part, that a district must ensure that a representative of a non-public school attends the IEP team meeting required when a district refers a child to a non-public school. If the representative cannot attend, the agency must use other methods, such as telephone conference calls, to ensure participation by the non-public school. (34 C.F.R. § 300.325(a).) The District Court of California has found that where a representative of such a school cannot be present, a district meets its obligations under that section of the Code of Federal Regulations if it arranges for parents to meet with non-public school personnel to discuss parents' questions or concerns. (*Student R.A. v. West Contra Cost Unified Sch. Dist.* (N.D.Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 at \*19.)

41. District here did not invite a Sierra representative to the May 20, 2015 IEP team meeting. However, it would have been futile even had District extended the invitation. According to Ms. Engle, Sierra's director, Sierra policy is to decline to attend IEP team meetings until a Student has enrolled at the school. Here, Student had not consented to the placement at Sierra and therefore had not enrolled. There is no evidence that Sierra would not have followed its policy in this case had District invited its staff to the meeting.

42. Additionally, Student failed to provide any persuasive evidence that District's procedural violation in failing to have a representative present rose to the level of a FAPE violation. First, District made at least two attempts to facilitate Parents' contact with Sierra, first in its April 26, 2015 letter, and later in its May 6, 2015 letter. Parents did not accept District's offer. Second, Parents unilaterally arranged to tour Sierra. At that

time, they were able to discuss Sierra's operations, curriculum, student body, and process for enrolling students with Sierra staff members. Parents therefore already had any information they needed about the school prior to the May 20 meeting. Third, Dr. Burkett provided Parents with information about the school during the May 20 meeting as well. Fourth, it is evident from the recording of the May 20, 2015 IEP team meeting, that Parents and their advocate had already made up their minds that they would not accept placement at Sierra. Finally, Parents could have requested further information about Sierra if they needed, but did not.

43. Student failed to present any evidence that he lost educational benefit or was denied a FAPE by District's failure to have a Sierra representative present at the May 20, 2015 IEP team meeting.

44. Student therefore failed to meet his burden of proof on this issue.

#### Meaningful Participation of Parents at the May 20, 2015 IEP Team Meeting (Issue 4(b))

45. Student contends that Parents were denied their right to meaningfully participate at the May 20, 2015 IEP team meeting, because District spent only a few minutes discussing the placement at Sierra. District contends that Parents were given full opportunity to participate in the meeting.

46. Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered "(A)mong the

most important procedural safeguards.” (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

47. Parents have an adequate opportunity to participate in the IEP process when they are “present” at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include a visit by the parent to the proposed placement. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 461.) An adequate opportunity to participate can include participation at the IEP meeting by outside experts retained by the parents, and the incorporation of suggestions made by such experts into the IEP offer. (*D.S. v. Bayonne Board of Educ.* (3rd Cir. 2010) 602 F.3d 553, 565; see also *W.T. v. Board of Educ. of the School Dist. of New York City* (S.D.N.Y. 2010) 716 F.Supp.2d 270, 288 [reports from child’s private school].) An adequate opportunity to participate can occur when parents engage in a discussion of the goals contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y. 2010) 682 F.Supp.2d 387, 394.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her 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, supra*, 993 F.2d at p. 1036.)

48. In this case, the weight of the evidence demonstrates that Parents and their representatives participated fully in the IEP discussions on May 20, 2015, including the discussion regarding Sierra. District had offered on two occasions to facilitate Parents’ contact with Sierra so that they could become familiar with the school. Parents did not accept District’s offers but chose instead to initiate their own tour of the school and interaction with Sierra staff prior to the May 20 meeting. Dr. Frampton voiced her displeasure with Sierra at the end of the meeting. Dr. Burkett attempted to respond to the concerns raised by Dr. Frampton and Parents by discussing the programs Sierra

could offer Student. However, it is apparent from the recording of the meeting that Parents and Dr. Frampton had already determined that they would not agree to place Student at Sierra and that they had already decided that NewBridge was the appropriate school to meet Student's needs. Therefore, even assuming that Parents' participation at the meeting was limited due to the short amount of time allotted to discussion of Sierra, Student has failed to demonstrate that their right of participation was impeded. There was nothing more to discuss since Parents had already toured the school, spoken to Sierra staff, and determined that they would not place Student there. Under these facts, Student has failed to meet his burden of proof that Parents were denied the right to meaningfully participate in the May 20, 2015 IEP team meeting.

