

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

COMPTON UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016030850

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on March 11, 2016, naming Compton Unified School District. OAH continued the matter for good cause on April 26, 2016.

Administrative Law Judge Alexa J. Hohensee heard this matter in Compton, California on June 7, 8 and 9, 2016.

Brian R. Sciacca and Tony Tai Nguyen, Attorneys at Law, represented Student. Parents attended the hearing on behalf of Student.

Elliot R. Field, Attorney at Law, represented District. Laura Kincaid, District's Director of Special Education, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until June 27, 2016. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Did District deny Student a free appropriate public education by failing to timely assess Student after Parents' request on December 1, 2014?
2. Did District deny Student a FAPE by failing to find Student eligible for special education and related services at the April 21, 2015 individualized education program meeting?
3. Did District deny Student a FAPE at the April 21, 2015 IEP team meeting by failing to:
 - a. Draft appropriate goals in the areas of (i) behavior and (ii) speech and language; and
 - b. Consider Parents' input?
4. Did District deny Student a FAPE in the IEP of April 21, 2015, by failing to offer:
 - a. Appropriate services in the areas of (i) behavior, (ii) speech and language; and
 - b. Placement in the least restrictive environment?
5. Did District deny Student a FAPE by failing to timely assess Student after Parents' request on August 17, 2015?
6. Did District deny Student a FAPE at the IEP team meetings of December 14, 2015 and January 15, 2016, by:
 - a. Failing to have a special education teacher present;
 - b. Failing to have a general education teacher present;
 - c. Failing to consider Parents' input; and

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- d. Failing to draft appropriate goals in the areas of (i) behavior and (ii) speech and language?

7. Did District deny Student a FAPE in the IEP of December 14, 2015, completed January 15, 2016, by failing to offer:

- a. Appropriate services in the areas of (i) behavior and (ii) speech and language; and
- b. Placement in the least restrictive environment?

8. Did District deny Student a FAPE by failing to timely develop and present a proposed assessment plan to assess Student in the areas of functional behavior and occupational therapy after Parents' request on January 15, 2016?

SUMMARY OF DECISION

District failed to timely assess Student after Parents' request on December 1, 2014 (Issue 1), and failed to find Student eligible for special education at the IEP team meeting of April 21, 2015 (Issue 2). District again failed to timely assess and review assessments after Parents' request on August 17, 2015 (Issue 5). District considered Parents' input at the IEP team meeting of April 21, 2015, but, as a result of the delays in assessment and failure to find Student eligible, Student was denied a FAPE and deprived of educational benefit until he was subsequently found eligible for special education at the IEP team meeting of January 15, 2016 (Issues 3(a) and (b); 4(a) and (b)). Student did not establish that the IEP of January 15, 2016, developed over two IEP team meetings on December 14, 2015 and January 15, 2016, failed to offer appropriate special education and related services in the least restrictive environment (Issues 7 (a) and (b)), and both meetings were attended by a special education teacher (Issue 6(a)). Parents' input was considered at both meetings, and appropriate goals were drafted (Issues 6(c) and (d)). However, District failed to include a general education teacher at the December 2015 and January 2016 meetings, which was a procedural violation that significantly impeded

Parents' opportunity to participate in the development of Student's educational program (Issue 6(c)), and resulted in a substantive denial of FAPE from January 15, 2016 forward. District did not deny Parents' requests during the December 14, 2015 and January 15, 2016 IEP team meetings to conduct assessments of Student's functional behavior and occupational therapy needs, and were not required to give prior written notice of a denial, and Student's claim regarding a delay in presenting an assessment plan is premature (Issue 8).

This Decision awards partial reimbursement to Parents for private preschool tuition, day treatment copayments, and behavioral intervention services and supervision incurred from March 31, 2015, the date that District should have timely completed and reviewed Student's initial assessments and found him eligible for special education and related services, through the end of the 2015-2016 school year. This Decision also orders District to provide training to its staff to avoid future procedural violations such as occurred here.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student was four years of age and in preschool at the time of the hearing. Student resided with his mother and father within District's boundaries at all relevant times.

2. By the time Student turned three years of age in October 2014, he had been asked to leave four private daycare or preschool facilities because he had meltdowns and exhibited aggression towards other children. Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in October 2014.

3. In late 2014, Student's teacher told Mother that more than ADHD might be contributing to Student's behaviors, and recommended that Mother contact her local

school district about an assessment for special education placement and services.

4. On December 1, 2014, Mother telephoned District and requested that Student be assessed for special education. Mother explained that Student's behavior had led to his dismissal from multiple daycare and preschool programs. She expressed worries about Student's understanding of what was said to him and his ability to communicate.

5. The next day, Mother provided District with documentation of her concerns, including a letter from Student's current teacher and an ADHD diagnosis from Student's pediatrician. The teacher's letter explained that Student could not sit still in circle time, held favorite toys for comfort, climbed over shelves, chairs and tables, cried and hurt peers when they would not give him toys he wanted, and bit instead of verbally expressing anger or frustration.

6. In mid-December, District contacted Mother to schedule a psychoeducational assessment.

7. On January 28, 2015, District prepared an assessment plan. Mother signed the assessment plan the same day, and took Student to the school nurse for screening.

8. In February 2015, District school psychologist David Esparza assessed Student in the areas of ability, learning potential and developmental skills. Mother told Mr. Esparza that she was concerned about Student's behaviors, which she attributed to ADHD.

9. Mr. Esparza has bachelor's and master's degrees in psychology, and has been a school psychologist for over three years. He assessed Student during his first year working with preschool children. Mr. Esparza did not contact Student's teacher or observe Student interacting with other children. He felt that the information from Mother and his own observations of Student were sufficient to establish that Student's ADHD manifested in inconsistent attention and an inability to sit still and focus on tasks.

At hearing, Mr. Esparza had poor recall of the amount of time spent with Student and Mother. Mr. Esparza did not consider autism an area of suspected disability.

10. On February 26 and 27, 2015, Mr. Esparza administered standardized tests of cognition, pre-academic skills and adaptive functioning to Student. He observed that Student made good eye contact and transitioned well between tasks. Although Student needed some redirection, he did not require an enormous amount of prompting or refuse to participate in assessment tasks, as some students did, and it was easy to get Student back on track. Mr. Esparza did not see Student display characteristics of autism. According to Mr. Esparza, preschool children are developing, and generally have less impulsivity control than older children. Preschool teaches children foundational skills for entering a structured classroom in kindergarten, such as group attention, obeying rules, copying shapes and letters, and consequences of actions.

11. Student's development in physical (muscle coordination), adaptive (independence in the environment) and cognitive (intellectual ability) skills was average. Student's receptive and expressive language (communication) skills were above average, and his social skills (social/emotional) were below average.

12. As to cognitive skills, Student had higher scores on nonverbal tests, and his global conceptual ability score was average. Student's pre-academic readiness skills ranged from average (vocabulary) to well above average (expressive and early academic skills) to upper extreme (numbers, letters, words and expressive skills). His early academic and language skills composite score was well above average.

13. A test of Student's basic psychological processes confirmed the pediatrician's diagnosis of ADHD. Mother's responses to standardized questions placed Student in the moderately low range of functioning by comparison to same age peers, with significant behavior in the areas of hyperactivity, depression, atypicality, aggression, withdrawal and adaptability.

14. Mr. Esparza concluded that Student met the criteria for special education in the category of other health impairment. Student exhibited a heightened alertness to environmental stimuli due to his ADHD that adversely affected Student's educational performance, and demonstrated a need for special education and services.

April 2, 2015 IEP Team Meeting

15. On April 2, 2015, District convened an IEP team meeting to determine Student's eligibility for special education. Parents and Mr. Esparza attended the meeting with a District special education teacher acting as a District administrator.

16. Mr. Esparza reviewed the results of his assessment with the team. He had his laptop computer with him, which contained his assessment report.²

17. The team discussed placement options for Student, including general education preschool classes with typical peers, and special day classes with a mix of children with developmental delays and typical peers. Mother focused on academics, an area in which Student had performed very well. She wanted Student in a program that would maximize academic learning. The District team members explained that a general education preschool might offer greater academic challenge, but that Student needed a small special day classroom with a low student to adult ratio and a focus on behavior and social skills to address his areas of need: behavior and social communication. Academics was not an area of educational need.

18. Mother felt that any program that did not offer advanced academics would be inappropriate for her son, and refused to place Student in a special day class for that reason. Mr. Esparza interpreted Mother's statements as a disagreement on

² The report is referred to as a "multidisciplinary" report, but except for a vision and hearing screening by the school nurse, the only assessor appears to have been Mr. Esparza.

whether Student needed special education. He concluded that the IEP team, which included Parents, did not find Student eligible for special education. He altered the assessment report on his laptop to conclude that Student's ADHD did not adversely affect Student's educational performance, and that Student did not qualify for special education and related services. District did not make an offer of FAPE.

19. At hearing, Mr. Esparza's recall of the IEP team meeting was good. He adamantly testified that he had given the IEP team his professional opinion that Student qualified for special education, and freely admitted that he had altered the assessment report to conclude that Student was ineligible based upon what occurred during the meeting. Mr. Esparza's testimony that he had altered the assessment report was credible, and his testimony that Student qualified for special education on the basis of the February 2015 assessment results was persuasive.

20. On or about April 13, 2015, Student began attending a full-day preschool and after-school program at Little Lambs Daycare and Preschool, five days per week. Little Lambs had only one classroom and eight students. Student's teacher, who was also director at Little Lambs, Susan Davis, suspected that Student was on the autism spectrum.³ Although Director Davis did not have a teaching credential, and had no specific training in working with children with autism, she had taught other children with known or suspected autism. She observed that Student exhibited autism characteristics, such as a fascination with spinning things, inappropriate interactions with others, a fixation on objects, poor relationships with peers, an inability to express himself, difficulty understanding or following directions, scripted speech (repeating phrases), a desire to isolate himself from others, and uncontrollable tantrums up to 30 minutes long

³ Susan Davis and District psychologist Sonya Davis, have similar names. To avoid confusion in this Decision, Susan Davis will be referred to as Director Davis.

and 15 times per day.

21. Director Davis recommended that Mother have Student assessed by the local regional center to determine if he was on the autism spectrum, and to see if Student qualified for behavior services from that agency.⁴ On July 10, 2015, she wrote a letter documenting that Student could not sit or stand still, bothered the other children during nap time, could not verbally express his feelings, refused to do as he was told, hit and bit the other children, had anger issues, and did not readily respond to redirection. She also noted that Student was obsessed with specific colors, shapes and letters, and tantrummed hysterically for 15 minutes at a time if he was not given access to those items. Student's teacher believed that when there were more than two other children in the room with him, he became overstimulated and incapable of participating in a classroom activity, and she recommended behavioral therapy.

22. The regional center arranged for Myah Gittelsohn, Psy.D. to conduct a psychological evaluation of Student to determine his current levels of functioning and to confirm the autism diagnosis. Dr. Gittelsohn is a licensed and well-qualified psychologist with extensive training and experience in assessing very young children with developmental delays and autism. She has conducted psychological evaluations of thousands of children between the ages of three and four years. Dr. Gittelsohn testified at hearing; her demeanor was professional, and her testimony was very informative and persuasive. Although Dr. Gittelsohn is not an educator, her opinions regarding Student's deficits in communication, adaptive behavior and social and emotional skills were given

⁴ The Lanterman Act, beginning at Welfare and Institutions Code, section 4500 *et seq.*, provides assistance to persons with certain developmental disabilities. Services under the Lanterman Act are administered locally by private non-profit entities called "regional centers."

great weight.

23. Dr. Gittelson was not overly concerned about her need to redirect Student during testing, as preschoolers generally have a difficult time sitting through psychological tests. However, she observed Student at Little Lambs, and saw that Student needed significantly more verbal and physical redirection than his peers to pay attention and participate in the classroom, and that his need for attention frequently took the teacher away from the other students.

24. On August 10 and 17, 2015, Dr. Gittelson administered standardized tests of intelligence and adaptive behavior. During testing, Student avoided eye contact, rarely showed an interest in others, paid limited attention to non-preferred tasks, was noncompliant, was fixated on certain shapes, and disregarded pretend play materials. Student scored in the average range in visual cognitive ability, but in the borderline range in verbal comprehension skills. Dr. Gittelson's assessment of Student was generally consistent with that of Mr. Esparza. Student had delays in development of some adaptive skills, strong functional preacademic skills, and very low social and behavioral functioning.

25. Dr. Gittelson observed that Student demonstrated knowledge of rote information, but had difficulty engaging in conversation to use that knowledge. Student had a large vocabulary and could form sentences, but used scripted statements, perseverated on preferred topics, and generally failed to respond to greetings or questions without prompting. Dr. Gittelson found that Student did not demonstrate adequate speech, language and listening skills to communicate in his environment. She explained to Mother that Student had autism, rather than ADHD. Children with ADHD are impulsive, but have social interactions, share toys and seek out other students, whereas children on the autism spectrum lack joint attention and do not engage with others.

26. After the August 17, 2015, test session, Mother contacted District to request that Student again be evaluated for special education. She told District that Student's maladaptive behaviors had increased and that he now needed one-on-one assistance in the classroom.

27. Dr. Gittelsohn's final assessment report, dated August 2015, concluded that Student had moderate autism, recommended that Parents share her assessment results with District and the regional center, and recommended further assessment in the area of behavior to determine if Student needed behavior intervention services. Parent provided District with a copy of Dr. Gittelsohn's report in August 2015.

28. On September 1, 2015, Student began attending an intensive early childhood treatment day program for children with behavior difficulties at Pediatric Minds. Parents were responsible for co-payments to Pediatric Minds for the program.

29. In September 2015, District program specialist Allyson Steiner-Dowling contacted Mother to arrange new assessments of Student's social and emotional functioning, adaptive functioning and speech and language skills. Ms. Steiner-Dowling testified at hearing that she understood from a telephone conversation with Mother that Mother wanted to delay the assessments until Student had completed his treatment program. However, Ms. Steiner-Dowling did not obtain written confirmation from Mother, and the District assessors conducted their assessments during Student's treatment at Pediatric Minds.

30. On September 8, 2015, District school psychologist Sonya Davis conducted a behavioral observation of Student at Pediatric Minds. Student was alone with a therapist in a small room, and required multiple prompts to move between tasks. Student responded to the therapist's inquiries but did not make eye contact.

31. Ms. Davis has a master's degree in school psychology and is a credentialed school psychologist. She has conducted psychoeducational assessments of elementary

and middle school children since 2008, and began assessing preschoolers in 2015. Ms. Davis exhibited good recall of her observations of Student, her conversations with Mother and Student's treatment coordinator at Pediatric Minds, and her administration of test measures to Student. She was familiar with District's preschool special day classrooms. Her opinions concerning Student's social emotional functioning and adaptive functioning, his educational needs, and an appropriate placement for Student were given significant weight.

32. On October 14, 2015, Student's treatment coordinator at Pediatric Minds, Alex Alvarado, completed a District questionnaire about Student's functioning in the day program. Ms. Alvarado reported that Student wanted to interact with peers, but needed constant supervision during peer interactions as he engaged in crying, throwing things, shouting, pushing, hitting and biting. Student was unable to independently follow program routines, or follow program rules, and required adult supervision to participate in program activities. Student had intelligible speech, and used words and gestures to communicate, but was not able to communicate his needs clearly when he was distressed. Ms. Alvarado indicated that Student needed limited distractions and received one-on-one direction from his therapist.

33. On October 26, 2015, Ms. Steiner-Dowling prepared a formal assessment plan for District's assessments. Mother signed the assessment plan that same day.

34. On October 30, 2015, District speech pathologist, Jose Dax Conde, assessed Student's speech and language skills at the District office. Mr. Conde is a licensed and exceptionally well-qualified speech language pathologist, and was the only speech language pathologist to testify. His demeanor was professional, and his recall was generally good. Mr. Conde's testimony concerning his assessment of Student was thorough, informative and very persuasive. His opinions of Student's communication and language needs were given significant weight.

35. Mr. Conde established a good rapport with Student during administration of standardized tests. Student displayed good attention for a span of 10 minutes at a time, exercised fair but not perfect impulse control when handling test materials, had good frustration tolerance and needed minimal redirection to remain on task. Student perseverated on a game he saw on a shelf, but Mr. Conde was able to redirect Student to the test materials. Student's receptive and expressive language skills were average.

36. On November 6, 2015, Ms. Davis conducted another observation of Student at Pediatric Minds. Student transitioned well between games with his therapist, but when a peer was introduced to the game, Student screeched loudly and left the area multiple times before he calmed down. Student participated in the game with the therapist's supervision, but did not speak to or make eye contact with the other child.

37. Ms. Davis completed behavior rating scales based on her observations and the reports of Mother and Ms. Alvarado. The resulting areas of concern were consistent with those observed by and reported to the IEP team by Mr. Esparza on April 2, 2015. Student displayed: an unusually high number of disruptive, impulsive and uncontrolled behaviors (hyperactivity); difficulty adapting to changing situations and a long time to recover from difficult situations (adaptability); withdrawal, pessimism and sadness (depression); difficulty interacting with tact and in a socially acceptable manner (social skills); engagement in strange or odd behaviors and disconnect from his surroundings (atypicality); difficulty maintaining necessary levels of attention (inattentiveness) and unwillingness to join group activities (withdrawal). Student displayed average communication skills, and above average cognitive skills, but below average ability to cope independently with his environment (adaptive behavior) and delayed functional performance in a social setting.

38. In her assessment report, Ms. Davis concluded that Student displayed characteristics often associated with autism that adversely affected Student's

educational performance. These characteristics included an inability to use oral language for appropriate communication, withdrawal, an obsession with maintaining sameness, preoccupation with objects, resistance to controls, and self-stimulating or ritualistic behavior. She recommended that Student receive the following accommodations: eye contact during verbal instruction, clear and concise directions; consistent daily instructions, complex directions broken into steps, multiple commands avoided, comprehension before beginning a task ensured, instructions repeated in a calm manner as needed, and multi-modal forms implemented when teaching new information.

39. On or about November 7, 2015, Mr. Conde observed Student at Pediatric Minds. Student did not greet others in the room, needed prompts to make verbal requests, had poor impulse control and was told repeatedly to “wait,” ignored a familiar peer during a turn-taking game, needed prompts to take turns, and required close supervision during clean-up activities. Mr. Conde found that Student had emerging skills in requesting and responding to peers, but displayed conduct indicating that Student had difficulty understanding others, expressing himself in social settings, working in a small group and developing peer friendships.

40. Mr. Conde concluded that Student had average receptive and expressive language skills, but exhibited limited ability to use language in a social context, particularly in interacting with peers and turn taking. Student’s language abilities adversely affected Student’s educational performance, and Mr. Conde concluded in his report that Student was eligible for special education as a student with speech language impairment.

41. On December 9, 2015, Parents had Student evaluated for occupational therapy at Pediatric Therapy Network.

December 14, 2015 IEP Team Meeting

42. District convened an IEP team meeting on December 14, 2015. Mother, Student's grandmother, a District administrator, Ms. Davis, and program specialist Ms. Steiner-Dowling attended the meeting. Mr. Conde was out of town for several weeks, and the team understood that another meeting would be held upon his return to address his report in detail and develop annual goals in the area of speech and language. No general education teacher attended the meeting.

43. The team reviewed the results of Student's social/emotional functioning and adaptive behavior assessments, and concluded that Student's autism interfered with his access to education. The team found Student eligible for special education as a student with autism. Based on Mr. Conde's report, which was provided to team members, the team also found Student to have a secondary eligibility of speech and language impairment.

44. Ms. Steiner-Dowling proposed annual goals to address Student's areas of need in communication and behavior, including learning to: follow classroom rules and routines (communication); attend to and engage in adult directed activities (social/emotional/ behavioral); identify emotions (social/emotional/behavioral); follow directives to transition away from preferred activities or to unexpected activities (social/emotional/behavioral); and display appropriate turn-taking in activities with a small group of adults and peers (social/emotional/behavioral). Each goal included criteria for measuring progress, and had a series of measurable short-term objectives. Short-term objectives were measured by demonstrations of ability in the preschool setting. For example, Student's communication goal required Student, at fixed periods of time, to demonstrate the ability to follow classroom rules and routines with a visual schedule with 40 percent, 50 percent and 60 percent accuracy, and ultimately, with 70 percent accuracy. A behavior goal required Student to attend to and engage in adult

directed activities without abandoning or receiving more than three prompts in four out of five trials, with short-term objectives of one out of five trials, two out of five trials, and so on. Student's progress would be measured by teacher observation, speech provider observation, and data collection.

45. The IEP team adopted the proposed goals. The team also adopted the accommodations (such as eye contact during instruction, simplifying complex directions) recommended by Ms. Davis.

46. The team considered a variety of placement options for Student. All team members agreed that Student needed constant adult supervision. The District team members agreed that the least restrictive environment for Student was a small special day classroom with limited distractions, a low student to adult ratio, and an embedded curriculum for behavior and communication skills. District's special day preschool classroom for high-functioning students with autism used a curriculum specifically designed to teach behavior and pragmatic communication skills to children with autism, and provided a language rich environment with opportunities for the students to practice language and social skills throughout the school day. District's special day preschool classrooms provided multi-modal learning experiences designed to support students with autism, such as a highly structured environment, visual schedules, tasks broken down into steps, repetition and reinforcement of learned concepts and positive behavior reinforcement. Preschool curriculum was focused on classroom readiness skills needed by Student, such as attending to group instruction, cooperative play, following classroom routines, adapting to a schedule, and turn-taking. Students in the special day class would interact with typically developing preschool peers on the same campus during recess, lunch, assemblies and campus activities.

47. Mother expressed her opinion that Student was functioning academically at kindergarten and first grade levels, and she believed that Student would not be

challenged intellectually in a special day class for children with disabilities. Mother wanted to discuss a general education placement with one-on-one assistance to address Student's behaviors. Mother was concerned about class size, as she did not want more than five students in the classroom. District team members assured her that although a preschool special day class had eight or more students, the adult to student ratio was not over 1:5 because an extra adult was added to the class when there were more than five students. The State of California ran general education preschool classrooms on some District elementary school campuses, and there were Head Start preschools within District boundaries, but nobody who was familiar with those programs was present at the meeting.

48. The District team members informed Mother that Student's ability to function in a classroom, and whether he needed one-on-one assistance, would be assessed when he transitioned to a classroom setting, and that such an assessment would not yield useful results if conducted while Student was in a clinical day treatment program. Ms. Steiner-Dowling and Ms. Davis also explained that Student had been attending daycare and general education preschools without the benefit of a credentialed special education teacher, special education curriculum, or related services, and opined that the small size of the special day class, the structure and visual supports, the embedded social and communication curriculum, and the low student to adult ratio would be sufficient to meet Student's behavior needs and permit him to make progress. District's intention to conduct a functional behavior assessment was documented in the IEP notes.

49. Mother did not inform the December 14, 2015 IEP team about the December 9, 2015, occupational therapy assessment. Mother testified that she told the IEP team that Student had been assessed for occupational therapy, and that Pediatric Therapy Network recommended occupational therapy for Student's sensory processing.

Neither Ms. Davis nor Ms. Steiner-Dowling recalled such a conversation. The extensive and contemporaneous December 14, 2015 IEP notes do not reference an occupational therapy assessment or discussion, despite detailed documentation of proposed behavioral assessments, and Mother was not credible on this point.

50. The meeting was adjourned until Mr. Conde's return.

January 15, 2016 IEP Team Meeting

51. On January 15, 2016, District reconvened the IEP team meeting to review Student's speech and language assessment results. The meeting was attended by Mother, speech pathologist Mr. Conde, and program specialist Ms. Steiner-Dowling. No general education teacher was present.

52. Mr. Conde went over his report, and proposed two annual goals in the areas of pragmatics to address Student's need to learn appropriate language skills to communicate with his peers. The goals were: (i) to initiate appropriate requests or verbal protests to peers, and (ii) to respond appropriately in sentences to peer requests. The goals included criteria for measuring progress, and were adopted by Mother and District team members as Student's annual goals.

53. Mr. Conde recommended that Student receive 30 minutes of speech therapy, four times per month, provided in a small group setting where Student could practice appropriate communication skills with his peers under the guidance of the speech therapist in accordance with his goals. Mr. Conde opined that this level of speech services would allow Student to make progress on his communication and speech goals.

54. The team again discussed the least restrictive placement for Student. Mother expressed that she was uncomfortable enrolling Student in a special day class because she believed that the academics presented would be below grade level. Mr. Conde and Ms. Steiner-Dowling indicated that District's offer was a special day

preschool class with other high-functioning students with autism at Emerson Elementary School. That class had 12 students, five of whom were mainstreamed into the State-run general education preschool on the same campus. The special day class was taught by a credentialed special education teacher, assisted by another adult trained in working with children with autism. The general education preschool class, and the elementary school campus, provided students in the special day class with opportunities to interact with typical peers under the supervision of the special day classroom staff. Twenty percent of Student's three-hour preschool day would be spent with typical peers in this way.

55. Mother insisted that Student needed a one-on-one aide, and had the cognitive ability to excel in a general education classroom with behavior support. Mother could not get answers to her questions from a general education teacher. District declined to offer a general education preschool placement. Instead, District team members told Mother that if she did not want to consent to the IEP, she could independently investigate enrolling Student in two local general education preschool programs: Head Start, which had large classes with a mix of typically developing peers and children with disabilities, or Southern California Health and Rehabilitation Program (SCHARP), an intensive day treatment program for preschool children with significant behavior challenges. Ms. Steiner-Dowling expanded on the discussion of Student's ability to function in a classroom and stated that District would conduct a functional behavior assessment, which looked at antecedents and consequences of behavior in a particular setting, when Student was enrolled in a classroom setting.

56. Mother again failed to inform District that Student had been assessed for occupational therapy by Pediatric Therapy Network. Instead, she told the team that Student had an aversion to touching certain items, such as eating utensils, and requested an occupational therapy assessment. District team members told Mother that a school-based occupational therapy assessment would be done as soon as Student

began attending school.

57. Mother requested that the behavior strategies that had been effective for Pediatric Minds during the treatment program be written into the IEP. Mr. Conde and Ms. Steiner-Dowling agreed to look at any information provided by Pediatric Minds, and to convene an IEP team meeting to review Pediatric Minds' strategies and recommendations. They also agreed that another IEP team meeting would be convened 30 days after Student enrolled in District preschool to review Student's performance and adjust goals as necessary.

58. District asked Mother to view the Emerson classroom offered. Mother initially resisted due to the class size, and Ms. Steiner-Dowling told Mother that she could also look at a smaller special day classroom at McKinley Elementary School, although District was offering the Emerson classroom on the same campus as the State-run general education preschool. District team members acknowledged Mother's concerns about class size and curriculum, and suggested several ways in which Parents could obtain more information on the offered programs before consenting to the IEP, including: placing Student in the offered placement on a trial basis, convening an IEP to include the special day class teacher to discuss strategies to meet Student's needs before actual attendance began, and/or having District and classroom staff coordinate with Pediatric Minds on strategies and methodologies that had proven effective for Student in treatment.

59. The audio recording of the January 15, 2016 IEP team meeting established that, with the exception of general education placements and supports, the District team members carefully and thoroughly discussed Student's problems with Mother, explained their reasoning and opinions with her, and agreed to reconvene after Mother had an opportunity to observe two special day classrooms with high functioning autistic preschool students to reconsider District's offer of placement. At that meeting, Ms.

Steiner-Dowling and Mr. Conde expressed opinions about what placement and services constituted a FAPE for Student, but demonstrated open minds about changing or revising those opinions. However, virtually no information was provided concerning general education placements, and Mother's attempts to discuss Student's integration into a regular education classroom with behavioral aide support were rebuffed, in part because District had limited general education preschool options available.

60. District's offer of FAPE at the January 15, 2016 IEP team meeting was placement in a preschool special education day classroom, with 80 percent of Student's school day in general education and 20 percent in regular education settings, for three hours per day, five days per week, and 30 minutes per week of speech therapy in a small group, with 120 minutes per month. The January 15, 2016 IEP included the accommodations discussed and adopted at the December 14, 2015 IEP team meeting (such as maintaining eye contact during verbal instruction, breaking down directions into simple steps, multi-modal teaching, checking for comprehensions, providing visual and auditory clues), and the annual communication, behavior, and pragmatics goals. Although not specified in the IEP document, team members, including Mother, understood that the preschool special day class offered was at Emerson, and the IEP did provide for transportation. Ms. Steiner-Dowling and Mr. Conde expressed a willingness to reconvene after Mother's observations to "discuss" the offer of FAPE and "determine" or "agree on" appropriate placement, which statements conveyed a willingness to change the offer of FAPE based on new information, and the need to obtain parental consent to the IEP prior to implementation of services.

61. At the close of the meeting, District asked Mother to sign a form excusing the general education teacher from the IEP team meeting. Ms. Steiner-Dowling told Mother that a general education teacher was not required at an IEP meeting for a preschool student, implying that the excusal form was just a formality. Parent signed the

excusal form.

62. Mother did not inform the January 15, 2016 IEP team that Student had recently begun receiving in-home behavior intervention services and supervision by Pediatric Minds. Mother did not inform the January 15, 2016 IEP team, or District at a later date, that she intended to unilaterally place Student at Little Lambs. Little Lambs had agreed to re-enroll Student if he was accompanied by a one-on-one behavior aide, and Mother was in the process of changing Student's in-home behavioral services to school-based services at Little Lambs.

63. After the January 15, 2016 IEP team meeting, Parents received the Pediatric Therapy Network occupational therapy report. Parents did not provide a copy to District.

64. In February 2016, Student left the Pediatric Minds treatment program, and began attending Little Lambs. He was accompanied by a behavior aide from Pediatric Minds for three to four hours in the mornings, and was without an aide in the afternoons. Student attended Little Lambs from 7:00 a.m. to 4:00 or 5:00 p.m., or approximately 10 hours per day, three days per week. In February 2016, there were 12 children at Little Lambs, ages two to six years. There was one teacher and one aide, for an adult to student ratio of 1:6.

65. At Little Lambs, Student's behavioral incidents were less frequent and shorter in duration during the mornings with the aide's assistance. Student was aggressive with the other children in the afternoons, when he would bite, hit, and slap the other children and tantrum for up to 30 minutes if things did not go his way. As spring 2016 progressed, Student's ability to sit still in class decreased, and Student's ability to communicate deteriorated, with Student often giving nonsensical responses to inquiries. Director Davis believed that Student was acquiring rote knowledge, but did not understand what he was learning. She believed that Student needed constant

repetition and reinforcement to learn, and constant prompting in order to function in a typical classroom or social setting. Little Lambs informed Mother that it would not accept Student for the 2016-2017 school year.

66. In February 2016, Mother observed two District preschool special day classrooms. Mother observed the classroom at Emerson Elementary School for an hour and a half. The class had a teacher and two aides. Mr. Conde was there to work with the students on communication skills. The Emerson teacher told Mother that Student would not be taught advanced academics, and Mother concluded that the Emerson special day class was therefore also inappropriate for her son. Mr. Conde told Mother that general education preschool classes had 15 to 30 students, and Mother decided that general education classrooms would provide too much distraction for her son.

67. Mother brought Student to McKinley Elementary School, and the teacher let him participate in class for an hour. Mother thought the school and the classroom were fine, and Student seemed to do well, but Mother felt that the academic level was too low, as the class only taught one new letter, shape and number per week. The teacher told Mother that the curriculum could not be changed for one child, and Mother decided that the academic level made the McKinley class inappropriate for her son.

68. Parent did not report her observations to an IEP team before Parents filed a due process hearing request with OAH on March 11, 2016.

Student's Behavior Supervisor

69. The supervisor of Student's Pediatric Minds behavior aides, Haydee Del Valle, testified at hearing. Ms. Del Valle received her Board Certified Behavior Analyst certification in 2010, and has a master's degree in applied behavior analysis. She has extensive experience in the field of behavior intervention, including supervision of behavior aides for another school district from 2006 through 2011, and supervision of behavior programs for young children since 2011. She is not a credentialed teacher, and

did not attend any IEP team meetings for Student, but she was very familiar with Student and his behaviors in the Little Lambs program from data taken by the Pediatric Minds behavior aides for Student's treatment plan. However, her testimony was restricted to Student's behavior after the January 15, 2016 IEP team meeting, and was of limited relevance.

70. Under Ms. Del Valle's supervision, Student was learning to identify emotions, coping strategies, cooperative play, initiating peer interaction, tolerating waiting, turn taking, sharing, and reduction of aggressive behaviors. These are essentially the same skills targeted by Student's goals in the IEP of January 15, 2016. Since February 2016, Student had made slight progress, and had less emotional meltdowns, but still required prompting to sit still, initiate conversation, or participate in activities. Ms. Del Valle opined that Student needed extra adult support in the classroom, and exposure to typical peers to model language and social interaction skills. She opined that Student would not be successful in a general education class of 15-20 children, as he had meltdowns in a smaller environment even with one-on-one support. Ms. Del Valle had no opinion on Student's academic level, as her aides focused on behavior and not academics. She did comment that Student had the same vocabulary as his age level peers, but was not able to comment like them during play.

Reimbursement

71. Parents seek reimbursement for the costs of a privately provided preschool education. Parents paid Little Lambs \$300 per week for full-day preschool and after-hours daycare from April 13, 2015 through June 19, 2015. Parents have paid Little Lambs \$225 per week for part-time (3 days per week) preschool and after-hours care from February 2016.

72. Parents seek reimbursement for medical co-payment costs associated with Student's treatment in the Pediatric Minds day program at \$15 per day, for a total of

\$810. Parents also seek reimbursement for aide services not covered by medical insurance of \$360 per day from January 8, 2016 through February 9, 2016, for a total of \$8,820.

Prospective Placement

73. Student seeks prospective placement for the 2016-2017 school year at Center for Learning Unlimited (Center), a private and nonpublic school for students with social, emotional and behavioral challenges. Student has been approved for admission in September 2016 if he is accompanied by a one-on-one aide.

74. Center has a total of 28 students, and has never had a preschool student. Center consists of three classrooms: an elementary school classroom, a middle school classroom, and a classroom of young adults from high school through 22 years of age. Each classroom has a teacher, and one or two instructional assistants. Center has an occupational therapy center on campus, and has an occupational therapist and speech pathologist on campus several days each week. Any behavioral assistance needed by a student must be provided by an outside nonpublic agency.

75. Center's elementary classroom teacher for 2016-2017 has an expired special education credential, and has never taught a preschool student. The elementary school classroom for 2016-2017 has one third grade student, and three fifth and sixth grade students. Three of the students have autism, one is intellectually disabled, and one has an anxiety disorder. Three of the students have behavior aides. Each student sits at an individual learning station, and receives an individualized curriculum at their academic level. Elementary students do not interact with the middle school or young adult students. There are no non-disabled peers on campus. A placement at Center would isolate Student from same-age peers, provide no typical peers for modeling opportunities. His teacher would be focused on non-kindergarten curriculum with four other students for 80 percent of instructional time. Center does not provide a preschool

environment, and Student would not be able to work on any of his social and behavioral goals, which require him to demonstrate skills in a preschool setting.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁵

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) et seq.;⁶ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 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) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on all issues.

5. An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031 at p. 1041 (*Fuhrmann*).) Whether a student was denied a FAPE is ultimately evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Adams*, 195 F.3d at 1149.)

ISSUE 1: TIMELINESS OF ASSESSMENT AFTER PARENT REQUEST ON DECEMBER 1, 2014

6. Student contends that District denied him a FAPE by failing to timely assess him for special education eligibility after Mother's December 1, 2014 request. District concedes that the assessment (which was not completed until February 2015 after District prepared its January 28, 2015 assessment plan) was untimely, and that any agreement to delay assessment was not documented. However, it argues that the delay did not result in any loss of educational opportunity because Parents ultimately did not consent to provision of special education services.

7. When a child is referred for assessment for special education or related services, a proposed assessment plan shall be developed and given to the parent or guardian within 15 calendar days of the referral, not counting calendar days between the student's regular school sessions or terms or calendar days of school vacation in excess of five school days, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a) and 56321, subd. (a).) In the case of school vacations, the 15-day timeline shall recommence on the date that the student's regular school days reconvene. (*Ibid.*)

8. When a child is referred for an initial assessment, an IEP team meeting must be held within 60 days of receiving parental consent to such assessment to determine the child's eligibility. (20 U.S.C. § 1414(a)(1)(C)(I); Ed. Code, § 56043, subd. (c).)

9. The weight of the evidence established that District received Mother's request for assessment on December 1, 2014. There was no evidence of a written agreement to delay assessment, yet District did not prepare an assessment plan until January 28, 2015, or 57 days after the request, and well beyond the 15 days mandated by statute. Even taking into account a typical winter break of two weeks (14 days) in December 2014, as no evidence of District's school calendar was offered, the assessment

plan was untimely presented to Mother 43 days (57 days less 14 days) after her assessment request.

10. Mother promptly responded to District's January 28, 2015 request for consent to assess, and it is a reasonable inference that Mother would have promptly provided consent to assess in December 2014 had an assessment plan been presented within 15 calendar days of her request, or by December 16, 2014. Even allowing for a two-week winter break, District should have convened an IEP team meeting to review its assessments of student within 74 days (60 days plus 14 days) of Mother's consent to the assessment plan on, or by March 1, 2015. However, District failed to hold an IEP team meeting until April 21, 2015, which constituted a procedural violation of the IDEA and California special education law. Had District timely reviewed the assessments and found Student eligible for special education, it would have been required to develop an IEP for Student within 30 days, or by March 31, 2015.

11. A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033 (*Park*).) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

12. As discussed at Issue 2, below, Student should have been found eligible for special education services at the April 21, 2015 IEP team meeting, and District's affirmative defense that no violation occurred because Parents declined the initial provision of special education services fails. Accordingly, the failure to timely conduct and review Student's assessments resulted in a deprivation of educational benefits from

March 31, 2015 to April 21, 2015.

13. Student met his burden of proving by a preponderance of the evidence that District denied him a FAPE by failing to timely assess and review assessments after Parents' request on December 1, 2014. Student prevailed on Issue 1.

ISSUE 2: ELIGIBILITY DETERMINATION AT APRIL 21, 2015 IEP TEAM MEETING

14. Student contends that District denied him a FAPE by not finding him eligible for special education at the April 21, 2015 IEP team meeting. District argues that it found Student eligible, but that Parents declined initiation of special education and related services.

15. Eligibility for special education requires a two-pronged analysis. A student is eligible for special education if he or she is a "child with a disability," and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability that cannot be met with modification of the regular instruction program, and related services that may be required to assist the child to benefit from the specially designed instruction. (20 U.S.C. § 1401 (29); Ed. Code, §§ 56031, subd. (a).)

16. Under the IDEA the term "educational benefit" is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) In light of the testimony, this is particularly important for preschoolers, who are learning foundational, pre-academic, or "learning to learn," skills, such as sitting in a chair or at a desk, attending to group instruction, following instructions and classroom rules, following a schedule, taking turns and cooperative play.

17. The decision as to whether or not the assessment results demonstrate that the degree of the child's impairment requires special education shall be made by the IEP team, including the child's parents. (Ed. Code, § 56342.5.)

18. California regulations define the disability categories under which a student is eligible for special education and related services as an individual with exceptional needs. (Cal. Code Regs., tit. 5, § 3030). The eligibility category of "other health impairment" includes a child exhibiting limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment due to a chronic or acute health problem such as attention deficit hyperactivity disorder, and adversely affects the child's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

19. Student was a child with a disability at the time of the April 21, 2015 IEP team meeting, and met the first prong of eligibility for special education. District's February 2015 psychoeducational assessment results demonstrated that Student exhibited a heightened alertness to environmental stimuli that resulted in limited alertness with respect to the educational environment due to chronic ADHD that adversely affected Student's educational performance. Mr. Esparza's alteration of the eligibility conclusion at the end of his report does not negate the substantial evidence that Student's disability had an adverse effect on his education in the areas of school behavior and socialization. Mr. Esparza's professional and uncontradicted opinion was that, on the basis of the psychoeducational assessment results, Student met the criteria for special education eligibility under the disability category of "other health impairment" at the time of the April 21, 2015 IEP team meeting.

20. Student also met the second prong of the eligibility determination, as he needed more than modification of the general education curriculum because of his disability. Student had been asked to leave multiple regular education settings, where

his disability manifested as an inability to communicate and aggressive behavior towards his peers, as well as an inability to follow directions and classroom rules. Mr. Esparza's uncontradicted professional opinion established that in April 2015, Student exhibited behaviors and adaptive functioning deficits that required special education and related services that could not be accomplished with simple modification of a regular school program. Accordingly, Student was eligible for special education and related services.⁷

21. District now takes the position that it found Student eligible for special education and related services, but Parents declined implementation of the IEP. A school district is not in violation of the requirement to make a FAPE available if the parent refuses to consent to the initial provision of special education and related services. (See 34 C.F.R. § 300.300(b)(3)(ii); Ed. Code, §56346, subd. (c)(i).) However, this affirmative defense is inapplicable here, as the evidence established that District did not find Student eligible for the provision of special education and related services. The April 21, 2015 IEP expressly states that the IEP team found Student ineligible for special education. Therefore, as discussed in more detail at Issue 4, Parents did not withhold their consent to the initial provision of a FAPE, as no FAPE offer was made in the April

⁷ Whether Student should have been qualified under the disability category of "other health impairment" or "autism" is immaterial. The IDEA does not concern itself with labels, but with whether a student is receiving a free and appropriate education. (*Heather S. v. Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055; *see also* 20 U.S.C. § 1412(a)(93)(B) ["Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter."].)

21, 2015 IEP.

22. Student met his burden of proving by a preponderance of the evidence that District denied Student a FAPE by failing to find him eligible for special education and related services at the IEP of April 21, 2015. Student prevailed on Issue 2.

ISSUE 3: PROCEDURAL VIOLATIONS AT APRIL 21, 2015 IEP TEAM MEETING

Issue 3(a) - Appropriate Goals

Issue 3(b) - Consideration of Parental Input

23. Student contends that District committed multiple procedural violations at the IEP team meeting of April 21, 2015, specifically by failing to draft measurable annual goals and failing to consider Parents' input. District disagrees.

24. An IEP must detail, in relevant part as to goals, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, and a statement of the special education and related services that are to be provided to the student to meet those goals. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).) The statement of measurable annual goals must be designed to: (1) meet the pupil's needs that result from his or her disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

25. The IEP must include "appropriate objective criteria, evaluation

procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved,” and a statement of how the student’s progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).) An examination of an IEP’s goals is central to the determination of whether a student has received a FAPE. In *Adams*, the court stated: “[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit.” (*Adams, supra*, 195 F.3d at p. 1149.)

26. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) The parents’ right to be involved in the development of their child’s educational plan is among the most important of procedural safeguards. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child’s problems, attends the IEP meeting, expresses disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

27. Student had behavior and communication needs that resulted from his disability, and he needed goals to target the skills that would enable him to be involved in and make progress in the general curriculum. As to goals, Student met his burden of proving by a preponderance of the evidence that District’s failure to offer an IEP on April 21, 2015 included the failure to offer appropriate annual goals and denied Student a FAPE. Student prevailed on Issue 3(a).

28. Although District denied Student a FAPE by failing to offer eligibility and goals at the April 21, 2015 IEP team meeting, the evidence demonstrated Parents were informed of Student's problems, attended the IEP meetings, expressed disagreement regarding the IEP teams' conclusions, and requested revisions in the IEP. Both parents attended the April 21, 2015 IEP team meeting. Parents were informed of assessment results and Student's identified educational needs, discussed with the team Student's history of behavioral and language challenges, and requested that Student be placed in a classroom where he could access kindergarten and first grade academics. Parents not only had an opportunity to disagree with the IEP team's initial recommendation, their disagreement with a proposed special day class placement resulted in a change of the IEP, correct or not, to find Student ineligible for special education.

29. Student did not prove that Parents' concerns were not heard and considered by the IEP team. District prevailed on Issue 3(b).

ISSUE 4: APRIL 21, 2015 IEP OFFER

Issue 4(a) - Appropriateness of Services Offered

Issue 4(b) - Placement in Least Restrictive Environment

30. Student contends that he was substantively denied a FAPE because he was not offered special education and related services to meet his educational needs, or placement in the least restrictive environment, by the IEP of April 21, 2015. District contends that its failure to offer Student a FAPE was not a substantive violation because Parents did not consent to the initial provision of special education and services.

31. District failed to make a FAPE offer in the IEP of April 21, 2015, although Student was eligible for special education and related services. District's affirmative defense, that Parents rejected the initial offer of services, fails because District did not make a formal, specific offer to Parents at the April 21, 2015 IEP team meeting. District

did not offer Student an individualized program of appropriate services, or placement, designed to allow Student to make educational progress under the *Rowley* standard, which failure constituted a substantive denial of FAPE.

32. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, the anticipated frequency, location and duration of services and modifications, an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

33. A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement or services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).)

34. A school district may not dispense with the procedural requirement of a FAPE offer as an empty gesture because it anticipates that the parents will not accept it. "[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate education placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union, supra*, 15 F.3d at p. 1526.) The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in, the district's preferred course of action. (See *Anchorage School Dist. v.*

M.P. (9th Cir. 2012) 689 F.3d 1047, 1055.)

35. Mr. Esparza's testimony that Parents told the April 21, 2015 IEP team that they did not want Student to be eligible for special education services was not credible, and in any event, would not excuse District's failure to document eligibility and an offer of FAPE in the IEP document. Parents wanted special education and related services for their child: Mother initiated the assessment for special education eligibility; Mother provided District with documentation of Student's difficulties in private preschool; Student had been asked to leave multiple daycare and preschool facilities and Parents knew that their child had medical and behavior problems that interfered with his preschool education. However, even if Parents had disagreed with the District's team members on whether Student was eligible for special education, the development of an IEP is a team decision, and if the team members do not agree it is the school district that is ultimately responsible for ensuring that a student is offered a FAPE. (*Letter to Richards*, 55 IDELR 107 (OSEP 2010). District cannot assert Parents' disagreement as an excuse for failing to find Student eligible for special education and related services, or failing to design a program to meet Student's unique educational needs.

36. District did not offer, and Parents did not withhold their consent to, District's initial provision of a FAPE, as no FAPE offer was made in the April 21, 2015 IEP. The failure of District to make an IEP offer was a procedural violation that substantively impeded Student's right to a FAPE and deprived him of educational benefit.

37. Student met his burden of proving by a preponderance of the evidence that District denied him a FAPE by failing to offer appropriate special education and related services in the least restrictive environment in the IEP of April 21, 2015. Student prevailed on Issues 4(b) and 4(c).

ISSUE 5: TIMELINESS OF ASSESSMENT AFTER PARENT REQUEST ON AUGUST 17, 2015

38. Student contends that District denied him a FAPE by failing to timely assess him for special education eligibility after Mother's August 17, 2015 request. District concedes that the assessment was not timely completed, but contends that this error did not result in any loss of educational opportunity.

39. Legal Conclusions 7 and 8 are incorporated herein by reference.

40. The weight of the evidence established that Mother's request for assessment of Student for special education eligibility based on new information was received by District on August 17, 2015. There was no evidence of a written agreement to delay assessment, or of District's calendar of days between the student's regular school sessions or terms or calendar days of school vacation in excess of five school days. District did not prepare an assessment plan until October 26, 2015, 70 days after Mother's request, well beyond the 15 days mandated by statute. District should have prepared and presented an assessment plan to Parents no later than 15 calendar days after Mother's request, or September 1, 2015.

41. Mother signed the October 26, 2015 plan on the same day it was prepared, and it is a reasonable inference that Mother would have signed an assessment plan timely prepared by September 1, 2015 on the same day, starting the 60-day timeline for assessment and IEP team review. Accordingly, District should have convened an IEP team meeting to review the assessments no later than October 31, 2015.

42. It is particularly troublesome that District failed to prepare an assessment plan until October 26, 2015, because District assessors began assessing Student before that date. Ms. Davis observed Student at Pediatric Minds in September 2015, and gathered information from Mr. Alvarado in early October 2015. By preparing the assessment plan and obtaining Mother's consent to assessment on October 26, 2015,

District artificially created the illusion of statutory compliance with the 60-day timeline by convening an IEP team meeting on December 14, 2015 to review the assessments. In fact, District took approximately 120 days from Mother's request to convene a review of just one of Student's two assessments. An IEP team meeting was not convened to review the speech and language assessment until January 15, 2016, three months after the assessment plan was signed, and almost six months after Mother's assessment request. District did not timely meet its statutory obligation to assess and review after Mother's August 17, 2015 assessment request.

43. District's delay in conducting assessments and holding an IEP team meeting to review the assessments resulted in a delay in Student being offered the special education and services District had determined that Student required. Accordingly, the delay in conducting and reviewing the assessments deprived Student of educational benefit until such time as a FAPE offer was made, on January 15, 2016.

44. Student met his burden of proving by a preponderance of the evidence that the failure to timely assess and review assessments deprived him of a FAPE from October 31, 2015 through January 15, 2016. Student prevailed on Issue 5.

ISSUE 6: PROCEDURAL VIOLATIONS AT IEP TEAM MEETINGS OF DECEMBER 14, 2015 AND JANUARY 15, 2016

Issues 6(a) and (b) – Required Attendees

45. Student contends that District did not have the required members of the IEP team, specifically special education or general education teachers, at the meetings of December 14, 2015 and January 15, 2016. District contends that Mother waived attendance of a general education teacher at the January 2016 meeting. District also contends that the failure to include general education teachers in those meetings did not deny Student a FAPE because Parents were given an opportunity to meaningfully participate in the IEP process, and the absence of required participants did not result in

a loss of educational opportunity for Student.

46. Each meeting to develop, review or revise the IEP of an individual with exceptional needs must be conducted by an IEP team. (Ed. Code, § 56341, subd. (a).) The IEP team must include: one or both of the parents or a representative chosen by the parents; not less than one regular education teacher if the pupil is, or may be, participating in the regular education environment; not less than one special education teacher, or where appropriate, one special education provider to the student; a representative of the school district who is (a) qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of the student, (b) knowledgeable about the general education curriculum, and (c) knowledgeable about the availability of school district resources; an individual who can interpret the instructional implications of assessment results; at the discretion of the parent, guardian or school district, other individuals with knowledge or special expertise regarding the student; and, if appropriate, the student. (20 U.S.C., § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

47. The IEP team must include at least one teacher or specialist with knowledge in the suspected area of disability. (See *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1499.) Any team member who is qualified to interpret the results of an assessment may do so. (20 U.S.C. § 1414(d)(1)(B)(v); 34 C.F.R. 300.321 (a)(5); Ed. Code, § 56341, subd. (b)(5).) An IEP team member may fulfill more than one role if he or she meets the criterion. (See *Z.R. v. Oak Park Unified Sch. Dist.* (9th Cir. 2015) 622 F.Appx. 630, 630-631 (*unpublished*).) However, the Office of Special Education Programs does not interpret the federal regulations implementing the IDEA to permit the IEP team to include only the child's parent and one other required IEP team member. (*Letter to Anonymous* (OSEP, January 24, 2011) 57 IDELR 260 [111 LRP 68372].)

48. The Ninth Circuit has held that "the plain meaning of the terms used in

section 1414(d)(1)(B) compels the conclusion that the requirement that at least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary.” (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2005) 394 F.3d 634, 643 (*M.L.*)). In *M.L.*, the Ninth Circuit found that a general education teacher was required at the IEP team meeting for preschooler in an integrated general education preschool classroom, even though information was available to the team about the teacher’s opinions, and despite the recommendation of district team members for a special education classroom placement. (*Ibid.*) A regular education teacher, to the extent appropriate, must participate in the development, review and revision of the student’s IEP, including assisting in the determination of appropriate positive behavioral interventions and supports, and other strategies for the pupil, and the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the student. (20 U.S.C. § 1414(d)(3)(C); Ed. Code, § 56341(b)(2).)

49. A general education teacher is necessary at the IEP team meeting of a preschool child to advise the team members, including the parents, on the availability, advisability, and supports necessary for a general education placement for the child. California does not mandate compulsory education for typically developing preschool children between the ages of three and six years. (Ed. Code, § 48200.) If, however, the preschool child requires special education and related services, school districts must offer appropriate services along the continuum of services. (20 U.S.C. § 1414(d)(1)(A)(I)(bb); Ed. Code, § 56435.) If a school district does not operate regular preschool programs, the U.S. Office of Special Education Programs (OSEP) has long taken the position that the obligation to provide a special needs preschooler with placement with typical children can be satisfied by providing opportunities for participation in alternative programs, such as (i) preschool programs operated by public

agencies, such as Head Start, (ii) private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children, and (iii) classes for preschool children with disabilities in regular schools. (*Letter to Neveldine*, OSEP (May 28, 1993) 20 IDELR 181.) "The [least restrictive environment] requirements...of the IDEA apply to all children with disabilities... including preschool children with disabilities aged three through five...." (*Dear Colleague Letter*, OSEP (February 29, 2012) 58 IDELR 290.)

50. The failure to include a regular education teacher on the IEP team deprives the team of "important expertise regarding the general curriculum and the general education environment." (*M.L.*, *supra*, 394 F.3d at p. 646; *see also*, *W.G. v. Bd. of Trustees of Target School Dist. No. 2* (9th Cir. 1992) 960 F.2d 1479, 1485 [affirming trial court's finding that school district deprived the student of FAPE by developing an IEP without the input and participation of student's parents and a regular education teacher].) Without a general education teacher, a reviewing court has no means to determine whether an IEP team would have developed a different program after considering the views of a regular education teacher, and a failure to include at least one general education teacher is a structural defect in the constitution of the IEP team. (*M.L.*, *supra*, 394 F.3d at p. 646.)

51. A member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parents and school district agree that the attendance of such a member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. (20 U.S.C. § 1414(d)(1)(C)(i).) A member of the IEP team may be excused from attending an IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related service if (i) the parent and the school district consent to the excusal, (ii) the member submits written input to the team prior to the

meeting for development of the IEP, and (iii) the consent is in writing. (20 U.S.C. § 1414(d)(1)(C)(ii) and (iii).) These procedures are slightly different. An “agreement” to excuse a team member refers to an understanding between the parent and the district. (71 Fed. Reg. 46,673 (Aug. 14, 2006).) The requirements for “consent” are more stringent, requiring the school district to fully inform the parent of all information relevant to the team member’s excusal, in the parent’s native language or other mode of communication, and to ensure that the parent’s understanding that the granting of consent to the team member’s absence is voluntary and can be revoked at any time. (71 Fed. Reg. 46,674 (Aug. 14, 2006).)

52. Neither the IDEA, its implementing regulations, nor California special education law specify the amount of notice that should be given to a parent when an excusal is sought. According to the U.S. Department of Education, the IDEA is intended to provide flexibility in scheduling IEP team meetings, but school districts must give “as much notice as possible.” (71 Fed. Reg. 46, 676 (Aug. 14, 2006).) The Department of Education also cautioned that if a last minute excusal was requested, or if the parent needed additional time to consider the request, the parent had the right to disagree or withhold consent to the excusal and the IEP team meeting could be rescheduled or reconvened. (*Ibid.*)

53. The weight of the evidence established that special education teachers were present at the IEP team meetings on December 14, 2015 and January 21, 2016. Ms. Henry, who attended the December 2015 IEP team meeting, was a preschool special education teacher. Ms. Steiner-Dowling attended the January 2016 IEP team meeting and was a credentialed special education teacher. Both of them were knowledgeable concerning preschool students with autism, and District’s special day preschool classrooms. Their participation in the meetings in the dual roles of representatives of District and special education teachers was permissible. Accordingly, Student did not

meet his burden of proving by a preponderance of the evidence that District denied him a FAPE by failing to include special education teachers in the December 14, 2015 and January 15, 2016 IEP team meetings. District prevailed on Issue 6(a).

54. The weight of the evidence established that no general education teachers were present at the IEP team meetings of December 14, 2015 or January 15, 2016, and that District did not obtain valid parental consent to excuse the absences.

55. Consent to the general education teachers' absences was required because both of these meetings involved a modification to or discussion of Student's placement in a general education preschool program. Student's academic strengths suggested, particularly to Parents, that Student might be capable of accessing the general education curriculum with the appropriate accommodations and supports for his communication and behavior difficulties. Mother expressly inquired about Student's placement in a class with general education curriculum with supports, such as one-on-one aide. The IEP notes document consideration of various regular education settings. Discussion of general education placement, and the accommodations and services necessary to support such a placement, invoked the need for written consent of a general education teacher was not to be present. Contrary to Ms. Steiner-Dowling's representation to Mother, there is no preschool exception to the requirement that at least one general education teacher attend the IEP team meeting. (*M.L.*, *supra*, 394 F.3d at p. 643; see also, *S.B. v. Pomona Unified Sch. Dist.* (C.D. Cal., April 15, 2008) 50 IDELR 72 [108 LRP 22952] ("Congress intended the benefits of the IDEA and its corresponding procedural safeguards to apply to children attending preschool.").)

56. As to Mother's written excusal of the general education teacher at the January 15, 2016 IEP team meeting, District failed to fully inform Mother of all information relevant to the general education teacher's excusal, or ensure Mother's understanding that the granting of consent to the team member's absence was

voluntary and could be revoked at any time. Rather, Ms. Steiner-Dowling presented an excusal form after the meeting had adjourned, misinformed Mother regarding the required attendance of a general education teacher in the development of a preschool IEP, and represented that the excusal form was a meaningless formality. On these facts, the written excusal did not constitute the statutorily required informed consent.

57. At the December 14, 2015 and January 15, 2016 IEP team meetings, Mother had questions concerning the level of academics presented to preschool children in both special education and general education programs. A general education placement and mainstreaming with a one-on-one aide were options Mother wanted the team to consider. District proposed placing Student in a special day classroom with mainstreaming opportunities in a State-run preschool program with typical peers, outside of special education, for 20 percent of Student's school day, but had nobody in attendance who could provide Mother with information on general education preschool opportunities. Mother raised questions regarding the appropriateness of a general education classroom with aide support for Student, and had a procedural right to receive answers from a general education preschool teacher. Instead, Parents were left without information on general education options, and unable to determine whether the program offered was a FAPE in the least restrictive preschool environment. The absence of a general education teacher at these important meetings was a procedural violation that impeded Parents' opportunity to participate in the IEP process, and so resulted in a substantive denial of FAPE.

58. Student met his burden of proving on a preponderance of the evidence that District denied Student a FAPE by failing to include a general education teacher in the IEP team meetings of December 15, 2015 and January 15, 2016. Student prevailed on Issue 6(b).

Issue 6(c) – Consideration of Parental Input

59. Student contends that District did not consider Parents' concerns at the December 14, 2015 and January 15, 2016 IEP team meetings. District contends that Parents were given the opportunity to participate meaningfully in the IEP process.

60. As set forth at Legal Conclusions 57 and 58, District's failure to include a general education teacher in the December 2015 and January 2016 IEP team meetings was a procedural violation that resulted in a substantive denial of FAPE. Mother's concerns regarding general education preschool placement options were not, and could not be, addressed without a general education teacher present.

61. The District team member's attempts to address Parents' other concerns were otherwise laudable, but insufficient to overcome the impediment of Parents' opportunity to meaningfully participate in the IEP process resulting from the general education teachers' absences. The team could not meaningfully discuss all the placement options without the attendance of a general education teacher familiar with the general education programs available to District preschool children with IEP's that could be implemented in a regular education setting.

62. On the basis of teacher absences, Student met his burden of proving by a preponderance of the evidence that District denied him a FAPE by failing to consider Parents' input at the IEP team meetings of December 14, 2015 or January 15, 2016. Student prevailed on Issue 6(c).

Issue 6(d) – Appropriateness of Goals

63. Student contends that the goals offered in the January 15, 2016 IEP were not appropriate because they were not objectively measurable due to a lack of measurable baselines. District contends that the goals appropriately addressed Student's areas of need in behavior, communication and pragmatic language, and that further refinement of Student's behavior goals, if necessary, would have been addressed

at a 30-day review IEP after District had an opportunity to observe Student and conduct an functional behavior analysis in a school setting.

64. Legal Conclusions 24 and 25 are incorporated herein by reference.

65. The weight of the evidence established that Student's goals were appropriate and measurable. There is no dispute that Ms. Davis correctly identified Student's areas of need as behavior and communication. She had done multiple observations of Student in multiple settings, reviewed the psychological assessments by Mr. Esparza and Dr. Gittelsohn, interviewed Mother and Pediatric Minds therapist Mr. Alvarado, administered rating scales of Student's behavior and adaptive functioning to Parent and Mr. Alvarado, and was familiar with Student's abilities and functional skills. Mr. Conde observed Student multiple times and interviewed Mr. Alvarado, and correctly identified pragmatics as an area in which Student demonstrated little or no skill. Student's classroom readiness and pragmatic skills were virtually nonexistent due to behaviors and communication deficits. Student had been expelled from multiple settings and was at the time of the IEP team meetings in therapeutic treatment for behavior and communication, where he failed to acknowledge peers or initiate and maintain conversation. The IEP baselines' lack of quantification resulted from a lack of target skills, and did not render the baselines inaccurate, or the progress on Student's goals unmeasurable.

66. Student's goals were written with appropriate objective criteria, evaluation procedures, and schedules for determining whether his goals were being achieved. Short- term objectives were measured by demonstrations of ability in a classroom setting. Student's progress would be measured in a variety of ways to determine mastery, including teacher observation, speech provider observation, and data collection. In addition, District explained to Mother at the January 15, 2016 meeting that another IEP team meeting would be convened 30 days after Student's enrollment, to

review Student's performance and adjust goals as necessary. The lack of quantified baselines did not render Student's goals incapable of being measured for progress.

67. Student did not meet his burden of proving by a preponderance of the evidence that District denied him a FAPE by failing to include measurable goals in the IEP of December 14, 2015, as completed on January 15, 2016. District prevailed on Issue 6(d).

ISSUE 7: JANUARY 15, 2016 OFFER

Issue 7(a) – Appropriateness of Services Offered

68. Student contends that District did not make a legally sufficient FAPE offer in the January 15, 2016 IEP because the placement offered was merely a suggestion, to be finalized after Mother's observation of two classrooms. District contends that an appropriate placement and appropriate speech services were offered as a FAPE in that IEP.

69. As found at Legal Conclusion 58, Student was denied a substantive FAPE as a result of the absence of a general education teacher at the IEP of January 15, 2016. Parents were not given the information necessary to determine if the program offered in the January 15, 2016 IEP constituted a FAPE. Aside from that flaw, which is fatal to District's offer, Student did not demonstrate that the January 15, 2016 IEP did not constitute a FAPE.

70. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U. S.C. § 1401(9).)

71. 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.*) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.) A school district is not required to maximize the potential of each special education student. (*Rowley, supra*, 458 U.S. 176 at p. 200.)

72. District made a firm offer of FAPE to Student in the January 15, 2016 IEP, including 180 minutes of specialized academic instruction, with 20 percent of Student's time in regular education and nonacademic activities, and four 30-minute speech therapy group sessions per month, with door to door transportation. Numerous aids, services, program accommodations or modifications, and supports specifically intended to support Student and his teachers and classroom staff were included in the IEP. Although not typed into the IEP document, but discussed at the January 15, 2016 IEP team meeting, District team members and Parent understood that District was offering a preschool special day class with high-functioning students with autism and mainstreaming opportunities at Emerson elementary school. That particular class was offered because five of the twelve students were mainstreamed in general education for most or part of the school day, effectively creating a smaller classroom with a lower student to adult ratio, which addressed Mother's concern about a large class. The transportation offer reflected that Student would not be attending his school of residence.

73. Although District members of the January 15, 2016 IEP team characterized

District's willingness to reconvene after Mother's observations to "discuss" the offer of FAPE and "determine" appropriate placement, their statements were intended to convey a willingness to consider Parents' input and change their minds based on new information at a future IEP team meeting, and did not rise to the level of voiding the written offer of FAPE embodied in the January 15, 2016 IEP. A school district is only required to offer a FAPE to a child based upon information known to the IEP team at the time of the meeting. (*Adams, supra*, 195 F.3d at p. 119.)

74. At the end of the January 15, 2016 IEP team meeting, Mother requested another meeting to discuss the specific behavior interventions that would be put into place in the classroom, particularly after the team's consideration of additional information from Pediatric Minds. The agreement to meet again to discuss specific interventions based on new information to be provided by Parents did not prevent District from offering Student a FAPE at the January 15, 2016 IEP on the information then available.

75. Additionally, to the extent Parents wanted more information on the behavior strategies that would be put in place in the classroom, such information is a matter of methodology, and a discussion of methodology does not require a change to the IEP. An IEP is not required to include the particular instructional methodologies that will be utilized in instruction. (71 Fed. Reg. 46,665 (Aug. 14, 2006).) Accordingly, District made a legally sufficient offer in the January 15, 2016 IEP.

76. Student did not demonstrate by the weight of the evidence that the speech and behavior offered in the January 15, 2016 IEP were not appropriate under the *Rowley* standard. Mr. Conde was the only speech pathologist who testified, and he opined without contradiction, at hearing and in the audio recording of the January 15, 2016 IEP team meeting, that the communication goals and speech therapy offered would address Student's need to develop pragmatic skills and allow him to make

educational progress. Both Ms. Davis and Ms. Steiner-Dowling opined credibly at hearing, and more persuasively than the contrary evidence provided by Student, that the communication and behavior goals, in conjunction with the language rich curriculum of the special day class, the training and experience of a credentialed special education teacher and staff, and the accommodations recommended by Ms. Davis and delineated in the IEP, would meet Student's unique communication and behavior needs and allow him to make educational progress.

77. Ms. Del Valle did not offer an opinion on the specific components of the January 15, 2016 IEP, but limited her testimony to Student's lack of success in his current general education, and an opinion that Student would not succeed in a large general education classroom of 15 to 20 children without support. The Pediatric Minds aides supervised by Ms. Del Valle worked with Student on essentially the same skills encompassed in the January 15, 2016 IEP annual goals or addressed in the special day class curriculum: identifying emotions, initiating interaction with peers; responding to peers; coping strategies; cooperative play; tolerating waiting; turn taking and sharing. Although not available to the IEP team, this later evidence lends weight to a finding that the behavior and pragmatics skills identified by District appropriately addressed Student's classroom readiness and the aggressive behavior Student displayed when frustrated and unable to communicate requests or protests.

78. Contrary to Student's assertion, the evidence was not convincing that the January 15, 2016 IEP should have included one-on-one behavioral assistance. Student was working one-on-one with his therapists in a day treatment program, but no service providers from that treatment program testified, and it is unknown if the one-on-one services observed in the day treatment program were provided due to the nature of the therapy chosen, required throughout the entire treatment program day, or specifically required due to Student's behaviors. The opinions of District IEP team members were

persuasive that the behavioral support of a special day preschool classroom would meet Student's needs without additional one-on-one support, including a low student to teacher ratio, embedded behavioral/social curriculum, and the experience of credentialed special education teachers and their assistants in teaching appropriate communication and behavior.

79. Dr. Gittelsohn opined at hearing that it would be "best" if Student had a one-on-one aide in a mainstream classroom, but she was not an educator, had not observed Student's proposed placements, and was unfamiliar with District classrooms. Ms. Del Valle opined that it would be "ideal" for Student to have extra adult support in the classroom, but the *Rowley* standard does not require District to maximize Student's potential. Director Davis testified that one-on-one behavior support allowed Student to integrate better into the general education preschool setting; however, she was not a credentialed teacher or a trained behaviorist, and her opinions on the extent or nature of behavioral support services required to allow Student to receive educational benefit were not persuasive, and were inapplicable to the special education preschool setting. Information based on Student's private preschool performance after February 2015 was not available to the December 14, 2015 or January 15, 2016 IEP teams. Ms. Andrade Mize opined that Student would need a one-on-one aide at Center, but she was not a credentialed teacher or behaviorist and had observed Student for only a few minutes in an unfamiliar setting. Her opinion was also based in substantial part on Student being placed in a classroom with a general education teacher responsible for five kindergarten-to-sixth grade students with documented behavior problems and little time to devote to Student individually. On the other hand, the testimony of credentialed educational professionals Ms. Davis and Ms. Steiner-Dowling was credible and convincing evidence that a preschool special day class for high-functioning preschool students with autism would have embedded behavior supports to allow Student to

access the curriculum and make progress on his behavior and communication goals without the necessity of one-on-one support. Applying the *Rowley* standard, the weight of the evidence established that the January 15, 2016 IEP offered Student appropriate services in the areas of (i) behavior and (ii) speech and language.

80. Mother's opinion that Student required a program with advanced academics was unpersuasive. Mother was not a credentialed teacher, and her testimony that Student was reading at a first grade level, without the support of any evidence that Mother was familiar with first grade reading curriculum, or of standardized testing in that regard, was neither credible nor convincing. More importantly, academics was not an area of need for Student, or a significant part of acquiring classroom readiness skills, and the weight of the evidence did not establish that Student required academic goals or specialized instruction in academics to access the preschool curriculum.

81. Student did not meet his burden of proving that District denied him a FAPE by failing to make a definite offer of FAPE in the January 15, 2016 IEP, or by failing to offer appropriate special education and related services. District prevailed on Issue 7(a).

Issue 7(b) – Placement in the Least Restrictive Environment

82. Student contends that the special day class placement offered in the January 15, 2016 IEP could not meet Student's needs, particularly his need for advanced academics. District contends that Student's placement was appropriate and the least restrictive environment.

83. There was substantial evidence that a special education preschool classroom was the least restrictive environment for Student.

84. In determining the educational placement of a child with a disability a school district must ensure that: (1) the placement decision is made by a group of persons, including the parents, knowledgeable about the child, the meaning of the

evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; (2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; (3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; (4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

85. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and that (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of general education was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's

Syndrome].)

86. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options.⁸ (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

87. Student's only evidence regarding the special day classroom at Emerson was Mother's statement that the teacher told her that the classroom was "not appropriate." Mother was very articulate, but appeared to be basing her opinions on a semantic misunderstanding. Mother firmly believed that Student required advanced academics, and questioned the special day classroom teachers during observation about whether Student would receive kindergarten and first grade academic instruction. The teacher of the Emerson preschool classroom for high-functioning autistic students responded that Student would not be taught advanced academics. Mother's characterization of the teacher's response as stating that the Emerson preschool class was inappropriate for her son appears to be Mother's conclusory opinion that the teacher would not provide the instruction Mother wanted, rather than an accurate

⁸ "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L.*, *supra*, 394 F.3d 634 and p. 640, fn. 7.)

statement of the content of that conversation.

88. Applying the *Rachel H.* factors shows that Student could not have been satisfactorily educated in a regular education environment.

89. As to the first *Rachel H.* factor, the educational benefits of a full-time placement in general education, Student's disabilities related to behavior development and pragmatic language delays interfered with his ability to participate in learning activities that required group instruction and cooperative play, despite his academic strengths. Student needed more support than general education classes and regular academic instruction could provide. Student's educational benefit from regular education classes would be adversely impacted by his behavior and communication delays.

90. As to the second *Rachel H.* factor, the nonacademic benefits of a general education placement, the evidence did not show that Student benefitted socially from general education. Student's attention and communication deficits significantly interfered with his ability to absorb language through casual modeling. Student's behavior in the Pediatric Minds treatment program through the time of the January 15, 2016 IEP, showed that Student did not even acknowledge familiar peers when engaged in an activity with them. The January 2016 IEP team members reasonably concluded that Student would receive little nonacademic benefit from placement in general education.⁹

91. The third *Rachel H.* factor also weighed against a general education placement. A regular classroom placement would have adversely impacted the teacher and classmates, as demonstrated by Student's history of manifesting frustration and the

⁹ Although not available to the January 2016 IEP team, Student did in fact begin to exhibit frustration in Little Lambs' general education preschool setting, despite the assistance of Pediatric Minds' behavior aides for a part of the school day.

inability to communicate by hitting, biting, and otherwise being aggressive with his peers. Director Davis and Dr. Gittelsohn both noted that Student needed constant attention and individualized instruction at Little Lambs that took his teacher away from work with other students in the classroom, to the detriment of the other children in the program. There was no evidence that the fourth *Rachel H.* factor affected the placement decision.

92. Applying the *Rachel H.* factors to the facts, Student could not have been satisfactorily educated solely in a regular education environment. Therefore, the least restrictive environment analysis requires a determination of whether Student was to be mainstreamed to the maximum extent that is appropriate per *Daniel R.R.*

93. Student had identified behavior and communication needs that required special education and related services, including a language-rich curriculum that focused on acquisition of behavior and communication skills. Accordingly, the January 15, 2016 IEP team reasonably limited Student's integration with typical peers to the nonacademic activities of recess, lunch, assemblies and extracurricular activities under the supervision of trained special day classroom staff. Moreover, in the special day class offered at Emerson, mainstreaming in academic classes was also available to high-functioning students with autism, and Student could be offered those opportunities as he learned the social and functional use of language necessary to participate in the general education curriculum. Mainstreaming was not appropriate during Student's speech therapy sessions, and the therapy room or other small group setting was the least restrictive environment for these services.

94. Mother's opinion that Student could not learn in an environment of more than five students was unpersuasive. At the time of the January 15, 2016 IEP team meeting, Student's lack of classroom success had occurred without the support of credentialed special education teachers, a curriculum designed to teach behavior and

communication skills to children with autism, or a classroom specifically designed to address the needs of students with autism, such as visual schedules, structured learning, and curriculum-based opportunities to practice language and socialization skills throughout the school day. Although Mother's observation of the Emerson special day classroom took place after the January 15, 2016 IEP team meeting, Student enjoyed his visit, and there was no evidence he displayed aggressive behaviors as a result of the number of students in the classroom. In addition, the 1:5 adult to student ratio in that classroom was smaller than the 1:6 adult to student ratio at Little Lambs, and the same as that offered in the Center elementary school classroom preferred by Mother. The evidence did not demonstrate that Student could not make progress in a classroom of more than five children with appropriate supports and services.

95. In sum, the Emerson special day class for high-functioning autistic students, small group speech therapy, and mainstreaming with support during lunch, recess, assemblies and campus activities, constituted mainstreaming to the maximum extent possible. Accordingly, the January 15, 2016 IEP offered Student an appropriate placement in the least restrictive environment.

96. Student did not meet his burden of proving by a preponderance of the evidence that the January 15, 2016 failed to offer Student an appropriate placement in the least restrictive environment. District prevailed on Issue 7(b).

ISSUE 8: TIMELINESS OF RESPONSE TO JANUARY 15, 2016 ASSESSMENT REQUEST

97. Student contends that District denied him a FAPE by failing to timely develop and present a proposed assessment plan to assess Student in the areas of (i) functional behavior and (ii) occupational therapy after Parents' request on January 15, 2016. Alternatively, Student contends that District failed to provide prior written notice of its refusal to conduct those assessments. District contends that these issues are premature.

98. Legal Conclusions 7 and 8 are incorporated herein by reference.

99. Special education due process hearings are limited to an examination of the time frame pleaded in the complaint and as established by the evidence at the hearing, and expressly do not include declaratory decisions about how the IDEA would apply hypothetically. (Gov. Code, § 11465.10-11465.60; Cal. Code Regs., tit. 5, § 3089; see also *Princeton University v. Schmid* (1982) 455 U.S. 100, 102 [102 S.Ct. 867, 70 L. Ed. 2d 855] ["courts do not sit to decide hypothetical issues or to give advisory opinions"]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539-542 [court deemed the matter not ripe for adjudication because it was asked to speculate on hypothetical situations and there was no showing of imminent and significant hardship].)

100. Student's due process hearing request was filed on March 11, 2016, before assessments requested on January 15, 2016 would be required to be completed and reviewed. Accordingly, no harm from any delay in preparing an assessment plan accrued to Student prior to the initiation of the current due process matter, and this issue is premature.

101. A school district is required to give the parents of a child with a disability written notice a reasonable time before it refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(3)(b); 34 C.F.R. § 300.503(a)(2); Ed. Code, §56500.4(a).) A prior written notice must contain: (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; and (3) a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).) The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are

both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

102. There was no evidence offered that District refused to conduct the requested assessments. To the contrary, the January 15, 2016 IEP notes reflect that District team members agreed that school-based assessments of Student's sensory needs and functional behavior could take place when Student left day treatment and enrolled in a classroom setting. The January 15, 2016 IEP team expressly discussed reconvening the IEP team to discuss Student's placement in a classroom, even on a temporary basis, for purposes of assessment. Accordingly, no prior written notice of refusal to conduct the requested assessments was required.

103. Student failed to prove by a preponderance of the evidence that District denied him a FAPE by failing to timely complete assessments requested at the January 15, 2016 IEP team meeting, or because it did not give parents written notice of a refusal to conduct such assessments. District prevailed on Issue 8.

REMEDIES

104. Student requests several remedies, including reimbursement for co-payments for the day treatment program at Pediatric Minds, the preschool tuition for the Little Lambs placement, costs of providing a behavioral aide with supervision in the private preschool setting, and prospective placement in a nonpublic school.

105. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996,

85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

106. School districts may be ordered to provide compensatory education or additional services to students who have been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 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 ex rel. Reid v. District of Columbia* (D.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.*)

107. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-371.) Parents may receive reimbursement for their unilateral placement if the placement met the child’s needs and provided the child with educational benefit, even if not all necessary educational benefits are provided. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159 (*C.B.*).) However, the parents’ unilateral placement is not required to meet all requirements of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 361].)

108. Reimbursement is the usual remedy when a school district denies a FAPE

by failing to place a preschooler in the least restrictive environment and parents make an appropriate unilateral placement. (*L.B. v. Nebo School Dist.* (10th Cir. 2004) 379 F.3d 966, 978-979; *Bd. of Educ. of LaGrange Sch. Dist. No. 5 v. Illinois* (7th Cir. 1999) 184 F.3d 912, 917; *G.B. v. Tuxedo Union Free Sch. Dist.* (S.D.N.Y. 2010) 751 F.Supp.2d 552, 586.) The authority to grant reimbursement is discretionary, and equitable considerations relating to the reasonableness of the action taken by the parents is relevant in fashioning relief. (*Ibid.*; *Frank G. v. Bd. of Educ. of Hyde Park* (2d Cir. 2006) 459 F.3d 356, 363-364; *Burlington, supra*, 471 U.S. at p. 374 [105 S.Ct. at p. 1996].)

109. The IDEA is instructive on what constitutes reasonable conduct by parents. If a child has been enrolled in a school district, reimbursement may be reduced or denied if, at the most recent IEP team meeting prior to removing the child, the parents did not inform the IEP team that they were rejecting the proposed placement, and state their concerns and intent to enroll their child in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1).) Reimbursement may be reduced upon a judicial finding of unreasonableness with respect to action taken by the parents. (20 U.S.C. § 1412(a)(10)(C)(iii)(III).) Here, although Student was not removed from District, Parents had multiple opportunities at the IEP team meetings of December 14, 2015 and January 15, 2016 to inform District that they were exploring private placement and to state their intent to enroll Student at Little Lambs with one-on-one aide support and seek reimbursement, and a discretionary reduction is equitable.

Costs of the Pediatric Minds Day Treatment Program

110. Student was denied a FAPE when not found eligible for special education and related services at the IEP of April 21, 2015. Parents were left on their own to find a program to address Student's educational needs. The Pediatric Minds day program addressed Student's behavior, and to some extent his interactions with other students for joint attention, turn-taking, and other social skills that would transfer to the

preschool education environment. Accordingly, reimbursement is awarded for Parents' out-of-pocket co-payment costs of the Pediatric Minds day treatment program from September 8, 2015 through September 16, 2015 totaling \$810.00.

Costs of Preschool Tuition at Little Lambs, from March 31, 2015 Through the Last Day of District's 2015-2016 School Year

111. Student should have been found eligible for special education and related services, and offered a FAPE, from March 31, 2015. At the subsequent January 15, 2016 IEP team meeting, District significantly impeded the opportunity of Parents to participate in the decision making process, and as a result Student continued to be substantively denied a FAPE. Parents' placement of Student at Little Lambs provided him some educational benefit, although it was not an appropriate placement under the *Rowley* standard. It provided Student with exposure to typical peers for modeling of age-appropriate language and behavior, and there was some evidence that after January 15, 2016, the behavior skills learned in the mornings transferred to activities in the afternoon, although imperfectly and not without incidents of aggression and tantrumming.

112. As a remedy for denial of a FAPE to Student, Parents are awarded reimbursement for preschool tuition paid to Little Lambs. However, there was no evidence that Student required a ten-hour preschool day, rather than a typical preschool day of three hours. The extreme duration of the Little Lambs school day raises a reasonable inference that Student's afternoon hours, or half of the 10-hour day, consisted of daycare, rather than an instructional program, despite the designation of all sums paid as "tuition." On these facts, equity would permit a 50 percent reduction in reimbursement for preschool tuition paid to Little Lambs. As this decision is issued after the end of the 2015-2016 school year, Parents are awarded reduced reimbursement for all days of attendance during District's 2014-2015 and 2015-2016 regular school years,

from March 31, 2015 through the last day of the 2015-2016 regular school year.

Costs of One-on-One Behavioral Services

113. There was evidence that school-based behavioral services and supervision provided Student with slight improvement in his behavior, at least temporarily. Parents are awarded their costs of providing school-based one-on-one behavioral intervention, with supervision of those services, paid to Pediatric Minds from January 15, 2016 through the last day of District's 2015-2016 school year. However, the remedy is equitably reduced for the reasons given below.

114. Parents did not inform District on January 15, 2016, that Student was receiving in-home behavioral services, and that they were rejecting District's proposed placement and intended to enroll Student in a private preschool with one-on-one behavior support at public expense. Had Mother given full information and notice to District, it could have reconvened Student's IEP team to determine if it wanted to change its FAPE offer, fund the private placement as a less restrictive preschool environment, or stand by its January 15, 2016 IEP offer and risk subsequent responsibility for reimbursement. Equity also permits a reduction from full reimbursement when a private program provides too much, or some things that do not meet educational needs (*C.B., supra*, 635 F.3d at p. 1159-1160.) Student would not have needed one-on-one behavior intervention in an appropriate preschool special day class, and the benefit of Student's behavioral intervention at Little Lambs was limited. Accordingly, although Student is awarded recovery for school-based behavioral intervention after January 15, 2016, recovery of those costs will be equitably reduced by 50 percent.

Prospective Placement in Nonpublic School

115. Parents seek a prospective placement in a highly restrictive special

education setting. The proposed setting is a far more restrictive environment than offered in the January 15, 2016 IEP. Center's program would isolate Student in a classroom with disabled students who were much older than Student, significantly more mature, and at much higher grade levels. Center provides no access to students without disabilities to model typical behavior, language or social skills. The majority of the students in that small school are in middle school, high school, or a program for adults through age 22 years, providing limited elementary-aged peers and no preschool aged peers with whom to interact and practice appropriate age-appropriate communication. In light of Student's undisputed need to learn how to initiate and maintain social communication with peers, as well as to acquire age-appropriate classroom readiness skills such as cooperative play and turn-taking, Center's program would be prohibitively restrictive and devoid of opportunities for Student to make meaningful progress on his pragmatic communication the prospective placement sought by Parents at Center is not appropriate for Student, and placement in such a restrictive environment is not warranted. Accordingly, prospective placement for the 2016-2017 school year at Center is denied.

District Training

116. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training may be an appropriate remedy. (*Park, supra*, 464 F.3d at p. 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.*, See also, e.g., *Student v. Reed Union School Dist.*, Cal.Ofc.Admin.Hrngs. Case No. 2008080580 (Jan. 23, 2009) [52 IDELR 240; 109 LRP 22923] [requiring training on

predetermination and parental participation in IEP team meetings]; *Student v. San Diego Unified School Dist.* (Dec. 13, 2004) Special Education Administrative Hearing Decisions SN 2739-04 [42 IDELR 249; 105 LRP 5069][requiring training regarding pupil's medical condition and unique needs].)

117. Here, District's staff committed multiple clear procedural violations including: intentional alteration of an assessment report; confusion over the role of District IEP team members in the determination of a student's eligibility; failure to timely prepare assessment plans; failure to timely conduct assessments; failure to document parental consent to an extension of time to assess; assessment without parental consent; failure to comply with statutory mandates regarding the composition of an IEP team; failure to timely notify parents of the absence of IEP team members; failure to fully inform parents regarding excusal of a district team member prior to obtaining written excusal; and incorrectly stating that a general education teacher is not a required IEP team member for a preschool child. Accordingly, District shall train District personnel who are involved in special education administration, including the preparation of assessment plans, conduct of assessments, arrangement of IEP team meetings and conduct of IEP team meetings. The training shall address the IDEA, its implementing regulations and California law impacting the following topics: timelines and procedures for obtaining parental consent to assess; timelines and procedures for conducting assessments; proper preparation and presentation of assessment results; the role of the IEP team in determining eligibility for special education and related services; determination of the proper composition of the IEP team, with specific attention to IEP teams for preschool age children; and proper procedures for providing parents with as much notice as possible of district team member absences and obtaining fully informed parent consent to excusal of absent team members.

ORDER

1. Within 90 days of this decision, District shall provide 12 hours of training to any and all of its administrative personnel who are or may be involved with the administration of special education programs, including the preparation of assessment plans, conduct of assessments, arrangement of IEP team meetings and conduct of IEP team meetings, in the following topics: timelines and procedures for obtaining parental consent to assess; timelines and procedures for conducting assessments; proper preparation and presentation of assessment results; the role of the IEP team in determining eligibility for special education and related services; determination of the proper composition of the IEP team, with specific attention to IEP teams for preschool age children; and proper procedures for providing parents with as much notice as possible of district team member absences and obtaining fully informed parent consent to excusal of absent team members.

2. In addition, within 45 days of receiving reasonable proof of payment after this Decision is issued, District shall reimburse Parents for:

- (a) Parents' out-of-pocket co-payment costs of the Pediatric Minds day treatment program from September 9 through September 16, 2015, totaling \$810.00;
 - (b) One-half, or 50 percent, of the amount paid by Parents to Little Lambs for preschool tuition attendance on days of District's 2014-2015 and 2015-2016 regular school years from March 31, 2015 through the end of District's 2015-2016 regular school year; and
 - (c) One half, or 50 percent, of the amount paid by Parents to Pediatric Minds from January 15, 2016 through the last day of District's 2015-2016 regular school year for school-based behavior intervention services provided in the mornings at Little Lambs, and for supervision of those school-based services.
3. Student's remaining requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues 1, 2, 3(a), 4(a), 4(b), 5, 6(b) and 6(c). District prevailed on all other issues.

RIGHT TO APPEAL THIS DECISION

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

Dated: July 22, 2016

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings