

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. 2016040750

PARENT ON BEHALF OF STUDENT,

v.

TAMALPAIS UNION HIGH SCHOOL
DISTRICT.

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on April 18, 2016, naming Tamalpais Union High School District.

Administrative Law Judge Lisa Lunsford heard this matter in Larkspur, California, on June 14, 15 and 16, 2016.

Susan Foley, Attorney at Law, represented Student. Sonia Melgoza, paralegal assistant to Ms. Foley, attended each day of hearing. Father attended each day of hearing, and Mother attended on June 15 and 16, 2016. Student was not present.

Lenore Silverman, Attorney at Law, represented Tamalpais Union High School District. Amira Mostafa, Tamalpais's assistant director of student services, attended each day of hearing on behalf of Tamalpais, and Wesley Cedros, senior director of student services, attended for partial days on June 15 and 16, 2016.

At the conclusion of the hearing, the matter was continued to July 5, 2016, at the parties' request, to afford the parties an opportunity to submit written closing briefs. The

record closed with the parties' timely submission of closing briefs, and the matter was submitted for decision.

ISSUES

1. Did Tamalpais deny Student a free appropriate public education during the 2014-2015 school year by failing to offer Student the following in his June 3, 2014 individualized education program:
 - a. a classroom with a low teacher to student ratio of not more than one teacher per eight students; and
 - b. counseling services?
2. Did Tamalpais commit procedural violations, which denied Student a FAPE from May 21, 2015, through May 17, 2016, by failing to assess Student in the areas of mental health and sensory integration?
3. Did Tamalpais deny Student a FAPE from May 21, 2015, through May 17, 2016, by failing to offer Student the following in his May 21, 2015 IEP:
 - a. a classroom with a low teacher to student ratio of not more than one teacher per eight students;
 - b. counseling services;
 - c. a clear and concise offer for speech language therapy; and
 - d. adequate speech language therapy for pragmatic language?¹

¹ At the start of hearing, Student withdrew Issue 3(e), which alleged a denial of FAPE based on the May 21, 2015 IEP's failure to offer occupational therapy to address Student's sensory integration deficits.

SUMMARY OF DECISION

This decision holds that Student did not establish that he required a ratio of one teacher per eight students to receive educational benefit at the time of the June 3, 2014 and May 21, 2015 IEP offers. Student similarly did not establish that he required counseling as a related service at the time of the 2014 and 2015 IEP offers.

Although Tamalpais was not obligated to offer counseling in Student's IEP's, Tamalpais was on notice that mental health was an area of suspected disability for Student. Tamalpais's failure to assess Student's mental health was a procedural violation of the IDEA that significantly impeded Parents' opportunity to participate in the IEP decisionmaking process. Tamalpais therefore denied Student a FAPE by failing to assess Student's mental health from May 21, 2015, through May 17, 2016. As a remedy, Student is entitled to an independent mental health assessment at public expense. Student's claim that Tamalpais failed to assess him in the area of sensory integration was not established and, therefore, Student was not denied a FAPE on this basis.

This decision also holds that the May 21, 2015 IEP offer for speech and language services was not clear. This lack of clarity constituted a procedural violation of the IDEA that significantly impeded Parents' opportunity to participate in the IEP process. Accordingly, the May 21, 2015 IEP offer was not clear and denied Student a FAPE from May 21, 2015, through May 17, 2016. As a remedy, Student is awarded reimbursement for tuition, shuttle and mileage expenses related to Student's appropriate private placement for the 2015-2016 school year through May 17, 2016. Finally, because the speech and language services offer's lack of clarity resulted in a denial of FAPE, it is not necessary to determine the issue of whether Tamalpais also failed to adequately address Student's pragmatic language needs.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 16-year-old male who has resided with his parents within Tamalpais's jurisdictional boundaries at all relevant times. Student is eligible for special education and related services as a student with other health impairment as a primary eligibility category and speech or language impairment as a secondary category.

STUDENT'S EDUCATIONAL HISTORY AND TRANSFER TO TAMALPAIS FOR THE 2014-2015 SCHOOL YEAR

2. Student began receiving special education and related services when he was three years old under the eligibility category of speech or language impairment. In fifth grade, he was diagnosed with attention deficit hyperactivity disorder and subsequently found eligible under the other health impairment category. Student has also previously been diagnosed with central auditory processing disorder.

3. Student is unilaterally placed at Stanbridge Academy, a private school in San Mateo for students in kindergarten through twelfth grade with mild to moderate learning differences and social communication disorders. Student has attended Stanbridge since third grade, except when he attended Sterne School in fall 2014 for part of ninth grade. Student has never attended a Tamalpais school.

4. Student was previously in the Reed Union School District and transferred to Tamalpais upon his transition from eighth grade to high school in fall 2014. In April 2014, Tamalpais proposed to assess Student in the areas of academic achievement, cognitive development/learning ability, and speech and language. Mother consented, and these assessments were conducted as part of Student's triennial evaluation and in order to determine his needs, services and program in preparation for his transition to high school.

2014 SPEECH AND LANGUAGE ASSESSMENT

5. Melanie Andreani, speech-language pathologist, conducted the speech and language assessment in April 2014. Although the results showed that Student did not have a language impairment, his receptive language skills were significantly less developed than his expressive language skills. Therefore, he appeared to comprehend more than he actually did. As a result, teachers must check his understanding frequently, and his comprehension could benefit from the use of graphic organizers, re-auditorization, visualization and experiential learning. Regarding pragmatic language skills, Student had a solid grasp of basic social rules but struggled with socially nuanced skills. Student therefore needed speech and language therapy targeting language comprehension and social pragmatics.

2014 PSYCHOEDUCATIONAL AND ACADEMIC ASSESSMENT

6. On June 3, 2014, the psychoeducational and academic assessment was completed by school psychologist Meredith Hanrahan² and special education teacher Mary Beth Leland. In addition to interviewing and testing Student, the assessors gathered information from educational records, Mother, Stanbridge teachers Maureen Zane and Nick Cagnacci, and a private 2011 neuropsychological evaluation provided by Parents.

7. Ms. Zane, Student's primary teacher for three academic subjects and homeroom in the 2013-2014 school year, established that academically Student performed at or above average as compared to his peers and received many accommodations and supports. His auditory processing was reinforced with written

² Ms. Hanrahan is identified by her maiden name, Meredith Nagy, on the assessment report.

materials and visual diagrams, and he was provided multiple accommodations, including extra time, an occasional open book for test taking, and long term deadlines for homework. While he could get frustrated with math, he was in a small math class of five students and received good teacher support. He had difficulty focusing at times, and spending time on a treadmill, in a quiet room or with a counselor helped him refocus.

8. Ms. Zane further established that Student exhibited multiple concerning behaviors. If Student was not getting along with any of his classmates, he did not hesitate to verbally attack them and required teacher or counselor intervention in order to stop. Student could also be volatile or physically aggressive with items, such as throwing or breaking objects. While the exact frequency of Student's volatile, aggressive behavior is unknown, the evidence established that it happened at least occasionally. During several of these incidents, Student refused to leave the classroom, so Ms. Zane decided to evacuate the class and allow the counselor to work with him in the classroom. Stanbridge has three on-site counselors who are generally available, and they individually responded to Student's behavioral incidents as necessary. Finally, Student had developed a habit of pulling his hair out and had a circular bald spot with a diameter of two inches for several weeks. Ms. Zane informed Tamalpais that she believes Student's behavior fluctuates according to his mood or medication effectiveness and that Student suffers from anxiety related to his feelings about next year, high school and graduation.

9. Mr. Cagnacci, Student's teacher for two subjects in the 2013-2014 school year, provided feedback that was less extensive but consistent with the feedback from Ms. Zane in affirming Student had disruptive behaviors and difficulty staying focused. Mr. Cagnacci and Ms. Zane completed the Conners, third edition, a behavior rating scale questionnaire, and both reported elevated scores in the areas of hyperactivity/impulsivity and defiance/aggression. They affirmed that Student was

restless, impulsive and argumentative, had poor anger control, and was at times physically aggressive. Mr. Cagnacci also reported elevated scores in the areas of inattention and learning problems.

10. Mother provided information consistent with the teacher feedback, reporting that Student occasionally acted out and had difficulty with listening, sustaining attention, following instructions, and trying new things. On the Conners rating scale, Mother reported clinically significant scores in the areas of inattention, hyperactivity/impulsivity, learning problems, defiance/aggression and peer relations. Student also completed the Conners rating scale and rated himself at risk in the area of aggression, with responses indicating he frequently wanted to get even with people he is mad at and occasionally started fights and broke things.

11. The neuropsychological evaluation confirmed Student's need for multiple classroom accommodations, including preferential seating, periodic check-ins, extra time for work and test completion, breaking long term assignments in to manageable tasks, and allowing breaks. In addition, the evaluator suggested Student may benefit from coaching and support around emotional and behavioral management.

12. Ms. Hanrahan and Ms. Leland concluded that Student continues to meet eligibility criteria for other health impaired pursuant to ADHD. The assessors deferred programmatic decisions to Student's IEP team and did not make any recommendations for Student in their report.

JUNE 3, 2014 IEP TEAM MEETING AND OFFER

13. On June 3, 2014, Tamalpais convened an IEP team meeting with Parents, Ms. Andreani, Ms. Leland, Ms. Hanrahan, Fiona Allen, a general education English teacher at Redwood High School, and Amira Mostafa, Tamalpais's assistant director of student services. Attending by telephone were Stanbridge program specialist Diane

Chau and Stanbridge speech and language pathologist Kari Schaiman.³ Stanbridge teacher Ms. Zane also joined mid-meeting. Ms. Schaiman informed the team that Student tends to shut down more in a group setting than individually, and Stanbridge has a school wide behavioral system and counselors available to Student at all times. The team determined that Student met his two previous goals, and new goals were proposed in the areas of organization, classroom focus, speech and language comprehension strategies, and speech and language pragmatics.

14. The IEP that was developed offered Student placement in a general education program at Redwood with one period per day of resource specialist support and 45 minutes per week of individual and group speech and language services. The IEP offer also included the following accommodations: extended time on classwork, homework and tests; visual and verbal cues to focus in class as needed; calculator use in science and math; breaks as needed during class to refocus or to check in with school staff when agitated; use of calming strategies to assist in refocusing when agitated; frequent checks for understanding; visual aids; breaking long term assignments into shorter ones with check ins; testing in smaller setting; and use of notes, textbook and study guides for tests.

Need for Classroom with a Low Teacher-to-Student Ratio

15. Student's assertion that the IEP offer failed to offer a classroom with a low teacher-to-student ratio of not more than one teacher per eight students is unsupported. Student did not provide evidence that information existed at the time of the IEP team meeting that should have led Tamalpais to offer a classroom with a low teacher-to-student ratio. Ms. Hanrahan and Ms. Leland did not uncover any information suggesting Student had a need for a particular teacher-to-student ratio. The

³ Ms. Schaiman is identified in the IEP as Ms. Sehaiman.

neuropsychologist recommended many classroom accommodations, like preferential seating, periodic check-ins, engaging him in class discussion, extra time for work and test completion, and allowing breaks, but did not recommend a low teacher-to-student ratio. While Ms. Zane mentioned that Student's math class has only five students, she did not indicate that this was required in order for him to make progress. Mr. Cagnacci did not comment on class size or teacher-to-student ratio. Neither Student nor Mother indicated to Ms. Hanrahan or Ms. Leland that Student benefited from a low teacher-to-student ratio. Ms. Andreani recommended that teachers frequently check Student's comprehension, use different instructional methods, and provide other accommodations, but she did not recommend any particular teacher-to-student ratio. There is no evidence that, prior to or during the IEP team meeting, Parents or Stanbridge staff communicated to Tamalpais the belief that Student needed a low teacher-to-student ratio. Student thus failed to meet his burden of proving that as of June 3, 2014, he required a low teacher-to-student ratio to benefit from his education.

Need for Counseling Services

16. Student additionally asserts that the IEP failed to offer counseling services. However, Student did not establish that Tamalpais, based on the information it had at the time, should have offered counseling as a related service. Tamalpais knew that Student had access to Stanbridge counselors on an as needed basis and received occasional assistance from them during the 2013-2014 school year. Student had engaged in negative peer interactions, exhibited aggressive behaviors, and had a severe episode of hair pulling. There was no evidence offered to explain whether these behaviors reflected a purely behavioral need requiring behavioral support⁴ or were

⁴ This decision is limited to the specific issues identified in the complaint and does not address whether Student had a need for behavior-related services.

rooted in a social-emotional need requiring counseling. Although Ms. Zane related the hair pulling to anxiety and other behavior to his mood, there is no evidence that Student has been formally assessed for or diagnosed with anxiety or a mood disorder. Student was not receiving regular counseling for mental health issues at Stanbridge. Rather, the Stanbridge counselors intervened in response to Student's behaviors. The Stanbridge counselors did not testify, and Student offered no expert opinion that Student's behaviors were caused by, or connected to, a mental health condition. Although Father believes a counselor was necessary for Student's educational benefit, Father did not suggest that Student's need extended beyond the occasional behavioral intervention or was related to a mental health condition.

17. Allison St. John, Student's seventh grade English teacher in the 2012-2013 school year, described Student's frequent defiance, such as throwing books, and the need to clear the classroom often, at which time counselors would come to provide him with support. However, there is no evidence that she communicated this information to Tamalpais. Additionally, Ms. St. John was not sure whether Student would require counseling if he attended a public school. Her testimony is therefore given little weight.

18. The opinions of Father and Ms. St. John are not sufficient to counter the opinion of Ms. Hanrahan with regard to counseling, which is given greater weight. Ms. Hanrahan has master's degrees and credentials in school psychology and special education and has been a school psychologist with Tamalpais since 2011. In Ms. Hanrahan's opinion, the information provided by Stanbridge did not indicate Student had a need for counseling as a related service. Ms. Hanrahan explained that counseling

as a related service⁵ is counseling written in the IEP, mandated and generally provided by a school psychologist. Having access to counseling, in contrast, refers to the general availability to all students of all of a school's counselors, regardless of their credentials. Ms. Hanrahan stated that the information received from Stanbridge did not indicate that Student was receiving anything similar to mental health counseling as a related service, nor did it indicate the need for such. In her opinion, Ms. Zane's classroom evacuations did not necessarily indicate the need for ongoing mental health support beyond the general availability of school counselors.

19. During the IEP team meeting, neither Parents, Ms. Zane, nor any other Stanbridge participants expressed any concern about Student's need for counseling services, and Father admitted that he did not inform Tamalpais of any disagreement with the psychoeducational assessment. Although the Stanbridge teachers' feedback and Student's behaviors put Tamalpais on notice of a potential mental health condition, Student did not establish that he had a need for counseling as a related service at the time of the June 2014 IEP team meeting.

COMMUNICATION REGARDING 2014-2015 SCHOOL YEAR

20. Subsequent to the June 2014 IEP team meeting, Mother visited and observed Ms. Andreani's social skills group. On July 7, 2014, Parents sent Tamalpais a 10-day notice of unilateral placement indicating their intent to place Student at Sterne School, a private school, and seek reimbursement based on their belief that the June 3, 2014 IEP offer did not provide Student a FAPE. On August 11, 2014, Tamalpais responded with a prior written notice that denied Parents' request for a public-funded

⁵ Ms. Hanrahan referred to counseling as a related service as "DIS" counseling, or designated instruction and services counseling. Related services are called designated instruction and services in California.

placement at Sterne.

21. On December 10, 2014, Parents sent Tamalpais a 10-day notice update, informing Tamalpais that Student was now placed at Stanbridge Academy and reiterating their disagreement with Tamalpais's IEP offer. On January 23, 2015, Tamalpais responded with a prior written notice that denied Parents' request for a public-funded placement at Stanbridge.

22. On March 13, 2015, in anticipation of the annual IEP team meeting, Tamalpais sent Parents an assessment plan proposing to assess Student in the areas of academic achievement, language/speech development, social/emotional/behavioral development, and career and vocational development. Father consented to the assessment plan.

MAY 21, 2015 PSYCHOEDUCATIONAL AND ACADEMIC ASSESSMENT

23. On May 21, 2015, the psychoeducational and academic assessment was completed and co-written by Ms. Hanrahan, speech language pathologist Alysoun Quinby, and special day class teacher Andrew Leist. Ms. Quinby and Mr. Leist both interviewed and administered tests or rating scales to Student. The assessors reviewed new written feedback from Stanbridge teachers, Student's grades, information from Ms. Mostafa's observation of Student at Stanbridge, the 2014 assessments, and the 2011 neuropsychological evaluation. The assessors reported the information collected, determined that progress had been made on all goals with one goal met, and did not make any recommendations beyond transition goals, instead deferring programmatic decisions to the IEP team.

Stanbridge Teacher Feedback

24. Feedback from Student's teachers established that Student's behaviors in ninth grade lessened in their intensity but did not disappear. His disruptive behaviors

shifted from volatile outbursts to “silly” and immature behavior, and teachers would prompt him to leave the class when behaving in this manner in order to check in with a counselor or take a break until he could get back on track. He tended to shut down or act out if required to perform an academic task he felt challenged by, such as a math problem or reading aloud. His ability to calm down had improved, as had his ability to be redirected when he shut down, and he could be “brought back” by answering fundamental questions correctly. He still engaged in negative peer interactions and wanted the “last word” in arguments, and he was making self-deprecating comments, such as referring to himself as “dumb” and “stupid.”

25. Student’s academic performance was above average, and he was receiving mostly A’s or B’s. He improved with homework completion but still had difficulty focusing and getting started on assignments. Student continued to receive many classroom accommodations, including repetition of directions, reminders, extra time on assignments and tests, frequent breaks, the use of notes on tests, and the use of a calculator.

Speech and Language Assessment

26. Student was receiving speech and language therapy from Ms. Schaiman and was in a pragmatics class, and he had made progress toward his three speech and language goals. Student still struggled with more nuanced pragmatic skills, such as making inferences, asking follow up questions, interpreting perspectives and transferring insights. Although Ms. Quinby concluded that he continued to be eligible for speech and language services, she did not make any specific recommendations for services.

MAY 21, 2015 IEP TEAM MEETING

27. On May 21, 2015, Tamalpais convened an IEP team meeting with Mother,

Ms. Hanrahan, Mr. Leist, Ms. Quinby, and Ms. Mostafa. Attending by telephone were Father and Student's Stanbridge academic advisor and resource teacher Kenny Katz. Mr. Katz stated that if Student moved to a larger Tamalpais campus, then Student would need support and access to counselors if he got upset. The team noted that the Tamalpais high school has counselors and school psychologists available to Student.

NEED FOR ADDITIONAL ASSESSMENTS

28. Student asserts that Tamalpais failed to assess him in the areas of mental health and sensory integration. Tamalpais maintains that the information they possessed about Student did not indicate that assessments in these areas were necessary.

Mental Health

29. Ms. Hanrahan's opinion that a mental health assessment was not necessary is not persuasive. Her rationale, in part, was that Student's aggression and hair pulling could be related to many different issues, such as frustration with the educational environment at Stanbridge or his struggles with pragmatics and social interaction. She felt that Tamalpais was adequately addressing his pragmatic needs and that he might function better in a Tamalpais school. However, speculation of better functioning in a different setting does not dispense with the requirement to assess in all areas of suspected disability. More importantly, the belief that Student's behaviors could be related to multiple conditions is, in fact, a reason to investigate further. It is this lack of clarity as to the root causes of Student's behavior that should have triggered further assessment.

30. Ms. Hanrahan also reasoned that Student's anxiety was not a significant concern based on her impressions of Student and Mother's feedback. Ms. Hanrahan's impression was that Mother reported Student's difficulties with anxiety and aggression in passing, and it did not seem to be the crux of Mother's concern. However, Ms.

Hanrahan only met with Student once, and Mother's expression of concern, however understated, put Tamalpais on notice of Student's symptoms of a possible mental health need.

31. Ms. Mostafa's opinion that Tamalpais did not have any information that indicated the need for a mental health assessment beyond the psychoeducational assessments performed by Ms. Hanrahan is also unpersuasive. Ms. Mostafa reasoned that Ms. Zane's description of Student, including his volatile, aggressive behavior, hair pulling, and verbal attacks on peers, is only one piece of information that must be considered along with other information collected about Student. Ms. Mostafa's belief that Ms. Zane's feedback by itself should not form the basis for further assessment is not convincing where, as here, Student was engaging in multiple behaviors of concern. That the behaviors were all described by one source is less significant, and Tamalpais was on notice of a possible mental health need once this teacher expressed that Student has anxiety and defiant, aggressive behaviors requiring counselor intervention.

32. Ms. Mostafa also reasoned that although Parents stated that Student needs access to onsite counselors, Tamalpais offers that to all students, and there is no need to assess for a service that is already available to Student. Ms. Mostafa's reasoning is flawed because it presumes either that onsite counseling would be the only recommendation of a mental health assessment, or that Student has no mental health needs if all he needs is a service that is available to all students. However, a mental health assessment would help address *why* Student needs access to counselors and would identify which, if any, of Student's special education and related service needs relate to his mental health. This extends beyond simply whether he needs an onsite counselor available. Ms. Mostafa's reliance on the general availability of counselors at Tamalpais as a reason not to assess is also not persuasive because counselor availability was not completely resolving Student's behaviors.

33. Tamalpais was on notice that Student had displayed symptoms of anxiety and may have a mental health condition. Tamalpais was aware that Student's verbal attacks on other students required adult intervention, Student's hair-pulling created a bald spot, and Student's aggressive, defiant behavior led the teacher to clear the classroom several times. Ms. Zane had reported that Student has anxiety and mood-related behavior changes, and she and Mr. Cagnacci both reported elevated scores in defiance and aggression related to poor anger control and physical aggression. Mother had reported clinically significant scores in defiance and aggression and peer relations, and Student rated himself at-risk for aggression. Student's ninth grade teachers had reported that Student's behavioral issues still required check-ins with counselors and breaks outside the classroom, and Student continued to engage in negative peer interactions and made self-deprecating comments. Finally, Mr. Katz had requested that Student have access to counselors at a Tamalpais school. Under these circumstances, Tamalpais was on notice that mental health is an area of suspected disability.

Sensory Integration

34. Student claimed that District failed to assess him for sensory integration deficits but did not present evidence related to sensory integration deficits. Neither Student's teachers nor the Tamalpais assessors indicated that Student had difficulty with sensory integration. Therefore, Student failed to establish that sensory integration was an area of suspected disability.

MAY 21, 2015 IEP OFFER

35. The IEP that was developed on May 21, 2015, offered the same goals as the June 2014 IEP in the areas of classroom focus, pragmatic perspective taking, and pragmatic social thinking strategies, plus three new transition goals and a new pragmatics goal for coping skills. The new pragmatics goal targeted stressful situations

when Student feels challenged by academic material, makes negative, self-deprecating comments such as “I’m stupid,” and has difficulty continuing with his work. The goal was for Student to identify and apply stress reduction strategies, such as deep breaths, positive self-talk, problem scale, breaks, and requesting help, in four out of five stressful moments. Accommodations remained the same as in the June 2014 IEP, except for the addition of repetition of instructions.

36. The IEP offered Student placement at Sir Francis Drake High School in a special day class for English, history, math, and academic workshop, and general education classroom for science, electives and physical education. Mr. Leist, a special day class teacher at Drake, described the special day class program, including the ratio of one adult to three to four students, class support from paraeducators, and variation in class size from six to twelve students depending on the subject. Ms. Quinby shared that she provides push-in support in these classes to support the pragmatics and language needs of the students.

37. The IEP also offered individual and group speech and language services for 45 minutes per week in a separate classroom from May 21, 2015 through May 21, 2016. The speech and language services offer was documented in the same manner as it had been in the June 2014 IEP. The meeting notes describe the speech and language services as a “combination of individual and group.”

Need for Classroom with a Low Teacher-to-Student Ratio

38. Stanbridge has a maximum teacher-to-student ratio of one to eight, and two Stanbridge teachers testified that Student needs this low ratio in order to benefit from his education. In Mr. Huston’s opinion, Student requires the low teacher-to-student ratio because Student requires vigilant monitoring to help him sustain his focus in order to be successful. If left unchecked, Student would not follow along or be on the right page, so he needs prompting, such as tapping on the table in front of him. In Ms.

St. John's opinion, Student requires the low teacher-to-student ratio because it would be challenging to provide him the level of attention he needs if there were more students in the class.

39. While Ms. St. John's and Mr. Huston's testimony regarding Student's needs is consistent and credible, there is no evidence that such prompting and monitoring can only be accomplished with a teacher-to-student ratio of one to eight or fewer. Student did not establish that his needs could not be met in Mr. Leist's special day class at Drake, which typically has only 10 students. Student similarly did not establish that his needs could not be met with the assistance of other classroom adults who could help provide the prompting and monitoring necessary for Student to focus. Mr. Leist's class utilizes paraeducators and has a ratio of one adult per four students. The special day class program at Drake has a maximum of 21 students and minimum of one teacher and two classroom assistants, so there is a maximum adult-to-student ratio of one adult per seven students. Finally, Student did not establish that a general education classroom teacher would not be able to adequately monitor and prompt Student through the provision of Student's IEP accommodations, which included visual and verbal cues as needed, breaks, and frequent checks for understanding of new material. Therefore, Ms. St. John's and Mr. Huston's opinions that Student requires a teacher-to-student ratio of one to eight or fewer were not persuasive.

40. The opinions of Ms. St. John and Mr. Huston are also given little weight because they were not shared with Tamalpais at the time of the May 2015 IEP offer. At that time, Tamalpais had asked Student's teachers to provide feedback about his academics, specifically with regard to his areas of need, participation, and accommodations and modifications. Not one of them mentioned that he needs or benefits from a low teacher-to-student ratio. Their feedback indicated that Student needs prompts, extra time, use of notes on tests, a calculator, and repetition, all of which

are accommodations offered in the May 2015 IEP.

41. There is no evidence that information existed at the time of the May 2015 IEP team meeting that should have led Tamalpais to offer a classroom with a low teacher-to-student ratio. There was no indication in either the Stanbridge teacher feedback or Tamalpais's 2015 assessments that Student required a low teacher-to-student ratio. While Student was making academic progress at Stanbridge, getting good grades and scoring in the average range on academic achievement tests, there is no evidence that this progress was a result of the low teacher-to-student ratio at Stanbridge rather than the multiple accommodations provided to Student there, which are included in the May 2015 IEP offer. It is determined that Student did not require a low teacher-to-student ratio outside of the multiple classroom accommodations and special day class supports offered by Tamalpais to meet his unique needs and provide educational benefit.

Need for Counseling Services

42. Student did not establish that Tamalpais should have offered counseling as a related service in the May 2015 IEP offer, in part because the underlying cause of his behaviors was still unknown. After the June 2014 IEP team meeting, there was no information obtained by or provided to Tamalpais that shed light on Student's mental health or indicated any increase in Student's utilization of Stanbridge's counselors. Student's behavioral issues, although not entirely resolved, had seen some improvement.

43. Mr. Huston's testimony confirmed that Student's behavior during the 2014-2015 school year was similar to the previous year but less frequent. Student still accessed counselors as needed and did not see them on a regular basis. Mr. Huston also explained that Student tended to go see a counselor during difficult science units, typically when math was involved, and not at all during units he found easier. The direct

relationship between the level of academic challenge and visits to counselors suggests that Student may have been utilizing counselors to manage his academic frustration and does not clearly demonstrate that Student had a need for regular counseling. In any case, the information provided by Mr. Huston at hearing regarding Student's utilization of counselors was not provided to Tamalpais prior to the May 2015 IEP team meeting, as Mr. Huston admitted. Prior to the meeting, Mr. Huston expressed only that Student shuts down but can be "brought back" by answering more fundamental questions correctly. Based on this information, Tamalpais was reasonable in determining that Student did not require counseling as a related service, although it should have further assessed Student's mental health.

44. Mr. Katz's statement at the May 2015 IEP team meeting that Student would need access to counselors at Drake if he got upset is not sufficient to establish that Tamalpais should have offered counseling as a related service. Student's need to have access to counselors to manage his occasional behaviors did not clearly rise to the level of a need for regular counseling to be written in to Student's IEP. Tamalpais affirmed that Student would have access to counselors and school psychologists at Drake. Under the circumstances, and considering that Student has no history of mental health treatment, Student did not establish that as of May 2015 he required counseling as a related service in order to benefit from his education.

Clarity of Speech and Language Therapy Offer

45. The IEP offer for speech and language therapy as written is unclear as to whether and how often the services would be provided in a group versus individual setting. The boxes for individual and group are both checked, and there is no additional explanation provided other than that the services are a "combination of individual and group." This language is ambiguous and does not provide the necessary specificity to ensure that Parents understood the offer. Indeed, Parents were not clear as to what was

meant by the “combination,” and this lack of clarity was part of the reason they did not accept the IEP offer.

46. Although Father did not recall whether the offer was clarified during the IEP team meeting, the weight of the evidence established that Tamalpais explained to Parents that the offer included a weekly 45-minute pragmatic social skills group. Ms. Quinby runs the 45-minute pragmatic social skills group and did so at the time of the May 2015 IEP team meeting. She recalls describing the group, discussing its appropriateness for Student, and offering the group at the meeting. Mr. Leist also recalled the pragmatics group being described and discussed at the meeting. Mother had observed the pragmatic social skills group after the 2014 IEP team meeting when it was run by Ms. Andreani, which tends to show it was also discussed as part of the June 2014 IEP offer. The May 2015 IEP offer, however, does not accurately document the weekly 45-minute pragmatic social skills group, since the IEP does not reflect that the 45 minutes per week is spent solely in a group, nor does it mention or describe the pragmatic social skills group.

47. Ms. Quinby clarified at hearing that the offer was presented as a combination of individual and group services because it consisted of the weekly 45-minute pragmatic social skills group with occasional individual services as needed. She explained that at times individual needs arise within the group, and she provides individual services as needed, including push in services in the special day class. Even if Ms. Quinby’s clarification had been included in the IEP, there is no way to tell from this offer what the frequency or duration of any individual speech and language services would be, how individual services would impact the time spent in the pragmatics group, nor who would make the determination of whether Student requires individual therapy. There was no agreement that Ms. Quinby would remain the service provider throughout the year that this IEP would be in effect.

Adequacy of Speech and Language Therapy Offer for Pragmatic Language

48. Although the parties do not dispute that Student has difficulties with pragmatic language, Student contends that the May 21, 2015 IEP did not offer adequate speech and language therapy targeting pragmatic language. Tamalpais maintains that its offer adequately addressed Student's unique needs in this area based on the information it had at the time of the offer. Because the May 2015 IEP offer of speech and languages services has been determined to be unclear and, as discussed below, constitutes a denial of FAPE, it is not necessary to reach the issue of whether the offer was substantively adequate.

PARENTS' REJECTION OF MAY 21, 2015 IEP OFFER AND STUDENT'S PLACEMENT AT STANBRIDGE

49. Subsequent to the May 2015 IEP team meeting, Mother visited and observed Mr. Leist's special day class. On June 17, 2015, Parents sent Tamalpais a 10-day notice of unilateral placement indicating their intent to place Student at Stanbridge and seek reimbursement. The letter listed the reasons they believed the May 21, 2015 IEP offer did not provide Student a FAPE. On July 1, 2015, Tamalpais responded with a prior written notice that denied Parents' request for a public-funded placement at Stanbridge.

50. Stanbridge met Student's academic needs and provided him with support services that allowed him to receive educational benefit. Delivery of the curriculum at Stanbridge is tailored for individual learning styles and needs, and a social skills and pragmatics curriculum is incorporated at all grade levels. Student accessed his curriculum with support from teachers who utilized appropriate strategies and provided accommodations tailored to his needs. Student was in a pragmatics class, received speech and language therapy, and obtained support for behavioral needs from Stanbridge's counselors and teachers. Although the cause of Student's behaviors was unknown, while at Stanbridge his aggressive behaviors became less frequent, and he

improved his abilities to calm down and resolve his issues more quickly. He made progress toward all of his IEP goals and also progressed academically, receiving passing grades and mostly average test scores.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

1. Jurisdiction over this matter arises 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)⁷ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; (2) to ensure that the rights of children with disabilities and their parents are protected; and (3) to assist States, localities, educational service agencies and Federal agencies in providing for the education of all children with disabilities. (20 U.S.C. § 1400(d)(1); 34 C.F.R. § 300.1; 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

⁶ Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

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

5. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the parents’ child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) A loss of an educational

opportunity is shown if there is a “strong likelihood” that, but for the procedural error, an alternative placement “would have been better considered.” (*Doug C. v. Hawaii Dept. of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 [quoting *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657 (conc. opn. of Gould, J.)].)

JUNE 3, 2014 IEP OFFER

Classroom with a Low Teacher-to-Student Ratio of Not More than One Teacher per Eight Students

6. Student contends he was denied a FAPE because the June 3, 2014 IEP did not offer a classroom with a low teacher-to-student ratio of not more than one teacher per eight students. Tamalpais maintains that Student failed to meet his burden of proving Tamalpais was obligated to offer such a teacher-to-student ratio and that its IEP offer was based on information known about Student at the time and was designed to meet his unique needs and reasonably calculated to provide educational benefit.

7. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district’s offer of special education placement and services to constitute a FAPE, the offer must be reasonably calculated to provide the student with educational benefits. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 [citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041].)

8. Student did not meet his burden to establish that, as of June 3, 2014, he required a classroom with a ratio of not more than one teacher per eight students to meet his unique needs and receive educational benefit. The inquiry must focus on what

was known at the time the IEP offer was developed, and there is no evidence establishing that at that time Tamalpais had any reason to believe that Student needed a particular teacher-to-student ratio. There were no indications from Tamalpais staff, including Ms. Andreani, Ms. Hanrahan, Ms. Leland and Ms. Allen, Stanbridge staff, including Ms. Zane, Mr. Cagnacci, Ms. Chau, and Ms. Schaiman, the neuropsychologist, or Parents that Student required a low teacher-to-student ratio.

9. In addition, Student did not demonstrate that the teacher-to-student ratio at Redwood would prohibit Student from receiving educational benefit. In the Redwood general education classroom, Student would have been provided the following IEP accommodations: visual and verbal cues to help focus in class, frequent check-ins for understanding of new material, verbal information presented with visual aids, and tests offered in a smaller setting. These accommodations addressed his unique needs in the classroom setting related to comprehension, auditory processing and focusing. Student did not establish that he could not make progress in the Redwood classroom with the IEP accommodations because he additionally required a low teacher-to-student ratio in order to receive educational benefit. It is therefore determined that Tamalpais did not deny Student a FAPE by failing to offer a low teacher-to-student ratio of not more than one teacher per eight students in the June 3, 2014 IEP.

Counseling as a Related Service

10. Student contends that he was denied a FAPE because the June 3, 2014 IEP did not offer counseling services. Tamalpais maintains that at the time the IEP was developed, there was no indication that Student required counseling as a related service.

11. The term "related services" (designated instruction and services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. §

1401(26); Ed. Code, § 56363.) Related services must be provided if they are required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) A related service shall only be added to a student's IEP if a qualified assessor who assessed the student recommended the service in order for the student to benefit from special education. (Gov. Code, § 7572, subd. (c).)

12. Student did not establish that in June 2014 he required counseling as a related service in order to benefit from his education. Although Student exhibited occasionally defiant and aggressive behavior, which Stanbridge counselors responded to, Tamalpais reasonably determined that these behaviors did not indicate that Student had a need for counseling as a related service. There was no evidence that Student needed a regularly occurring therapeutic counseling service in order to benefit from special education. There was no evidence that the root cause of the behaviors was a social-emotional need or mental health condition that would improve with counseling. Student offered no opinions from the Stanbridge counselors or any other mental health experts or practitioners. There was no evidence that Student was formally diagnosed with anxiety or a mood disorder or that he had received regular counseling during the 2013-2014 school year, and yet Student was making progress. Finally, none of Student's assessors recommended counseling, and none of the IEP team members mentioned Student's mental health or need for counseling at the June 2014 meeting. Based on the information available to Tamalpais at the time of the June 3, 2014 IEP offer, Tamalpais did not deny Student a FAPE by failing to offer counseling as a related service.

ASSESS IN ALL AREAS OF SUSPECTED DISABILITY

13. Student contends that he was denied a FAPE from May 21, 2015, through

May 17, 2016, as a result of Tamalpais's failure to assess in the areas of mental health and sensory integration. Although Student's closing brief discusses a failure to assess for DIS counseling services, this decision conforms to the issue as identified in the complaint and prehearing conference and determines whether Tamalpais failed to conduct a mental health assessment. Tamalpais maintains that it identified all of Student's areas of need and conducted the appropriate assessments.

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

15. A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. May 23, 2016, No. 14-55800) 2016 WL 2957215, pp. 11, 13.) Such notice may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior. (*Id.* at p. 13 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].) 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, ex rel. Park v. Anaheim Union High School Dist., supra*, 464 F.3d at pp. 1032-1033; *Timothy O., supra*, 2016 WL 2957215 at pp. 15-17.)

Mental Health

16. The evidence established that Student should have undergone a mental

health assessment as of May 21, 2015, because Tamalpais was on notice that he displayed symptoms of anxiety and may have a mental health impairment. Tamalpais was aware, based on teacher reports and parent concerns, that Student had behaviors that could be rooted in a social-emotional or mental health condition. Mother reported Student's difficulties with anxiety and aggression and clinically significant scores in defiance and aggression and peer relations, and Parents notified Tamalpais of their belief in Student's need to access counselors. Student rated himself at risk for aggression and was known to make self-deprecating comments, like "I'm stupid." Tamalpais was aware that a neuropsychologist had previously recommended support for emotional and behavioral management. Ms. Zane provided detailed descriptions of distressing behaviors resulting in negative peer interactions, classroom evacuations and a bald spot, and indicated these were related to his mood and anxiety. Mr. Cagnacci, consistent with Ms. Zane, reported elevated scores in the areas of defiance and aggression, and ninth grade teachers also reported the need for check ins with counselors and time outs. Mr. Katz also reported Student's need to see counselors. Tamalpais knew that the Stanbridge counselors managed Student's symptoms and behaviors on multiple occasions for such behaviors as throwing and breaking objects. Finally, Tamalpais acknowledged Student's agitation and stress in offering Student a calming strategies accommodation and a coping skills goal.

17. Ms. Hanrahan's and Ms. Mostafa's opinions that a mental health assessment of Student was not indicated were not persuasive. Ms. Hanrahan's belief that Student's behaviors could be tied to needs unrelated to mental health was in fact a reason to further assess Student in order to discover the root cause of his behaviors. Ms. Hanrahan's impression that Student's mental health was not the crux of Mother's concerns was not a legitimate reason to disregard the information itself. Similarly, Ms. Mostafa's minimization of Ms. Zane's report as only one report in the totality of

information collected about Student was also not a legitimate basis on which to disregard the information about Student's behaviors. Ms. Mostafa also erred in determining that a mental health assessment was not necessary because Tamalpais offered access to onsite counselors, which is what Student needed. This determination presumes that the assessment would not uncover additional needs or offer helpful information concerning why Student requires such access. The opinions of Ms. Hanrahan and Ms. Mostafa were therefore not persuasive and did not counter the weight of the information Tamalpais had about Student's symptoms and behaviors. This information, which came from multiple teachers, Parents and Student, put Tamalpais on notice that mental health was an area of suspected disability.

18. Tamalpais argues in its closing brief that its 2014 psychoeducational assessment adequately addressed Student's social-emotional and behavioral functioning and its 2015 psychoeducational assessment satisfied the components of an educationally related mental health services assessment. While no findings are made with regard to the appropriateness of those assessments, it is the information gathered as part of those assessments, in combination with other circumstances, that should have triggered further assessment. The admission of Tamalpais's own witness, Ms. Hanrahan, that Student's hair pulling could be a function of many different issues was made after conducting the psychoeducational assessments and highlights the need for additional assessment.

19. Accordingly, additional assessment in the area of mental health was warranted, and Tamalpais was required to assess Student's mental health regardless of the opinions of its staff concerning the likely outcome of such an assessment. (*Timothy O., supra*, 2016 WL 2957215 at p. 13.) The failure to conduct a mental health assessment thus constitutes a procedural violation of the IDEA.

20. Tamalpais's procedural violation significantly impeded Parents'

opportunity to participate in the decisionmaking process regarding the provision of a FAPE to Student. Tamalpais's failure to assess Student deprived Parents and the IEP team of critical evaluative information about his mental health and related needs and whether a mental health disability was contributing to his behaviors. That deprivation made it impossible for Parents to know whether Tamalpais's May 2015 IEP offer recommended the appropriate goals, accommodations and services to address Student's unique needs and, in particular, his concerning behaviors. (*Timothy O., supra*, 2016 WL 2957215 at p. 10.) Therefore, Tamalpais's failure to assess Student's mental health denied Student a FAPE from May 21, 2015, through May 17, 2016.

21. This conclusion does not conflict with the earlier determination that Student did not establish a need for counseling as a related service. The two conclusions are based on different legal standards, and while the evidence showed that mental health was an area of suspected disability, Student did not establish that he required counseling as a related service in his June 2014 IEP in order to receive educational benefit.

Sensory Integration

22. Student's contention that Tamalpais failed to assess him in the area of sensory integration was unsupported. Accordingly, Student failed to establish that sensory integration was an area of suspected disability, and Tamalpais did not deny Student a FAPE by failing to assess in this area.

MAY 21, 2015 IEP OFFER

Classroom with a Low Teacher-to-Student Ratio of Not More than One Teacher per Eight Students

23. Student contends he was denied a FAPE because the May 21, 2015 IEP did not offer a classroom with a low teacher-to-student ratio of not more than one teacher

per eight students. Tamalpais maintains that Student failed to meet his burden to establish that he required this low teacher-to-student ratio, and its IEP offer was based on information known about Student at the time and was designed to meet his unique needs and reasonably calculated to provide educational benefit.

24. Student did not meet his burden to establish that, as of May 21, 2015, Tamalpais was on notice that Student needed a particular teacher-to-student ratio. Nothing in the information received by Tamalpais leading up to the May 2015 IEP team meeting from Stanbridge teachers or from Tamalpais's own assessors indicated that Student required a low teacher-to-student ratio.

25. Moreover, Student did not establish that he required a classroom with a ratio of not more than one teacher per eight students to meet his unique needs and receive educational benefit. Although Ms. St. John and Mr. Huston opined that Student needed such a teacher-to-student ratio, their opinions were based on Student's need for prompting and monitoring of his focusing in class, and Student failed to demonstrate that such prompting and monitoring could only be provided with a ratio of one teacher per eight students. There is no persuasive evidence that Student would not receive adequate monitoring and prompting in Mr. Leist's special day class of 10 students or in a larger special day class at Drake where the maximum ratio is one adult per seven students. Similarly, no evidence showed that the general education teachers at Drake would not provide adequate monitoring or prompting through Student's IEP accommodations which required monitoring and prompting as needed with visual and verbal cues, breaks, and check-ins. Although Student was receiving educational benefit at Stanbridge, there was no evidence presented to show that it was the direct result of the low teacher-to-student ratio rather than the multiple accommodations provided to Student, which were included in the May 2015 IEP offer. It is therefore determined that Tamalpais did not deny Student a FAPE by failing to offer a low teacher-to-student ratio

of not more than one teacher per eight students in the May 21, 2015 IEP.

Counseling as a Related Service

26. Student contends that he was denied a FAPE because the May 21, 2015 IEP did not offer counseling services. Tamalpais maintains that Student did not meet his burden on this issue because, at the time the IEP was developed, there was no indication that Student required counseling as a related service.

27. Student failed to establish that in May 2015 he required counseling as a related service in order to benefit from his education. Subsequent to the June 2014 IEP team meeting, Student's behaviors requiring counselor intervention had not increased, and no further information had been obtained to help the IEP team understand the underlying causes of his behaviors. Student engaged in "silly" and immature behavior and negative peer interactions, made self-deprecating comments, shut down when academically challenged, and needed counselor check-ins. Student failed to prove that his need to have access to counselors, as reiterated by Mr. Katz during the IEP team meeting, rose to the level of a need for counseling as a related service. No qualified assessor had recommended counseling as a related service, and Student offered no opinions from the Stanbridge counselors or any mental health experts or practitioners. Student was not diagnosed with a mental health condition and had not previously received regular counseling or mental health treatment. Although Tamalpais had sufficient information to suspect that Student might have mental health needs, which warranted an assessment, Student did not establish that he had mental health needs that entitled him to services. Accordingly, based on the information available to Tamalpais at the time of the May 2015 IEP offer, Tamalpais did not deny Student a FAPE by failing to offer counseling as a related service.

Clear Written Offer for Speech and Language Therapy

28. Student claims that the offer for speech and language therapy in the May 21, 2015 IEP was not clear and concise.⁸ Tamalpais maintains that Student failed to establish that the offer was unclear and, conversely, the offer was clear. Tamalpais further asserts that even if the offer is determined to be unclear, it was harmless error and did not result in a denial of FAPE.

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

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in “present[ing] complaints with respect to any matter relating to the ... educational placement of the child.”

⁸ Student asserts in the closing brief that the June 2014 IEP offer also was not clear and concise and denied Student a FAPE. However, this issue was not pled in this due process hearing and thus will not be addressed in this decision.

(*Union*, *supra*, 15 F.3d at p. 1526 [quoting 20 U.S.C. § 1415(b)(1)(E)].)

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

31. The rule of *Union* extends to the statement of the frequency, location, and duration of offered services. The IDEA requires that an IEP include a statement of the special education and related services that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IDEA also requires that an IEP contain a projected date for the beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) The Ninth Circuit has observed that the length of time that an offered service will be delivered must be "stated [in an IEP] in a manner that is clear to all who are involved." (*J.L. v. Mercer Island School Dist.*, *supra*, 592 F.3d at p. 953 [citation omitted].) The requirement ensures that "the level of the agency's commitment of resources" is clear to all members of the IEP team, including

parents. (*Bend LaPine School Dist. v. K.H.*, *supra*, 2005 WL 1587241 at p. 9 [quoting 34 C.F.R. § 300.347(a)(6)].)

32. The May 21, 2015 IEP did not clearly identify the nature of the speech and language services that Tamalpais intended to provide to Student. On the IEP, the boxes are checked for both individual and group services and there is no further information to describe how the 45 minutes per week would be allotted to each. The IEP's only description of the services is a "combination of individual and group." Such language is too vague to permit Parents to understand the nature, frequency and duration of the services. Although Tamalpais explained to Parents that the offer included a weekly 45 minute pragmatic social skills group, the IEP does not reflect that the 45 minutes per week is spent solely in a group, nor does it reference or describe the specific group. Ms. Quinby's explanation that individual services would be offered "as needed," even if it had been understood by Parents and part of the written offer, does not satisfy *Union* or the requirement to identify the frequency and duration of related services. Thus, the May 21, 2015 IEP offer for speech and language therapy fails to comply with the *Union* standard and is a procedural violation of the IDEA.

33. This procedural violation constituted a denial of FAPE because it significantly impeded Parents' opportunity to participate in the IEP process. In light of the nature of Student's speech and language impairments, especially in pragmatics, speech and language services are a central part of any acceptable program for him, and the May 2015 offer was too vague to permit Parents to make an intelligent decision about whether to accept the offer. Parents could not tell what the nature, frequency and duration of individual services for Student would be, who would make those determinations, how the provision of individual services would impact Student's participation in the social skills group, or whether he would receive any individual services at all.

34. Tamalpais argues that the failure to make a clear written offer is harmless error where the parents were aware of the district's offer and they fully participated in the IEP process, citing to *J.W. ex rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 460-461. However, in that case, the placement offer was clear; there was no factual dispute over it, and the mother testified she was aware of what the offer was. (*Ibid.*) The parents understood the offer and had enough information to determine whether to accept it. (*Ibid.*) The procedural violation found harmless was the delay in presenting the offer in writing until three days after the start of the school year. (*Id.* at p. 461.) Here, in contrast, the procedural violation is the lack of clarity of the offer itself, and the evidence does not establish that parents clearly understood it. Thus, the violation here is not harmless as it was in that case.

35. Even if the offer for individual services on an as needed basis had been understood by Parents and documented in the IEP, it would impede Student's right to a FAPE. The offer left it to Ms. Quinby's discretion as to whether and how to apportion Student's speech and language services between group and individual therapy, yet there was no agreement, nor could there be a guarantee, that she would be Student's service provider throughout the year. Understanding the offer and implementation of the services could therefore change with each service provider, ranging from up to 45 minutes per week of individual services to none at all. The possibility of such broad variation in the implementation of a related service and Student's corresponding inability to predict the services he will receive impedes his right to a FAPE. Accordingly, by failing to provide a clear offer for speech and language therapy in the May 21, 2015 IEP, Tamalpais denied Student a FAPE from May 21, 2015, through May 17, 2016.

Speech and Language Therapy Offer's Adequacy for Pragmatic Language Needs

36. Student contends that he was denied a FAPE because the May 21, 2015

IEP did not offer adequate speech and language therapy for pragmatic language. Tamalpais asserts that its offer was appropriate and adequately addressed Student's unique needs in this area based on the information it had at the time of the offer. Because it has already been determined that Tamalpais denied Student a FAPE by failing to provide a clear offer for speech and language therapy in the May 21, 2015 IEP, this decision need not reach the issue of whether the offer also failed to adequately address pragmatic language.

REMEDIES

1. Student established a denial of FAPE from May 21, 2015, through May 17, 2016, based on Tamalpais's failure to assess Student's mental health and make a clear offer of speech and language services. As a remedy, Student seeks reimbursement for his private placement at Stanbridge, including tuition and related transportation expenses.

2. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of the Town of Burlington, Mass. v. Dept. of Education of the Commonwealth of Mass.* (1985) 471 U.S. 359 at pp. 369, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d at p. 1496.)

Independent Mental Health Assessment at Public Expense

3. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Id.* at p. 1497.) An award to compensate for past violations must rely

on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524.) An independent educational evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 822-23.)

4. The independent educational evaluation is not just an additional tool for determining a student's needs; it is designed to give parents essential information to use in the IEP process. The Supreme Court has stressed the importance of an independent evaluation in redressing the relative advantages a school district has in expertise and in its superior control of information about a student:

School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them [Parents] have the right to an independent educational evaluation of the[ir] child IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

(*Schaffer v. Weast, supra*, 546 U.S. at pp. 60-61 [citations and internal quotation marks omitted].)

5. Based upon the finding that Tamalpais failed to assess Student's mental health, Student is entitled to an independent mental health evaluation at public

expense. It is determined that an independent evaluator is appropriate based on the testimony of Tamalpais staff, who expressed clear opinions that a mental health assessment of Student was not warranted. Parents shall choose the evaluator in accord with Tamalpais's independent educational evaluation criteria,⁹ and the evaluator should, as part of the assessment, identify Student's needs, if any, in the area of mental health and make recommendations for addressing any such needs in the school setting. Tamalpais shall additionally fund the presence of the assessor at an IEP team meeting to discuss the results.

Reimbursement for Private Placement

6. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra*, 471 U.S. at pp. 369-370 [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE].) The private school placement need not meet the state education standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, pp. 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where

⁹ No findings are made in this decision regarding whether Tamalpais's independent evaluation criteria are legally compliant.

expert testimony showed that the student had made substantial progress].)

7. In *C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155 (*Garden Grove*), the Ninth Circuit set forth the standards to be applied in determining whether a private placement is appropriate for the purpose of reimbursement. There a student had benefited substantially from a private placement, but parents had been awarded only partial reimbursement because the placement did not address all of the student's special education needs. (*Id.* at pp. 1157-1158.) The Court of Appeals held that parents were entitled to full reimbursement because the IDEA "does not require that a private school placement provide all services that a disabled student needs in order to permit full reimbursement." (*Id.* at p. 1158.) In reaching this conclusion the Ninth Circuit relied upon a standard set forth by the Second Circuit:

To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(*Id.* at p. 1159 [quoting *Frank G. v. Bd. of Education* (2d Cir. 2006) 459 F.3d 356, 365 (citations and emphases omitted)].) The Ninth Circuit explicitly agreed with the Second Circuit: "We agree with and adopt that standard in interpreting what constitutes a 'proper' placement within the meaning of the IDEA." (*Garden Grove, supra*, 635 F.3d at pp. 1159-1160.) The Ninth Circuit has adhered to that standard since. (See, e.g., *S.L. v. Upland Unified School Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159; *Doug C. v. Hawaii Dept.*

of Education, supra, 720 F.3d at p. 1048; *M.N. v. Hawaii Dept. of Education* (9th Cir. 2013) 509 Fed.Appx. 640, 641 [nonpub. opn.]

8. 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 they were rejecting the proposed placement, and state their concerns and intent to enroll their child in a private school at public expense; or at least 10 business days prior to the removal of the child, the parents did not give written notice to the public agency of this information. (20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1).) Reimbursement may also be reduced or denied if the parents' actions were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3); see *Patricia P. v. Bd. of Education of Oak Park* (7th Cir. 2000) 203 F.3d 462, 469 [reimbursement denied because parent did not allow district a reasonable opportunity to evaluate student following unilateral placement].)

9. Student established that Stanbridge provided educational instruction designed to meet his unique needs, and he was supported by services that were necessary to permit him to receive educational benefit. Student accessed his curriculum with support from teachers who utilized strategies and accommodations appropriate to his needs. Student received speech and language therapy and attended a pragmatics class, and social skills and pragmatics were also integrated across classes. Stanbridge's counselors and teachers supported his behavioral needs, and he decreased the intensity of his behaviors and improved his ability to calm down. Student progressed academically, receiving passing grades and mostly average test scores, and made progress toward his goals. Although Tamalpais asserted that Stanbridge is not the least restrictive environment for Student, private placements are not required to satisfy the IDEA's mainstreaming requirement for purposes of reimbursement. (*Aaron P. v. Hawaii, Dept. of Education* (D.Hawaii 2012) 897 F.Supp.2d 1004, 1028.) Accordingly, Stanbridge

was a proper placement, and in light of Tamalpais's failure to make a clear offer, reimbursement for Stanbridge is appropriate.

10. Parents timely and appropriately notified Tamalpais regarding their intent to place Student at Stanbridge. Although Tamalpais asserted that, prior to its offer, Parents did not intend to place Student in Tamalpais, the evidence did not establish that Parents were not considering a Tamalpais placement. Parents learned about the placement offers, conducted observations, and according to Tamalpais witnesses, appeared interested. Their June 17, 2015, 10-day notice was submitted after Mother's observation of Mr. Leist's special day class and almost one month after the IEP offer was made. Under these circumstances and given that the May 2015 IEP offer did not constitute a FAPE, Parents were not shown to have acted in bad faith or unreasonably such that reimbursement should be declined or reduced. (*Union, supra*, 15 F.3d at p. 1526 ["a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement"].)

11. Reimbursement shall begin 10 business days after Parents' June 17, 2015 notice, or on July 1, 2015. Since Stanbridge's last day of the 2014-2015 school year was June 4, 2015,¹⁰ reimbursement shall begin with the first day of the 2015-2016 school year. Student is awarded reimbursement for full Stanbridge tuition and shuttle fee expenses incurred beginning on the first day of the 2015-2016 school year and

¹⁰ Two emails from Mother sent in April and May 2015 refer to June 4, 2015, as Student's last day of school. Although a Stanbridge staff person indicated in a November 24, 2014 email that June 5, 2015, marked the end of the school year, the conflict does not require resolution. Both dates are prior to July 1, 2015, and therefore have the same impact on reimbursement.

continuing through May 17, 2016. As no findings are made beyond May 17, 2016, based on Student's identification of the issues in this matter, no remedy is awarded beyond that date.

12. Additionally, Student shall be awarded reimbursement for mileage related to Student's appropriate placement at Stanbridge. Parents drove Student 12.9 miles one-way from their home to the shuttle location. Tamalpais shall reimburse Student for mileage for one round trip per day for the days that Student actually attended Stanbridge during the 2015-2016 school year through May 17, 2016, at Tamalpais's mileage rate that was in effect at that time. In his closing brief, Student requests reimbursement for bridge tolls. This request was made for the first time in Student's closing brief, and no evidence was presented regarding bridge tolls. Accordingly, the request for bridge toll reimbursement is denied.

ORDER

1. Within 15 days of the date of this decision, Tamalpais will provide Parents with its criteria for obtaining an independent educational evaluation at public expense.

2. Within 30 days of receiving Tamalpais's independent educational evaluation criteria, Parents shall provide Tamalpais with the name of their selected assessor to conduct an independent mental health evaluation.

3. Within 15 days of Parents' identification of a qualified and available assessor, Tamalpais will contact the assessor and expeditiously complete the contracting process. Student will request that the assessor include in the report a description of Student's needs, if any, in the area of mental health and recommendations for addressing any such needs in the school setting.

4. Tamalpais will pay for the independent mental health assessment directly. The report will be provided to Parents, and Parents will provide a copy to Tamalpais. Tamalpais shall also fund the presence of the independent assessor at an IEP team

meeting, either in person or via telephone at the assessor's election, to review the results of the independent assessment. This IEP team meeting shall be convened within 30 days of receipt of the independent assessment.

5. Within 45 days of the date of this decision, Tamalpais shall reimburse Student the cost of tuition and shuttle expenses paid to Stanbridge for the 2015-2016 school year prorated through May 17, 2016, consistent with the invoices and payment documentation in evidence. No further documentation will be required from Parents to substantiate those amounts and payments, as sufficient documentation was submitted as evidence in this case.

6. Parents shall submit proof of Student's attendance at Stanbridge for the 2015-2016 school year through May 17, 2016. Within 45 days of receiving that documentation, Tamalpais shall reimburse Student for mileage for one round trip between Student's home and the shuttle location per day that Student attended Stanbridge at Tamalpais's mileage rate that was in effect at that time.

7. All of Student's other claims 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 Issue 3(c) and partially prevailed on Issue 2. Tamalpais prevailed on Issues 1(a), 1(b), 3(a) and 3(b) and partially prevailed on Issue 2. Issue 3(d) was not decided.

RIGHT TO APPEAL

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

(k.)

DATED: July 8, 2016

/s/

LISA LUNSFORD

Administrative Law Judge

Office of Administrative Hearings