#### FAILURE TO CONDUCT A VISION THERAPY ASSESSMENT AND NEED FOR VISION THERAPY (ISSUES 5 AND 6)

49. Student contends that District had sufficient information regarding his vision challenges, particularly in the area of vision processing and tacking, to put it on notice as of the December 15, 2014 IEP team meeting that it should have conducted an assessment to determine if Student required vision therapy. He also contends that District should have provided him with vision therapy as a related service. District contends that it adequately assessed Student's visual processing needs during its triennial assessment. District further contends that Student did not require vision therapy. District's arguments were more persuasive on this issue.

50. A school district must assess a special education student in all areas of suspected disability, including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).) The district must use a variety of

assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A)). No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e)). Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) The school district must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii)).

51. Student claims that District had sufficient notice that he might have a unique need in the area of vision such that District should have assessed him are unpersuasive for a variety of reasons. First, there was no reason to administer a vision therapy assessment because District had already administered a wide range of tests to Student in the area of vision processing as part of its triennial assessment. The tests were identical or similar to those administered by Dr. Hillier. For example, District's occupational therapist administered the Beery-Buktenica, which specifically addressed vision processing issues. Many of the other standardized assessments it used had sections that also assessed vision processing.

52. Additionally, Dr. Hillier administered a second full battery of assessments to Student in September 2014, only two months before District assessed him. Dr. Hillier, Student's vision expert, did not believe that any additional testing was necessary for Student. It is unclear what assessments Student believes should have been administered after Dr. Hillier's testing. Student provided no evidence that different assessments exist that might have given more information regarding his vision needs. As District

educators stated, most standardized tests are invalid if given too frequently. Re-assessing Student less than a year after Dr. Hillier's September 2014 assessment would therefore have yielded inaccurate test results, at least for some of the tests.

53. The failure to assess in an area of suspected need is a procedural violation. Therefore, it was incumbent on Student to prove that District's failure to assess for vision therapy deprived him of a FAPE, caused him to lose educational benefit, or significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the Student. Student failed to present any persuasive evidence that Parents' participation in his IEP process was impeded. Parents had sufficient information on Student's possible vision needs based on the three assessments done by Dr. Hillier as well as by District's comprehensive triennial assessment. Student put on no evidence whatsoever as to what further testing should have been done to assess his vision needs, or what information further testing would have gleaned about his vision needs.

54. As stated above in paragraph 2 of the Legal Conclusions, "related services" are transportation and other developmental, corrective, and supportive services that are required to assist a child in benefiting from special education. In its closing brief, District cited to an OAH decision that found that "back end" vision issues, which affect a child's ability to process information once it makes it back to the eyes and into the brain, may be assessed by school psychologists using visual processing measures and therefore do not require assessment or services by an optometrist.

55. District did not offer any expert testimony to counter Dr. Hillier's testimony regarding the efficacy of vision therapy and whether school districts are only required to address a student's need for "front end" rather than "back end" vision issues. The ALJ declines to rule on the viability of vision therapy as a treatment modality based upon the findings made in another OAH decision. For the purposes of this decision, the ALJ

accepts that vision therapy may be necessary to treat some children's vision processing deficits. However, in this case, Student did not demonstrate that he required vision therapy by an optometrist, and therefore did not prove by a preponderance of the evidence that District's failure to assess him impeded his right to a FAPE or deprived him of any educational benefit.

56. In spite of having received vision therapy from Dr. Hillier for over a year, and also many interventions used by Banyan Tree to address Student's processing issues, Student did not demonstrate any significant improvement in his vision processing. Dr. Hillier's own assessments demonstrated that Student did not progress in any major areas. Although Dr. Hillier testified to the contrary, his test scores did not support his contention that Student made more than de minimus progress. Student's vision processing scores on the Beery-Buktenica actually dropped significantly from the time Dr. Hillier first assessed Student in January 2014, to the last time Dr. Hillier assessed him in May 2015. Dr. Hillier also ignored the fact that Student's percentile scores on the Developmental Eye Movement Test did not show more than minimal progress. Dr. Hillier's opinion that Student's vision needs had improved more than minimally therefore is not supported by the record. Additionally, when Student began attending NewBridge in July 2015, staff there noted Student had the same tracking problems that had concerned Banyan Tree almost two years before. Student therefore failed to prove that he benefited from vision therapy.

57. Finally, Student failed to prove that he required vision therapy to benefit from his education. Dr. Hillier did not observe Student in the educational setting. He did not review any of Student's schoolwork to determine if Student required vision therapy in order to progress. He did not review Student's academic progress or lack of progress. Dr. Hillier acknowledged that any progress reports he had regarding Student were some

two years old because he did not address the issue with Student's parents or teachers during the year and half he provided vision therapy to Student.

58. Student failed to prove by a preponderance of the evidence that his right to a FAPE was impeded or that he lost educational benefit due to District's failure to assess his vision therapy needs or by its failure to offer vision therapy.

#### SUFFICIENCY OF DISTRICT'S OFFER OF SPEECH AND LANGUAGE THERAPY AND OCCUPATIONAL THERAPY

59. Student contended that District's offer of two, 25-minute sessions of speech and language therapy, and its offer of 30 minutes a week of occupational therapy, were insufficient to meet Student's needs. District responds that its offers were sufficient. It also argues that Student failed to provide any evidence that he required more services in either area. Both therapies are related services that a school district must provide if a student requires them to benefit from his education.

60. Student provided no evidence that District's offer of services would not meet his needs. He did not provide any testimony from an occupational therapist or from a speech and language pathologist. He did not provide any testimonial or documentary evidence that contradicted the persuasive testimony of District's speech and language pathologist and occupational therapist that the services offered by District would have addressed Student's needs.

61. In his closing brief, Student does not argue that the level of occupational services or speech and language services were inadequate. Rather, he argues for the first time that District did not make a clear offer of services in the January 23, 2015 IEP. Student also argues for the first time that District predetermined the amount of speech and language therapy and occupational therapy services that it was offering him. Student did not raise those issues in his complaint, in his Prehearing Conference Statement, or in the parties' stipulation as to issues. Issues not raised in Student's



complaint cannot be considered unless District consents, which it has not in this case. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i)).

### District's Issues

#### DISTRICT'S OFFERS OF FAPE (ISSUE 7)

62. District contends that its December 15, 2014 IEP, as amended on January 22, 2015, and May 20, 2015, provided Student a FAPE in the least restrictive environment. Student contends that District's offer of placement was procedurally defective and that District failed to offer Student the related services he required to benefit from his education. Student has stipulated that in all other aspects, including the substantive adequacy of District's offer of Sierra as a placement for Student, District's IEP offers met at least minimal legal requirements.

63. As stated above, a school district must comply with the procedures set forth in the IDEA and must develop an IEP designed to a child's unique needs, and that is reasonably calculated to enable the child to receive educational benefit. (*Rowley*, *supra*, 458 U.S. at pp. 206-207.)

64. As stated above, 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. District has demonstrated that Parents in this case were afforded an opportunity to participate in every aspect of the development of Student's IEP.

65. A student's IEP team is required to include one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in the regular education environment; a special education teacher; and a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about

available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) All required team members were present at each of the three IEP team meetings at issue in this case.

66. An IEP should include: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

67. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).) Here, District met

these requirements. District conducted a thorough triennial assessment. It considered all information from Banyan Tree as soon as Banyan Tree provided the information. District considered input from Parents and their representatives regarding their concerns for Student as well as their input concerning his present levels. Additionally, District considered information from Banyan Tree staff based on their observations of Student.

68. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) Here, all parties agreed that Student's least restrictive environment was a non-public school that provided small group instruction in a structured environment with little distractions. Student agrees that Sierra met those criteria.

69. 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.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Board of Education, supra*, 993 F.2d 1031, 1041.) In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. (*Ibid.*)

70. With the exception of its failure to offer Student a placement until April 26, 2015, as discussed in detail above, District complied with all other procedural requirements of the IDEA and California law. District provided Parents with notices of all meetings and gave them an opportunity to participate in the development of Student's

IEP. Parents or their advocate contributed to every aspect of the IEP, including the development of Student's present levels of performance, his goals, and the type of placement he required.

71. District has demonstrated that its IEP, as finalized on May 20, 2015, met all procedural and substantive requirements of the IDEA.

NEITHER THE PARTIES' SETTLEMENT AGREEMENT NOR THE CONDUCT OF STUDENT'S PARENTS LIMIT AN AWARD OF REMEDIES IN THIS CASE (ISSUE 8)

72. District contends that the settlement agreement executed by the parties on February 28, 2014, and March 3, 2014, precludes or limits an award of remedy to Student in this case. District also contends that Parents' refusal to accept District's offer to reimburse them for costs of Banyan Tree after January 1, 2015, was unreasonable because it resulted in unnecessary litigation. District therefore contends that reimbursement for Banyan Tree should be denied or limited.

73. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

74. 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. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra*, 471 U.S. at pp. 369-370 [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, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement found to be reimbursable where it 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]; *C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155 [a private placement need not provide all services that a disabled student needs in order to permit full reimbursement]; See also, *S.L. v. Upland Unified Sch. Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159.)

75. District spent a considerable amount of its time at hearing eliciting evidence that Banyan Tree was not an appropriate placement for Student because he did not make any academic progress while there. However, District failed to demonstrate that Banyan Tree was so inappropriate that Parents should not be reimbursed for their costs of funding the placement. Even if Student's academic progress was minimal, he had undisputed non-academic social, emotional, and behavioral benefits. Under the authority cited above, these non-academic benefits are sufficient to support reimbursement of the placement costs.

76. Additionally, the fact is that District did not offer Student a placement of any sort between December 19, 2014, and April 26, 2015. Student is entitled to a *free public* education. District did not provide one, so Parents therefore had to place Student in a school somewhere. He was already at Banyan Tree, which offered to delay pressing for tuition payments. Under the circumstances, Parents decision to retain Student at Banyan Tree was warranted.

77. Reimbursement may 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); see *Patricia P. v. Board of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 469 [reimbursement denied

because parent did not allow district a reasonable opportunity to evaluate student following unilateral placement].) District argues that Parents should be denied reimbursement because Parents rejection of District's non-confidential settlement offer was unreasonable.

78. District provided no persuasive legal authority supporting its position that failure to accept a settlement offer warrants denial or reduction of a remedy for a district's failure to offer a FAPE. Student may have had several reasons for declining the offer. Those reasons may later affect any attorney's fees to which Student may be entitled. However, Parents' settlement posture is not dispositive of whether they are entitled to reimbursement for the substantial costs they incurred in being forced to retain Student at Banyan Tree because of District's delay in offering Student a placement.

79. District's contention that the settlement agreement precludes or limits reimbursement for Banyan Tree is also unpersuasive. The agreement specifically stated that Parents would be responsible for continued funding of Banyan Tree if they rejected District's offer of placement. District did not make an actual placement available to Student until April 26, 2015, when it offered Student placement at Sierra. Student had no place to go in the interim. It was not until Parents rejected the placement that the terms of the agreement applied.

80. Even if there was a viable argument that Parents should have enrolled Student in a District special day class after the end of Winter Break 2014-2015, even if not offered by District at any time during the January 23, 2015 IEP team meeting, Student's IEP team clarified that a special day class placement was not appropriate for him. The IEP team, including District staff, determined that Student required placement at a non-public school other than Banyan Tree. However, District, which had not predetermined Student's placement, did not have a recommendation for a non-public

school that day. District staff had previously contracted NewBridge, which informed District that it would not have room for Student until the beginning of the 2015 extended school year. Therefore, as of January 23, 2015, there was no District-offered placement available for Student to attend that would meet his needs. Student was entitled to a non-public placement as of the date, but District did not provide one until April 26, 2015.

81. District has therefore failed to meet its burden of proof that an award to Student should be denied or reduced.

#### REMEDY FOR DISTRICT'S DELAY IN OFFERING STUDENT A PLACEMENT

82. As a remedy for District's alleged violations, Student requests that Parents be reimbursed for the costs of retaining him at Banyan Tree and for the costs they have expended to date for his placement at NewBridge. Student also requests compensatory education in the areas of occupational therapy and speech and language therapy because he was not provided with services in those areas while at Banyan Tree. Student also requests remedies related to his alleged need for vision therapy.

83. As discussed above, reimbursement of expenses is an appropriate remedy where parents have had to privately place a student due to a school district's failure to provide FAPE. Here, District failed to offer Student any placement whatsoever for four months. Parents are entitled to reimbursement for all costs of Banyan Tree, including mileage costs in transporting Student to school during that time. However, even had Parents accepted District's offer of Sierra on April 26, 2015, Student would not have been able to immediately enroll at the school. According to Ms. Eagling, Sierra's director, although Sierra had space available for Student, the process of reviewing his application, including having him do a two-day trial enrollment, would have taken two to six weeks. Therefore, even had Student immediately begun the process, he would not have been able to start school until almost the end of the 2014-2015 school year.

Because that time frame was so close to the end of the school year, equity supports awarding Parents reimbursement for expenses associated at Banyan Tree through the end of the school year.

84. However, Student is not entitled to reimbursement for NewBridge or an order prospectively placing him there. District's May 20, 2015 IEP offer met all procedural and substantive requirements. Parents rejected placement at Sierra not because it could not offer Student a FAPE, which they have stipulated it could, but because they believed NewBridge would benefit him more. That may be so. However, as stated in *Rowley*, districts are not required to maximize a child's educational potential. The fact that Parents believed NewBridge could better meet Student's needs does not mean District is required to offer it as a placement or to reimburse Parents for the cost of tuition once District made an offer of FAPE.

85. Districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 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 v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) 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." (*Ibid.*)

86. Here, Student has not demonstrated that he required vision therapy. He is therefore not entitled to compensation or reimbursement for District's failure to offer



that service. Student has also failed to present any evidence regarding his occupational therapy or speech and language needs, and offered no evidence of what he may have missed because he did not receive those services while at Banyan Tree. In any case, the \$265 a day Banyan Tree charged for Student's one-on-one instruction was supposed to include related services. It would be inequitable to order District to pay for services that Student should have been receiving because they were supposed to be included in the daily charge for tuition.

## ORDER

1. Within 45 days of the date of this Order, District shall reimburse Parents for their expenses in maintaining Student at Banyan Tree from January 5, 2015, to June 10, 2015, in the amount of \$27,030, by tendering payment in that amount directly to Banyan Tree. Documents submitted in this hearing and testimony of Mother and Ms. Engle are adequate proof of tuition payments Parents owe to Banyan Tree.

2. Within 45 days of the date of this Order, District shall reimburse Parents for their mileage costs incurred in transporting Student from home to Banyan Tree and back, in the amount of \$1,604.67. Documents submitted in this hearing as well as Mother's testimony are adequate proof of the mileage costs Parents incurred.

3. District's May 20, 2015 IEP offer of placement at Sierra provided Student with a FAPE.

4. All other relief sought by either party is denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on that portion of Student's Issue 1 that pertained to the December 15, 2014 and January 23, 2015 IEP's; on Issue 2(a); on that part of Issue 7

addressing the December 15, 2014, and January 23, 2015 IEP's, and on Issue 8. District prevailed on all other issues.

## RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATED: January 8, 2016

/s/

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DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings