

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2017041132

v.

TEMECULA VALLEY UNIFIED SCHOOL  
DISTRICT.

DECISION

Parent on behalf of Student filed a Request for Due Process Hearing with the Office of Administrative Hearings on April 26, 2017, naming Temecula Valley Unified School District. On June 12, 2017, OAH granted District's motion to continue. Administrative Law Judge Vernon Bogy heard this matter in Temecula, California on September 5, 6, 7, 26, and 27, 2017, and October 17, 18 and 19, 2017.

Wendy M. Housman, Attorney at Law, represented Student. Theresa Sester, educational advocate, assisted Ms. Housman each day of hearing. Student's Parent attended each day of the hearing. Student did not attend the hearing.

Sarah W. Sutherland and Amanda Johnston, Attorneys at Law, represented District. Breck Hilton, Assistant Director of Special Education, attended the hearing on behalf of District.

At the conclusion of the hearing, the matter was continued until November 22, 2017, to allow the parties to file written closing arguments. Closing arguments were timely filed, the record was closed, and the matter was submitted for decision on November 22, 2017.

## ISSUES<sup>1</sup>

1. Did District fail to appropriately implement Student's May 13, 2015 positive behavior intervention plan from March 17, 2016, through the filing of Student's complaint by (a) failing to address escalating behaviors; (b) allowing Student to sleep in school; and (c) failing to motivate Student to complete his work?
2. Did District fail to timely revise Student's May 13, 2015 positive behavior intervention plan from March 17, 2016, through the filing of Student's complaint after it was clear that his behaviors were escalating, and despite acknowledgement that the current positive behavior intervention plan was not working?
3. Did District deny Student a free appropriate public education from March 17, 2016 through the filing of Student's complaint by failing to materially implement Student's October 13, 2015 individualized education program when District:
  - (a) failed to provide all assistive technology required devices and services mandated under his IEP;
  - (b) failed to appropriately implement Student's behavior and post-secondary transition goals;
  - (c) allowed Student's instructional aide to complete Student's homework, and allowed teachers to artificially inflate his grades?
4. Did the October 5, 2016 IEP fail to offer Student a FAPE because it was not reasonably calculated to provide Student with a meaningful educational benefit, and

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<sup>1</sup> The issues have been clarified to include specific sub-issues regarding alleged cheating on homework and grade inflation which were raised in the complaint and presented at hearing. 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.)

would have caused Student academic regression and substantial educational/social/emotional harm?

5. Did District deny Student a FAPE by failing to file a due process complaint against Parent for lack of consent to the October 5, 2016 IEP?

## SUMMARY OF DECISION

Student was not denied a free appropriate public education beginning March 17, 2015. District did not materially fail to appropriately implement Student's May 13, 2015 positive behavior intervention plan, and properly addressed his behavioral issues at school. District did not allow Student to sleep in school, and made appropriate efforts to motivate and encourage Student to complete his work. While Student's instructional aides assisted him with school work, they did so within the appropriate accommodations and services set forth in Student's operative IEP. Although Student's maladaptive behaviors at home had escalated substantially, he did not display the same type or degree of behavior at school, such that District was required to revise his May 13, 2015 behavior intervention plan.

Further, District provided Student with the assistive technology required devices and services required under his IEP, and appropriately implemented his behavior and post-secondary transition goals. Student's October 13, 2015 IEP was appropriately implemented, and the proposed October 5, 2016 IEP was reasonably calculated to provide Student with a meaningful educational benefit.

District did not deny Student a FAPE by failing to file a due process complaint against Parent for lack of consent to the October 5, 2016 IEP.

## FACTUAL FINDINGS

1. At the time of hearing, Student was 18 years old, and had assigned his educational rights to Parent. At all relevant times he resided with Parent within the

geographical boundaries of District. Student attended District's Great Oak High School in Riverside county beginning in August 2014, his freshman year until January 5, 2017, when Parent placed Student at New Haven School and Residential School, a non-District residential treatment center which was located in San Diego County.

2. Student sustained a traumatic brain injury when he was approximately 18 months old. As a result, Student developed cognitive issues and non-convulsive seizure disorder. When Student was five-years-old, he was adopted by Parent. Upon adoption, he initially demonstrated aggressive behavior, emotional reactivity, food hoarding, and difficulty in trusting others and forming lasting relationships.

3. Student initially qualified for special education services in 2006, under the eligibility categories of traumatic brain injury and other health impairment.

#### STUDENT'S ATTENDANCE AT GREAT OAKS HIGH SCHOOL

4. Student attended primarily special day classes in middle school. When he began high school at Great Oak, at Parent's request, Student was placed in primarily general education classes, with special education and related services provided under his IEP. Student was on track to earn a regular high school diploma.

5. During the 2014-2015 school year, Student demonstrated considerable behavioral issues. He eloped from class and school. He acted out by climbing on top of a soda machine at school. He was defiant to his teachers and staff. During that school year, he had an assigned one-to-one instructional aide, with whom he had worked since fifth grade. At the end of the school year, that aide moved to a new position at another school, and Student was assigned new one-to-one instructional aides for the following school years.

## STUDENT'S INSTRUCTIONAL AIDES

6. Mike Farley was Student's afternoon aide in math, history and English beginning in November of the 2014-2015 school year. Mr. Farley remained as his aide through that school year, as well as during the 2015-2016 school year, and during the fall semester of the 2016-2017 school year. During the fall semester of 2016-2017, Mr. Farley was Student's aide in algebra, geometry and weights. At the beginning of every school year, Mr. Farley met with Student's case carrier to discuss his IEP and positive behavior intervention plan. Prior to working with Student, Mr. Farley had no formal behavioral training, but at the start of each school year, he met with Student's case carrier to discuss his IEP and positive behavior intervention plan.

7. Ted Woodard was Student's aide beginning in March 2016. When Mr. Woodard began in that position, he met with Student's case carrier and the school nurse to determine Student's disability and ensure that he treated him appropriately. He also reviewed Student's IEP to determine what his responsibilities would be and how he would carry out his duties and meet Student's needs, which included keeping Student on task, prompting him when he was feeling tired and assisting Student with his classwork and homework as and when necessary.

## MAY 13, 2015 POSITIVE BEHAVIOR INTERVENTION PLAN

8. On May 13, 2015, as part of Student's upcoming annual IEP review, a behavior plan was developed for Student, which targeted Student's off-task behaviors, his struggles with completing assignments, and his self-advocacy, that is, requesting assistance from school staff when necessary. The interventions identified in the behavior plan included checking for Student's understanding of work assignments and expectations; using verbal and visual cues to support Student to stay on task and complete assignments; work modifications as needed to assist in writing tasks and

academic fatigue; prompting Student to check his backpack for missing assignments; providing him with praise and encouragement for staying on-task and completing assignments; requesting assistance when necessary; asking to take breaks and taking breaks when necessary; setting a timer for Student to work on a portion of a task; giving Student a "break card" to use when needed; providing a "time away" area for Student to take needed 10-minute breaks when necessary; and allowing the use of a study room where Student could go to complete his assignments.

9. The behavior plan identified strategies to use when Student's behaviors escalated in frequency, intensity or duration, including responding to Student in a verbally supportive manner, using a quiet and reassuring tone to redirect Student back to task, and if Student was not able to return to task to offer him a choice to take a break in a preferred area for no longer than 10 minutes. Coordination of the behavior plan was to be carried out by Student's case carrier, Rachel Medwid.

10. Thereafter, Mr. Farley and Mr. Woodard, as his instructional aides, prepared daily data collection logs, tracking Student in such areas as his preparedness for school, his attendance, his progress in remaining on-task and work completion, and his use of accommodations. The data logs were provided to Ms. Medwid, who reviewed them with Student's school behavioral counsel, Jonathan Sorbello. Ms. Medwid and Mr. Sorbello met with Student's teachers and aides to discuss his progress, and they observed Student in class as well. The logs were provided to Parent on a weekly basis. Parent did not consistently review the data logs, did not question the data on the weekly logs, and did not request any changes to the data logs, or the information tracked in the logs.

## OCTOBER 13, 2015 INDIVIDUALIZED EDUCATIONAL PLAN - THE LAST CONSENTED TO AND IMPLEMENTED IEP

11. On October 13, 2015, Student's IEP team met. Parent participated in the meeting, as did Student's educational advocate and all appropriate District personnel. The team reviewed Student's progress on his goals from his previous IEP of May 13, 2014, and set goals for the coming year in the areas of transition, math, social/emotional, reading and writing, on-task behavior, task completion, and self-advocacy.

12. The team determined that Student required assistive technology devices to access his education, including the use of writing software provided to him on a laptop, to assist in writing fluency and to address fatigue and anxiety with respect to writing. District proposed services for Student for the coming year, including specialized academic instruction in a regular classroom group setting in math, English, science and history, and a group setting in a separate classroom for academic success; individual counseling and guidance in a separate classroom; a group setting in a separate classroom for vocational assessment, counseling, guidance and career assessment; and note-taking assistance, which included the options of "student highlights power point or outline provided." The IEP incorporated the May 13, 2015 behavior plan.

13. Parent did not agree that the behavior plan addressed all of Student's behavioral issues, which she felt impeded his education, and did not believe that the post-secondary transition plan was adequate to meet his needs. She did not agree with specialized academic instruction in his academic success class, and did not believe that Student should be excluded from his elective schedule. Nevertheless, and having documented her concerns, Parent consented to the IEP "because any IEP is better than nothing."

14. On March 7, 2016, when Student failed to pass his biology class for that semester, Parent agreed to amend the IEP to add an academic success class and drop biology for the coming semester.

#### IMPLEMENTATION OF THE OCTOBER 13, 2015 IEP AND BEHAVIOR PLAN

15. Student's history teacher during the 2016 fall semester, Christine Pollero, was aware of Student's IEP and behavior plan. She prompted him when he went off-task, and consistently checked his understanding of his school work to ensure that he understood what the work required. She reviewed and provided Student with her comments about his work. She had him sit near other students who typically were on-task to encourage him to do the same, and in close proximity to his one-to-one instructional aide who could offer him assistance when needed. Her classroom instructional assistant circulated around the room to make certain that all of her students, including Student, were on task. She urged Student to ask for assistance and to take breaks when necessary, and encouraged him to engage in activities so that he might feel more of a connection in her classroom and be able to self-advocate, for example, allowing him to play his guitar for the class at the end of the class session.

16. Maria Castillo, Student's math teacher during both the 2014-2015 and 2015-2016 school years, worked with Student on his on-task behavior and self-advocacy goals by encouraging him to request a break when needed, and to make certain that he took appropriate breaks of 10 minutes or less. She redirected Student when he occasionally showed a lack of motivation. She did not find him to have issues with remaining on-task in her class, and while he did not always turn in his homework, he demonstrated a mastery of the content standards of her classes, and understood the content of the classes.

17. Kerry Leander, Student's world history teacher during the 2015-2016 school year, allowed Student to take short breaks when requested, and allowed him to



occasionally turn in assignments late, because that was Mr. Leander's practice with all his students, Student received no special treatment in that regard, and Student received passing grades in Mr. Leander's class. He worked with Student's instructional aides to ensure that Student stayed on-task.

18. Student's instructional aides worked with Student to implement his IEP and behavior plan. Mr. Farley prompted Student to return to task when he was off-task, and praised him for completing his assignments. He made sure that Student took breaks when necessary. He maintained a homework log for Student to track task completion, and if Student missed assignments, Mr. Farley would speak to Student about the assignments and encourage Student to complete and return them.

19. Mr. Woodard worked with Student to keep him on task, prompted him when he was feeling tired, and assisted him with his classwork and homework as and when necessary. He used verbal cues to prompt Student back to task, and to make sure that he understood the assignments. He encouraged breaks when Student needed one. When Student did not return an assignment, he prompted him to check his backpack.

20. Mr. Sorbello, Student's school counselor, monitored the implementation of Student's IEP and behavior plan. He met with Student regularly, meeting with him on 17 occasions between March 2016 and December 2016. He worked with him on the behavior goals identified in the IEP and behavior plan. He tracked Student's progress through the data logs of his instructional aides, which showed that Student was progressing in the areas of on-task behavior, task completion, and requesting assistance or a break when needed.

#### STUDENT'S ACADEMIC PROGRESS

21. During the 2016 spring semester and the 2016 fall semester, Student was on a diploma track, and performed at grade level standards in most of his classes. He received passing grades in eight of 10 general education classes. During the 2016 fall

semester, he received grades of "A-" to "A+" in three classes, grades of "C-" to "C" in two other classes, and received an "F" in U.S. History. Had Student performed well enough in the next semester, he could have raised his U.S. History grade to a passing level.

### Work Completion

22. In August 2016, prior to the start of the 2016-2017 school year, Parent contacted Student's school counselor to discuss his schedule for the coming school year, and at that time advised the counselor that Student had reported to her that instructional aide Ted Woodard was doing his homework for him in his history class. Parent made this complaint verbally, did not present a written complaint, nor did she identify what particular work she believed had been done for Student.

23. Student's counselor reported Parent's concern to District's dean of special education, Angel Toner, who initiated an investigation. As part of her investigation, she interviewed Student, Mr. Woodard, the history teacher, and several of Student's other teachers.

24. Mr. Woodard told Ms. Toner that Student had been struggling with his work at the end of the school year, and was finding it difficult to perform his work or take notes. Therefore, Mr. Woodard would go over his work with him, discuss the assignments including possible correct (or incorrect answers) to multiple choice assignments, prompt him, and help him with his notetaking. After their discussions, Student would dictate his answers to Mr. Woodard, who would then transcribe Student's answers.

25. When Ms. Toner interviewed Student, he told her essentially the same thing, admitted that he would "get lazy," and so would dictate his responses to the aide. Student denied to Ms. Toner that he was having Mr. Woodard do his work for him.

When Ms. Toner interviewed Student, his case carrier, Ms. Medwid, was present in the room as well.

26. Student's history teacher, Christine Pollero, reported to Ms. Toner that she had not seen any evidence that Mr. Woodard had been doing Student's work for him. The other teachers Ms. Toner interviewed also told her that they were not aware of anything which would support Parent's concern that an instructional aide was doing Student's work for him. Each of the teachers interviewed told Ms. Toner that Student earned his own grades, and they had no reason to believe otherwise.

27. At the end of investigation, Ms. Toner sent Parent a letter advising her that the investigation had uncovered no evidence of cheating or anyone doing Student's work for him. Parent never responded to that letter, nor did she challenge any of his grades, even though District has an established and specific protocol in place for challenging a grade. At the time of hearing, Parent had taught at District for 14 years, and was aware of District's protocol for challenging grades.

#### Grade Inflation

28. Parent concluded that Student's grades at Great Oaks were being fabricated during the spring semester of 2016. She believed that his transcripts showed numerous missed assignments, and that some of his teachers were changing and inflating his grades to give him passing grades.

29. Kerry Leander was Student's world history teacher during 2015-2016 school year. Mr. Leander held a bachelor of arts degree in psychology and Christian education, a single subject teaching credential, and a master's degree in computer education. In 2003, he received his certification in specially designed academic instruction in English. Beginning in 1982, he taught social sciences at the high school and middle school level.

30. During the fall semester, Student earned a grade of "C-" in Mr. Leander's class. During the spring semester he earned a grade of "C." Mr. Leander solely determined Student's grades. He based the grades on a number of factors, including exams, periodic quizzes, homework assignments, special projects, and class participation. Each of the factors was assigned a certain weight in establishing the grade, and a student could "fail" in one area, but still receive a passing grade for the class by performing better in the other areas. It was Mr. Leander's custom and practice to give a passing grade only when a student performed sufficiently to earn the grade, and he applied that same standard to Student. Student earned the grades given him by Mr. Leander; he was not told what grades to give Student; he made the sole determination of the grades Student earned.

31. Maria Castillo was Student's math teacher for two consecutive years. During the 2014-2015 school year, she taught him algebra, and during the 2015-2016 school year, she taught him geometry. Ms. Castillo held a bachelor of science degree in biology and a single subject credential.

32. Student received passing grades during each semester in Ms. Castillo's classes. In algebra, he earned grades of "B-" for the fall semester and "C" for the spring semester. In geometry, he earned a "C-" for both the fall and spring semesters. Ms. Castillo assigned those grades to Student; nobody told her what grades to give. She gave Student passing grades because he demonstrated grade level competency during all four semesters he was in her classes. She found that he was good about doing his own work, although his aide, Mr. Farley, often wrote class notes and checked his homework, which she believed to be in compliance with Student's IEP which allowed note-taking assistance. While Student did not always turn in his homework, it was possible to pass Ms. Castillo's classes without homework, because she emphasized overall mastery of the content standards as a key to passing the classes.

## STUDENT'S USE OF ASSISTIVE TECHNOLOGY DEVICES AND SERVICES

33. The October 13, 2015 IEP team determined that Student required assistive technology devices to access his education, including the use of writing software provided to him on a laptop, to assist in writing fluency and to address fatigue and anxiety with respect to writing. District provided Student with a touch-screen laptop computer, which included a program to allow him to speak into the laptop, with his spoken words then converted into text. Student reported to Parent that he generally did not use his assistive technology, because he felt that it took too long to set up, and that he was missing out when the teacher began the class.

## STUDENT'S TRANSITION SKILLS ASSESSMENTS

### Student's Independent Post-Secondary Transition Skills Assessment

34. In 2016, Parent retained Ann Michaels-Weinburger to perform an independent post-secondary transitional skills assessment of Student. Ms. Michaels-Weinburger held a bachelor of science degree in education and a master of arts degree in the art of teaching.

35. Ms. Michaels-Weinburger held teaching credentials in Colorado and Ohio for special education for kindergarten through 12th grade, and for general education for kindergarten through eighth grade. Since 1974, she held teaching and related positions at several different schools and organizations, primarily at the elementary school level. She completed five hours of training in transition assessment in March 2016 from the University of Kansas's Department of Education, and in January 2016 received a certificate of completion for e-training from Brigance Transition Skills Inventory. Ms. Michaels-Weinburger never worked in California as a teacher or a site administrator, did not hold an administrative credential, and never worked on a comprehensive campus at the high school level. She last taught in a general education classroom in 2008.

36. Prior to performing Student's transition assessment, Ms. Michaels-Weinburger had performed her first transition assessment in California in January 2016. Her post-secondary transition assessment of Student was the third or fourth such assessment she had performed.

37. Ms. Michaels-Weinburger conducted Student's transition assessment over two sessions in May and June 2016, and issued her assessment report on June 24, 2016. She concluded that Student did not know how to fully complete a résumé or job application, and could not define all employment-related words. She opined that Student struggled with executive functioning skills including independent, purposeful and self-serving behaviors. As examples, she found that he did not know how to start preparing food for a recipe; would not stop a task (such as cutting vegetables) even though he had enough to finish the recipe; had difficulty determining how much time was required to complete certain tasks; did not properly respond to feedback about how to perform certain tasks; and was unable to focus on more than one thing at a time. She believed that Student would benefit from a program which integrated a high school diploma curriculum and a work-supported program to explore post-secondary employment, education and independent living goals.

38. She reviewed the October 13, 2015 IEP, and concluded that it did not include appropriately measurable transition goals with respect to education, training, employment or independent living. She believed the transition goals were not age-appropriate. She did not believe that the transitional services provided an adequate amount of time for vocational assessments, individual counseling and guidance, or for vocational and career assessments. She opined that the transition services did not include courses of study that would reasonably enable Student to meet his post-secondary goals.

39. Ms. Michaels-Weinburger never presented her assessment to District. She intended to do so at the IEP team meeting to be held on January 24, 2017, but the meeting adjourned without being concluded, and the assessment was never provided to District.

#### District's Post-Secondary Transition Skills Assessment

40. At the beginning of the 2016-2017 school year, Student's case carrier, Rachel Medwid performed a post-secondary transition assessment for Student, to be used at his annual IEP meeting which was to begin in October 2016.

41. Ms. Medwid was employed by District as an education specialist beginning in 2008. She held a bachelor of arts degree in social science, a master of arts degree in special education and an education specialist instruction credential. At the time of hearing she was District's department chair for special education. She had been a resource specialist program teacher for District, and for seven years taught economics in a high school special day class. She had worked as a case carrier for approximately 10 years, and in that position her duties included writing IEPs, pulling students out for transition assistance, and working collaboratively with students, parents and general education teachers.

42. In conducting her assessment, Ms. Medwid met with Student on three occasions to discuss his interests and his post-graduation goals. She administered a transition survey, and had Student fill out several mock employment applications. She assisted Student in researching colleges, programs, and classes which could meet his interests, and helped him to understand how to apply to schools. Student completed a careers interest survey, in which he identified music instruction and dance instruction as two areas of career interest. He completed a student transition planning profile. Ms. Medwid's assessment made recommendations in the areas of post-secondary education and training transition, independent living, employment and community participation.

The assessment proposed 30 minutes of monthly vocational assessment, counseling, guidance, and career assessment, and an additional 30 minutes of monthly career awareness.

#### STUDENT'S INDEPENDENT FUNCTIONAL BEHAVIOR ASSESSMENT

43. Because Parent believed that Student's behavioral issues had begun to escalate at the end of his freshman year of high school, she had a private functional behavior assessment conducted by Creative Solutions on May 26, 2015. That assessment concluded that Student had exhibited aggression towards Parent and others, which on at least one occasion escalated to the point where he grabbed Parent at home and law enforcement had to be called to the home. The functional behavior assessment recommended that Student receive counseling and applied behavioral analysis services to meet his goals in reducing his aggressive behaviors. When Parent was interviewed by the assessor, she reported that she had told Student that if he did not "shape up" his behaviors at home, she would place him in a group home.

#### STUDENT'S BEHAVIORS AT HOME AND SCHOOL

##### Student's Behaviors at Home

44. During the 2015-2016 school year, Parent initiated a six-week session of home-based mental health services through Therapeutic Behavior Services to assist with his maladaptive behaviors at home. During the spring of 2016, Student's home behaviors began to increase dramatically. He became increasingly aggressive, angry, and defiant. Parent found liquor in his backpack. She felt that he was becoming dissociative with her. If Student believed that she was looking at him, he would posture and become aggressive.

45. Because of her concerns, Parent called in Therapeutic Behavior Services for a second session to assist her with Student at home. TBS provided one-to-one



behavioral coaching beginning July 11, 2016 through December 19, 2016. On occasions when TBS was present, Student acted towards Parent in a threatening and aggressive manner. On one occasion he physically restrained her to the point where law enforcement had to be called to intervene. He was often physically aggressive with her. On one occasion he pointed a sharp object at her and told her "You need to step back." On another occasion he became angry when asked about a school assignment and punched a hole in the wall. He stopped bathing. He became non-compliant. He refused to allow her to touch his backpack, and began sleeping with it. When Parent asked him about his homework, he would become hostile and aggressive. He eloped from home in the middle of the night. He developed erratic sleeping patterns which she believed to be a result of the school allowing him to sleep in class. Parent resorted to removing dangerous objects from the home. She locked up any alcohol which was in the house. She was concerned that Student might harm their pets. She called in respite workers, mentors and tutors to work with Student, but found them to be unsuccessful in alleviating his behaviors. Nonetheless, in a treatment summary dated August 25, 2017, the TBS clinical supervisor stated "Client successfully graduated after meeting all benchmarks and remained in the same level of care at the time of graduation."

#### Student's Behaviors at School

46. During the period from March through December 2016, Student had three behavioral incidents at school.

47. On May 18, 2016, Student refused to go to his next class, and Ms. Medwid, as his case carrier, intervened. She spoke calmly to him, and gave him time to think and calm down. Ms. Medwid felt this was in compliance with the reactive strategies portion of his behavior plan, which included being supportive, speaking calmly to him, and allowing him to take a break of no more than 10 minutes in a preferred area. Student, however, told her "you need to take a step down," or words to that effect, looked at her

with a stern gaze, and clenched his fists. He did not go to his class, but remained sitting at the lunch tables throughout his next school period, even though his behavior plan called for him to return to class after 10 minutes.

48. On August 22, 2016, instead of reporting to his first-period class, Student sat in the hallway with his guitar. His one-to-one aide spoke to him, and gave him several prompts to return to class, but Student refused. Ms. Medwid then intervened, and reminded Student of his behavior plan, but Student continued to sit in the hallway. He became upset with Ms. Medwid, and told her that what she was saying to him would "bite her in the ass." Student finally left the hallway and went to his second period class.

49. In October 2016, Student was involved in an incident with several other students. A female peer apparently made a rude comment about one of Student's friends who had recently died. Student became angry, and pushed the female peer who had made the comment. Several other students became involved in the subsequent verbal confrontation. There were no injuries as a result of the incident. On October 4, 2016, Student and several of the other students were placed on a "no contact contract," that is, the students were not to interact with one another for a certain period of time after the incident. Student himself requested at least some of the no contact contracts directed at other students involved in the incident.

#### JANUARY 24, 2017 IEP

50. In October 2016, during Student's 11th grade school year, the IEP team convened over the course of several meetings for Student's annual review. The IEP meeting was initially scheduled to convene on October 5, 2016, but was cancelled by Parent. The team then met on November 1, 2016, November 10, 2016, November 29, 2016, and finally on January 24, 2017. Prior to each meeting, district provided Parent with drafts of the proposed IEP. Parent and Student's educational advocate attended

each meeting. Prior to the November 1, 2016 meeting, District provided Parent with the proposed revised behavior plan.

51. The draft IEP described Parent's concerns about Student's social/emotional and behavioral issues, and acknowledged that he could become non-responsive if challenged by a non-preferred task, and shut down when tired. It noted that he socialized and enjoyed playing his guitar. District team members saw improvement in his on-task behavior and task completion, and self-advocacy (asking for assistance or breaks when necessary). The IEP noted Parent's concerns regarding task-completion and aggressive behaviors at home, as well as his two verbal confrontations with his case carrier.

52. The IEP District team members discussed Student's progress on the goals in his 2015 IEP, concluded that he had met his goals in self-advocacy, task completion, transition, and math, had made substantial progress toward his goal of remaining on task, but had made only partial progress toward his reading and writing goal.

53. The draft IEP described Student's needs in the area of reading and writing, transition, and behavior, and developed goals in self-advocacy, task completion, on-task behavior, organization, and use of assistive technology device to address his reading and writing by providing a laptop computer and a voice-to-text application to allow Student to speak into the device, which would then translate the spoken word into written text.

54. The draft IEP included services including specialized academic instruction in the regular classroom for 240 minutes for English, Math and History served weekly; specialized academic instruction in a separate classroom for 253 minutes for Science and Academic Success, served weekly; 30 minutes of Career Awareness and 30 minutes of College Awareness, served yearly; and 120 minutes of Counseling and Guidance, served yearly.

55. The draft IEP also included services and supplementary aids; daily instructional assistance and checking Student's understanding at the start of an assignment; extra time to complete tests and assignments; access to visuals, manipulatives and graphic organizers; note taking assistance; assistive technology and use of a talk-to-text device to assist in writing; breaks as needed and the use of a "break card;" use of electronic device to take pictures of the class board; dividing assignments into smaller increments; access to audio books and a word bank; having tests and quizzes read aloud; and consultation between general education and special education staff.

56. The draft IEP included a post-secondary transition plan for Student based on his case carrier's transition assessment, which included a transition survey, completion of mock job applications, discussing with Student his interests and his post-graduation goals, and helping him to research colleges programs and classes, and understanding how to apply to schools.

57. Parent disagreed with District team members' conclusions regarding Student's progress, and expressed concern whether Student's behavior plan was working effectively, because Student's behavior at home had become increasingly aggressive. District team members informed Parent that they had not seen the types or degree of behavior at school that Parent was describing to them.

58. During the November 10, 2016 team meeting, Parent advised District that she had retained TBS to provide in-home behavioral support to address Student's home behaviors. Despite District's request for information from TBS, Parent would not allow TBS and the District to share information regarding their information and findings.

59. During the course of the several IEP team meetings, Student's behavioral counselor, Mr. Sorbello, presented progress charts which he had prepared based on the instructional aides' data collection, to show Student's behavioral progress since his last

IEP. Parent disagreed with the progress reports, because she felt that Mr. Sorbello hand-picked data simply to support his conclusions.

60. Due to Parent's concerns regarding Student's behaviors and task completion issues, District team members acknowledged that if the behavior plan was not working, a revision of the behavior plan could be discussed. The IEP team meetings never progressed beyond discussion of Student's present levels of performance, however, so a revision of the behavior plan was never substantively discussed in any of the IEP meetings.

61. On several occasions, and in particular before the November 29, 2016 meeting, Parent requested that Student's one-to-one instructional aides attend the IEP team meetings. She felt that they spent the most time with Student, and therefore knew more than anyone about his circumstances at school, including his behaviors. In advance of the November 29, 2016 meeting, Student's case carrier sent Parent a copy of the draft IEP and draft revised behavior plan to be discussed at the meeting. When the November 29, 2016 team meeting began, District advised Parent that Student's aides would attend the meeting, but only during discussions regarding Student's behavior plan. Because the aides would not be present for the entire meeting, Parent and her advocate left the meeting, and the meeting adjourned before any substantive discussions could be held. District then scheduled an IEP meeting for January 5, 2017, but Parent cancelled the IEP meeting.

62. The next IEP team meeting convened on January 24, 2017. Parent and Student's educational advocate attended the meeting. During the meeting, Parent expressed confusion as to what District was offering Student as a FAPE, while District believed that a clear offer of FAPE was included in the draft IEP. Because of that dispute, the meeting ended prematurely and the proposed goals, services, placement and behavior plan were not discussed, nor was District able to review Ms. Michaels-

Weinburger's independent transition assessment. The meeting ended without Parent's consent to the IEP. Parent did not request another IEP meeting, and there were no further IEP meetings.

63. On February 10, 2017, District sent Parent a prior written notice setting forth the offer of FAPE. The offer included specialized academic instruction in the regular classroom for 240 minutes for English, Math and History; specialized academic instruction in a separate classroom for 253 minutes for Science and Academic Success); 30 minutes of Career Awareness; 30 minutes of College Awareness; and 120 minutes of Counseling and Guidance. Parent did not consent to the January 24, 2017 IEP.

#### STUDENT'S UNILATERAL REMOVAL FROM DISTRICT AND ENROLLMENT IN A NON-PUBLIC SCHOOL

64. On December 28, 2016, when District was on winter break, Parent emailed Jess Caponigro, a District program specialist, advising that she believed that Student required another placement. Parent advised District that she would be unilaterally removing Student from District and placing him at New Haven Youth and Family Services, a nonpublic school, on January 5, 2017, if District did not agree to the placement in less than 10 business days. Mr. Caponigro was on vacation when Parent sent her e-mail, and Parent received an automatically generated "out-of-office" reply to her email. Mr. Caponigro returned to work on January 3, 2017, but did not respond to Parent's email, because an IEP meeting had been scheduled for January 5, 2017. On January 4, 2017, Parent cancelled that meeting.

65. Because Parent did not receive a reply from District by January 5, 2017, she moved Student into a group home at New Haven and enrolled him in New Haven's nonpublic school on January 5, 2017. He was referred to New Haven by the Riverside County Adoptions Assistance Agency, which funded Student's residential placement at

all relevant times. New Haven is located in San Diego County, California. District is located in Riverside County, California.

66. Within two weeks of enrolling at New Haven, Student earned grades of "A" in all of his courses. Parent believed that Student began to immediately flourish at New Haven, and "became his old self."

#### STUDENT'S PRIVATE THERAPIST -DEBORAH WEINSTEIN

67. Deborah Weinstein, Student's private therapist since 2012, testified at hearing. Ms. Weinstein was a licensed marriage and family therapist since 2006. She earned a bachelor of science degree in psychology and a bachelor of arts degree in religious studies from San Diego State University in 2000. She received a master of science degree in marriage and family therapy from San Diego State University in 2004.

68. Based on her counseling sessions with Student, she concluded that he was struggling with social skills, as well as the learning process. She believed that during the period from March 2016 through December 2016 he had regressed behaviorally, and had begun to demonstrate increasingly delusional thinking. She believed that his lines between reality and fantasy had begun to blur.

69. During their sessions, Student often spoke to Ms. Weinstein about school, including social-emotional issues and also academics. She did not observe him at Great Oaks, nor did she speak to his teachers or aides. Although she believed that Student refused to go to class, slept in class, and struggled with peer relationships, she had no personal knowledge in that regard, and based her opinions on what Student reported to her.

70. Student told her that he found his school work, and the school's expectations for him, to be "laughable." He reported that he could do whatever he wanted to do in school, could sleep in class, and that he was a "mastermind of the school," because he could easily distract others from what they wanted him to do. He

expressed that he barely had to do anything at school, and that he was given multiple chances to do work over and over yet would still receive credit for the work. He seldom spoke about his school aides with Ms. Weinstein, but when he did, while he never made negative comments about the aides, she concluded that he considered them to be non-entities whom he could manipulate into doing things for him. Ms. Weinstein concluded that Student was manipulative, and that he was capable of using various methods for controlling his environment, both at school and home, including emotional, aggressive and resistant behavior, to suit his needs. She opined that although Student was successful in manipulating adults in that manner, he continued to struggle with befriending his peers.

71. Ms. Weinstein concluded, based on her sessions with Student that his behaviors at home had begun to escalate beginning in early 2016. She believed Student was physically aggressive with Parent, was verbally aggressive toward a sibling, and engaged in avoidance of, and resistance to, non-preferred tasks.

72. On January 22, 2017, at Mother's request, Ms. Weinstein wrote a report in which she concluded that Student's placement at Great Oaks was not appropriate, because the school had not been able to provide sufficient structure for Student, that he required constant redirection and accountability to learn how to perform his school work, and that the school allowed Student to use his emotions to manipulate his environment without sufficient interventions even though he had assigned behavioral aides. Ms. Weinstein reported that during his final semester at school, Student "was threatened so often he obtained multiple different 'no contact' orders against peers on campus." She recommended that he be placed in the New Haven Youth and Family Services Residential and Day Program. After Student enrolled at New Haven, Ms. Weinstein observed him at school on one occasion, approximately one week after he began taking classes there.



STUDENT'S BOARD CERTIFIED BEHAVIOR ANALYST EXPERT – PEDRO VILLA, JR.

73. Parent retained Pedro Villa to review Student's operative IEP and behavior plan from 2015, and the October 5, 2016 draft IEP and behavior plan. Mr. Villa testified at hearing.

74. Mr. Villa received a bachelor's degree in history in 2002 and a master's degree in special education in 2008. He held a moderate to severe special education teaching credential, a graduate certificate in applied behavior analysis, and had been a board certified behavior analyst since January 2011.

75. From 2004 to June 2012, Mr. Villa was an education specialist, providing intensive behavior analytic classroom treatment to children with autism. From January 2008 to June 2012, he was an intensive behavior intervention supervisor/autism specialist, providing after-school and in-home behavioral therapy supervisor services. He had drafted more than 100 IEPs and 50 behavior intervention plans for students at the elementary school level. None of the IEPs or behavior plans he drafted were for students at the high school level, nor had he performed any assessments at the high school level.

76. Mr. Villa reviewed numerous Student records for the period from March to December 2016, including the draft October 5, 2016 IEP and behavior plan. He also reviewed Student's records from TBS, as well as Ms. Weinstein's records, and interviewed both Student and Parent.

77. Based on his review of the records, Mr. Villa concluded that Student's behaviors at home, which included elopement, physical aggression, not responding, and shutting down, were also occurring at school. He drew a connection between Student's home behaviors and school behaviors based on Student's school work. He concluded that school-related matters, such as homework, acted as a trigger for his behaviors at home. He opined that Student's October 5, 2016 draft IEP and behavior plan were not appropriate because they did not provide for adequate training of Student's

instructional aides, and because a reduction in counseling services had been proposed, when he felt that more counseling services would have been appropriate.

78. During his interview with Student, which took place on August 17, 2017, for approximately 30 minutes, Student informed Mr. Villa that he had an extremely negative view of Great Oak, that the teachers at Great Oak did not care, that he did not have to do any work at Great Oak, that his aides would do his work for him, that he could “get away” with anything. He told Mr. Villa that he was able to and had been manipulating the school staff.

79. Mr. Villa opined that the daily activity logs prepared by Student’s aides showed overuse of his 10-minute break accommodation, and that he was sleeping in class. He concluded that Student’s aides were not recording data consistently and that the logs were incomplete.

80. Based upon his review of Student’s records, and his interviews with Parent and Student, Mr. Villa concluded that Student’s behaviors included refusing non-preferred tasks and eloping from classes. He believed that Student must have been engaging in that type of behavior at school, because he was doing so at home, and therefore it made sense to him that Student must also have acted the same way at school. Mr. Villa “formed the impression” that Student’s case carrier, Ms. Medwid felt threatened by Student, when he told her to “stand down” and clenched his fists at her. His recollection was that during that incident, a “larger male” had to intervene and get Student to return to class. That recollection was based on an email which Ms. Medwid sent to Parent. Mr. Villa never spoke with Ms. Medwid about that incident, and his conclusions that she felt threatened by Student, or that a larger male had to intervene, were based on his interpretation of the tone of the email.

81. Mr. Villa was aware of “no contact contracts” to which Student was a party. He believed, based on what Parent told him, that at least one of the incidents involved

physical contact with a female peer, when he pushed her. He believed Parent's report to be credible because Student had engaged in the same type of physical aggression with Parent at home. Mr. Villa did not see a reference to pushing a female peer in Student's disciplinary records. The incident involving the female peer was the only incident that led him to believe that Student's aggressive behaviors were increasing during the period of March to December 2016.

82. With respect to Student missing class or eloping from school, Mr. Villa based his assumption on a general belief stated by Student's history teacher during the November 16, 2016 IEP team meeting, who expressed concern about Student misusing his 10-minute breaks, failure to complete his homework, and lack of motivation to complete his tasks. Mr. Villa did not attend that IEP meeting, but reviewed a transcript of a recording of the meeting. He did not know whether Student's elopement had increased from previous school years. He did not know how many times, or when, Student eloped during the period March to December 2016.

83. While Mr. Villa believed that Student's target behaviors had increased during the period March to December 2016 from previous school years, he did not have a baseline to determine whether that was the case. Apart from what Student and Parent told him, Mr. Villa did not know how many times Student fell asleep in class, or when, if at all.

## LEGAL AUTHORITY AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>2</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.<sup>3</sup>; 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 Parents or guardian, which meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of Parents and school personnel that describes the

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<sup>2</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis below.

<sup>3</sup> All references to the Code of Federal Regulations are to the 2006 version.

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

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *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.) Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Id.* at pp. 206-207.)

4. The Supreme Court's recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) (2017) 580 U.S.\_\_\_\_ [137 S.Ct. 988] (*Endrew F.*) reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

5. 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.)

6. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof.

7. 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).)

#### ISSUES 1 AND 2: IMPLEMENTATION AND REVISION OF STUDENT'S MAY 2015 POSITIVE BEHAVIOR INTERVENTION PLAN

##### Implementation of Student's May 2015 behavior plan

8. Student contends that during the period from March 2016 through December 2016, he was denied a FAPE when District failed to implement his May 15, 2015 behavior plan by not addressing his escalating maladaptive behaviors, allowing him to sleep in school, and not motivating him to complete his work. District denies this contention and asserts it properly implemented Student's behavior intervention plan in all respects.

9. A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by

the child's IEP." (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) A child's educational progress, or lack thereof, may be probative of whether there exists more than a minor shortfall in the services provided. (*Ibid.*)

10. Student did not meet his burden on this issue. The preponderance of the evidence established that District implemented the behavior plan interventions and reinforcement techniques, and if there were any shortfalls in the implementation, they were minor in nature and not material failures to implement the behavior plan.

11. For example, Christine Pollero, Student's history teacher during the 2016 fall semester was aware of Student's behavior plan, and that the behavior plan was designed to address the issues of remaining on-task, self-advocacy and task completion. In order to keep him on-task, Ms. Pollero prompted him when he went off-task. She checked his understanding of particular tasks to make certain that he knew what to do, and had him repeat back to her the task so she could ensure that he understood the task. She reviewed his work and provided him with her comments about the work, and she had him sit near other students who typically were on-task to encourage him to do the same. She made certain that he sat in close proximity to his one-to-one instructional aide who could offer him assistance when he needed it, and her classroom instructional assistant would circulate around the room and make certain that all of her students, including Student, were on task.

12. Ms. Pollero also encouraged Student to self-advocate, allowed him to take a break when he requested one, and encouraged him in ways outside of history so that he might feel more of a connection in her classroom and be able to self-advocate. For example, she allowed him to play his guitar for the class at the end of the class session.

13. Maria Castillo, Student's math teacher during both the 2014-2015 and 2015-2016 school years, also worked with Student on his on-task behavior and self-advocacy goals. When Student needed a break, he requested one and typically took no longer than five minutes for breaks. Ms. Castillo found that Student was easily redirected if he occasionally showed a lack of motivation, but she did not find him to have issues with remaining on-task in her class. With respect to task completion, while Student did not always turn in his homework, he demonstrated a mastery of the content standards of her classes, understood the content of the classes, and received passing grades all four semesters in her classes.

14. Kerry Leander, Student's world history teacher during the school year 2015-2016, worked with Student on implementing his behavior plan as well. He allowed him to take short breaks when requested by Student, and those breaks were limited to just a few minutes. With respect to task completion, while Student was sometimes late in turning in his homework assignments, Mr. Leander allowed him to do so because that was his practice with all his students, and Student received no special treatment in that regard. He worked with Student's instructional aides to ensure that he stayed on-task. Student received passing grades in Mr. Leander's class.

15. Student's instructional aides were also aware of his behavior plan, and worked with Student to implement it. Mr. Farley, Student's aide in the 2014-2015, 2015-2016, and the 2016-2017 school year, prompted Student to return to task when he was off-task, prompted Student to check his backpack for missing assignments, praised and encouraged Student for finishing assignments, and made sure that he took breaks when



he requested one. He maintained a homework log for Student to track task completion, and if Student missed assignments, Mr. Farley would speak to Student about the assignments and encourage Student to complete and return the assignments. He believed that the behavior plan behavior interventions were having positive results, and Student was receptive to Mr. Farley's interventions which worked well him.

16. Mr. Woodard, Student's instructional aide beginning during the fall semester of the 2015-2016 school year through December 2016, worked with Student to keep him on task, prompted him when he was feeling tired, and assisted him with his classwork and homework as and when necessary. He used verbal cues to prompt Student back to task, and to make sure that he understood the assignments. He encouraged breaks when Student needed one. When Student did not return an assignment, he prompted him to check his backpack.

17. Although Student was not provided with a "take a break" card or a timer to track his breaks, he was able to and did request breaks when necessary, and his teachers and aides made sure he received breaks when he asked for them. With only a few exceptions, he took breaks of generally appropriate lengths, and there was no evidence that a "break card" or a timer would have made a material difference in the implementation of his behavior plan.

18. Jonathan Sorbello, Student's school counselor, developed and monitored the implementation of Student's behavior plan. From March 2016 through December 2016, he met with Student 17 times. He worked with him on the behavior goals identified in the IEP and behavior plan. He tracked Student's progress through the data logs of his instructional aides, which showed that Student was progressing in the areas of on-task behavior, task completion, and requesting assistance or a break when needed. Student's grade point average had improved, and the frequency of his behavioral incidents dropped significantly following his freshman year.

19. None of Student's teachers or aides observed him engaging in the types of behaviors described by Student as showing a failure to implement the behavior plan. While Student occasionally put his head down on his desk, he was easily redirected, and was never observed sleeping in class. He did not act aggressively or defiantly in class. Although Mr. Woodard heard of some aggression exhibited by Student outside the classroom, he never personally observed such behaviors. Mr. Farley observed only a single occasion when Student was verbally aggressive with his case carrier during the period that he acted as Student's aide. When Student took breaks, they were of a generally appropriate length of time.

20. While Parent testified to an array of behaviors by Student which she believed showed that his behavior plan was not being appropriately implemented, she did not observe him at school during the relevant time period, nor did she consistently review the data logs prepared by his aides. She did not speak with his teachers to determine his progress. Parent's conclusions about Student's behaviors, and whether the behavior plan was being properly implemented were, largely, if not entirely, based on unsubstantiated statements and representations made to her by Student, who by Parent's own admission, was consistently manipulative.

21. Ms. Weinstein, Student's longtime private therapist, did not observe Student at school, nor did she speak to his teachers or aides. Although she believed that Student refused to go to class, slept in class, and struggled with peer relationships, she had no personal knowledge in that regard, and based her opinions on what Student reported to her. In her testimony, she acknowledged that Student was capable of using various methods for controlling his environment, including emotional, aggressive and resistant behavior, to suit his needs, and in her professional opinion found Student to be manipulative with the adults with whom he interacted.

22. Although Pedro Villa, Jr., Parent's retained board certified behavior analyst expert witness, reviewed Student's educational records as well as the records of TBS, he did not observe Student at Great Oaks and had no personal knowledge of Student's situation at Great Oaks. His experience as a behavior analyst did not include any experience or background working with students at a high school level. He had not drafted IEPs or behavior plans for students at a high school level. He had not performed assessments at the high school level. He based his opinions in large part on his conclusion that because Student was engaging in certain types of maladaptive behaviors at home, it "made sense" to him that Student must also be doing so at school. He had no personal knowledge to support that conclusion. He formed an impression that Student had acted aggressively towards his case carrier based on his perception of the tone of an email from the case carrier to Parent. He had no personal knowledge of Student's interactions with his case carrier. He did not interview or speak with anybody, apart from Student, who was involved in any such interactions.

23. Mr. Villa's testimony carries little weight; it was based almost entirely on speculation, hearsay, conjecture, misreading or misunderstanding of certain records (including the email describing Student's verbal confrontation with Ms. Medwid), and lack of relevant experience at the high school level.

24. The weight of the credible evidence established that District appropriately implemented Student's behavior plan, and Student failed to meet his burden of proof on this issue.

#### Revision of Student's Positive Behavior Intervention Plan

25. Student contends District failed to timely revise Student's behavior plan, after it became clear that his maladaptive behaviors were escalating, and after his case carrier acknowledged that his behavior plan was not working. District contends that Student's behavior plan was properly implemented, that his behaviors were not

escalating, and that neither Student's case carrier nor anyone from District believed or stated that his behavior plan was not working.

26. An IEP team must revise the IEP as appropriate to address "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." (20 U.S.C. § 1414 (d)(4)(A)(ii)(I); 34 C.F.R. § 38 300.324(b)(2).) Neither Congress, nor the U.S. Department of Education, nor any statute or regulation has created substantive requirements for a behavior intervention plan as contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method, strategy, or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).) Although failure to develop a behavior intervention plan where required can deny FAPE, the lack of a written or formal plan, specifically called a behavior intervention plan, is not a per se denial of FAPE. (*Neosho R-V Sch. Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *E.H. v. Board of Education of Shenendowa Central Sch. Dist.* (2d Cir. 2009) 361 Fed.Appx. 156, 160 (cert. denied (2010) 559 U.S. 1037, 130 S.Ct. 2064).)

27. A school district is not required to address behavior problems which occur outside of school, if the student demonstrates educational progress in the classroom. (*San Rafael Elementary Sch. Dist. v. California Special Educ. Hearing Off.* (N.D.Cal. 2007) 482 F. Supp.2d 1152, 1160-1164).

28. While Parent, Student's private therapist, and Student's behavior analyst expert witness, each testified at length about Student's escalating maladaptive behaviors at home, the preponderance of the credible evidence establishes that Student was not displaying such behaviors at school. During the time period at issue, Student's teachers, instructional aides and District's administrative staff observed only minor behavioral

issues with Student. On two occasions, Student was rude to his case carrier, but on neither occasion did the case carrier feel threatened by Student. On one occasion, Student was involved in a minor physical and then verbal incident with another student, and while that incident cannot be trivialized, it did not approach the level of aggression as testified to by Parent or her experts.

29. Parent testified that Student's at-home behaviors were so out of control that she was required to sign Student up for a second round of behavioral therapy from TBS, but at the close of that session, TBS found that Student had "successfully graduated after meeting all benchmarks and remained in the same level of care at the time of graduation."

30. While Student's at-home behaviors were understandably of great concern to Parent, he did not display those same behaviors at school, and progressed academically in the classroom. He received passing grades in most of his classes, and although he was failing two classes at the end of the 2016 fall semester, there is no evidence that had he remained at Great Oaks he would not ultimately have successfully passed those classes.

31. Parent expressed concern whether Student's behavior plan was working effectively. While several IEP team meetings were held, none of the meetings proceeded to a point where there could have been or was a meaningful discussion of a possible revision of Student's behavior plan. Nevertheless, District did prepare a proposed revision to Student's behavior plan, and provided a copy to Parent at the November 1, 2016 IEP meeting for Parent's input.

32. Student failed to carry his burden that District failed to timely revise his behavior plan, or had a duty to do so at all.

### ISSUE 3: FAILURE TO IMPLEMENT STUDENT'S OCTOBER 13, 2015 IEP

#### Student's Assistive Technology Device and Services

33. Student contends that District failed to provide him with appropriate assistive technology devices and services as required by the October 13, 2015 IEP, or to ensure that he properly used the technology provided him. District contends that Student was provided with appropriate assistive technology devices, including a touch-screen laptop with talk-to-text capabilities to assist him with his writing fatigue and associated anxiety, and that Student simply refused to use the device.

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

35. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn, supra*, 502 F.3d 811 at pp. 815, 822.)

36. Student's October 13, 2015 IEP required assistive technology devices for Student to access his education, including the use of writing software provided to him on a laptop, to assist in writing fluency and to address fatigue and anxiety with respect to writing. District provided Student with a touch-screen laptop computer program to allow him to speak into the laptop, which then converted his speech into text. Student

generally refused to use the device, because he felt that it took too long to set up, and he missed information when the teacher began the class.

37. Here, Student did not carry his burden of proof that District failed to provide him with assistive technology devices and services. District provided the devices required by the operative IEP. Student's refusal to use the assistive technology and the services available to him did not rise to the level of a failure on District's part to implement the IEP or a denial of FAPE, as evidenced by Student's generally passing grades in his general education classes

#### Implementation of Student's behavior and post-secondary transition goals

38. Beginning at age 16 or younger, the IEP must include a statement of needed transition services for the child. (Ed. Code, § 56043, subd. (h).) The IEP in effect when a student reaches 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); Ed. Code, §§ 56043, subd. (g)(1), 56345, subd. (a)(8).) The plan must also contain the transition services needed to assist the pupil in reaching those goals. (34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8). This requirement is sometimes referenced as a "transition plan." (See e.g., *K.C. v. Nazareth Area Sch. Dist.* (E.D. Pa. 2011) 806 F.Supp.2d 806, 822.).

39. Transition services are a coordinated set of activities that are (1) designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation; (2) based on the student's individual needs, taking into consideration the student's strengths, preferences and interests; and (3) include

instruction, related services community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocation evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

#### BEHAVIOR GOALS

40. As discussed above, the preponderance of the evidence establishes that District implemented the behavior plan interventions and reinforcement techniques, and any shortfalls in the implementation were minor in nature, and not material failures.

41. Student's teachers, instructional aides and District's staff and administrators, took appropriate steps to address the target goals in Student's behavior plan, which included remaining on-task, self-advocacy and task completion. His teachers and aides prompted and redirected him when he went off-task, checked his understanding of the tasks assigned to him, reviewed his work, provided him with breaks as and when requested or necessary, prompted Student to check his backpack for missing assignments and praised and encouraged him for finishing assignments. His aides maintained daily activity and homework logs, which were reviewed by his case carrier and school behavioral counselor, and then provided to Parent on a weekly basis.

42. While Parent testified at hearing that Student's aides were not collecting Student's data properly or completely, she neither observed him at school during the relevant time period, nor did she consistently review the data logs prepared by his aides, even though she was a long-time teacher at District, and the data collected on Student was readily available to Parent. She did not question the logs at the time, nor did she speak with his teachers to determine his progress, or whether the data in the logs was accurate and complete.



43. The preponderance of the evidence establishes that District appropriately implemented Student's behavior plan, and Student failed to meet his burden of proof that it did not so.

#### POST-SECONDARY TRANSITION ASSESSMENT AND GOALS

44. At the beginning of the 2016-2017 school year, Student's case carrier Ms. Medwid, performed a post-secondary transition assessment, which was to be used at his next annual IEP meeting. She administered a transition survey, assisted Student in completing mock job applications, and discussed with Student his interests and his post-graduation goals. She proposed 30 minutes of monthly vocational assessment, counseling, guidance, and career assessment, and an additional 30 minutes of monthly career awareness. She assisted Student in researching colleges, programs, and classes which could meet his interests, and helped him to understand how to apply to schools.

45. Student's transition expert, Ann Michaels-Weinburger, conducted a transition assessment over two sessions in May and June 2016, and concluded that District's transition assessment was inadequate to address his post-secondary transition requirements.

46. On whole, Ms. Michaels-Weinburger's assessment carries less weight than that performed by Ms. Medwid. She had performed her first transition assessment only a few months before she conducted her assessment of Student. Student's assessment was only the third or fourth she had ever conducted. She had no experience working on a comprehensive campus at the high school level. She had minimal formal training in transition assessments when she conducted Student's assessment.

47. In contrast, Ms. Medwid, had worked as a case carrier at the high school level for approximately 10 years. She had attended hundreds of IEP team meetings, had written or been involved in writing numerous IEPs, had provided numerous students with transition assistance, working collaboratively with students, parents, and general

education teachers. She had worked with behavioral counselors and psychologists to draft behavior plans. Ms. Medwid's post-secondary transition assessment was more credible than Student's independent transition assessment.

48. Student did not carry his burden to show that District's post-secondary transition assessment was inadequate. District's assessment set appropriate measurable post-secondary goals; it assessed age-appropriate transition skills related to training, education, employment and independent living skills. District's assessment was appropriate.

#### Implementation of October 13, 2015 IEP; Grade Inflation; and Cheating on Homework

49. Student contends that the October 13, 2015 IEP was not appropriately implemented, in part, because his homework was done for him, and his teachers were inflating his grades. District contends that any homework assistance was appropriate and pursuant to the services and accommodations in the IEP which allowed Student's aides to provide note-taking assistance, and that Student's grades were not inflated.

50. Student presented no credible evidence that his instructional aide, Mr. Woodard, was doing his homework for him. A careful review of the entirety of Mr. Woodard's testimony establishes that he was not doing Student's homework for him, but rather was merely acting in compliance with the services and accommodations called for under the operative IEP, including assisting Student in note-taking, using verbal cues to prompt him back to task, checking for his understanding of the homework and classwork, and providing him with breaks when necessary. When Mr. Woodard went over Student's homework with him, discussed the various proposed answers, posed scenarios to suggest which answers might be correct (or incorrect) and why, and transcribed Student's answers to the homework, he was performing his job as an instructional aide.

51. The data logs prepared by Mr. Woodard substantiate that he informed Ms. Medwid during her investigation of the homework issue that he was not doing Student's homework for him, and that contemporaneous statement to the case carrier, combined with Student's own contemporaneous statement to the case carrier in that same respect, is more credible than conflicting and conclusory testimony presented at hearing more than a year later.

52. Similarly, Student's argument that Student's grades were intentionally inflated was not supported by the evidence. Student's teachers testified clearly and unambiguously that Student earned every grade he was given; that they did not inflate his grades; and that District does not have a policy which requires, or even encourages, them to inflate grades. Parent did not present any credible evidence to establish what grades, if any, were inflated, or that grades were inflated at all. The direct and uncontradicted testimony of each of the teachers is entitled to full credit on this issue.

#### ISSUE 4: PROPRIETY OF DISTRICT'S OCTOBER 5, 2016 IEP

53. Student contends District denied him a FAPE because the October 5, 2016 IEP did not adequately address or identify Student's needs with respect to his behavioral, academic, social/emotional and transition issues, and did not offer appropriate supports and services, including placement, to meet his unique needs and allow him to make progress on his goals. District argues that District IEP team members who were knowledgeable about Student made proper recommendations about Student's special education supports and services based on all the information available to the team, including Student's data evaluations, the placement options available, and the least restrictive environment.

54. 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. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required

to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) 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 must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*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 *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

55. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level or failure to meet the goals stated in his IEP are not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*E.S. v. Independent Sch. Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. Sch. Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.)

56. The Supreme Court's recent decision in *Endrew F, supra*, 137 S.Ct. at p. 996, reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

57. Student did not meet his burden of proof that the October 5, 2016 IEP was not reasonably calculated to provide him with a meaningful educational benefit, and

would have caused Student academic regression and substantial educational, social and emotional harm.

58. The IEP appropriately and adequately addressed Student's social/emotional and behavioral issues, identified areas in which he displayed behavioral challenges, and recognized the factors which resulted in behavioral issues. The IEP determined the level of Student's progress on his 2015 IEP goals, identified his areas of need, developed appropriate goals, and established the types of services and accommodations required to address Student's unique needs. The IEP set goals to support Student's post-secondary transition.

59. The IEP offered services specifically designed to address Student's academic needs, including specialized academic instruction in the regular classroom for some subjects and specialized academic instruction in a separate classroom for others, as well as services related to career and college awareness, and counseling and guidance services.

60. The October 5, 2016 IEP was reasonably calculated to provide Student with a meaningful educational benefit, and to allow Student to make appropriate progress in light of Student's specific needs. Student failed to meet his burden of persuasion as to this issue.

#### ISSUE 5: DISTRICT'S FAILURE TO FILE FOR DUE PROCESS TO IMPLEMENT THE OCTOBER 5, 2016 IEP

61. Student contends that he was denied a FAPE because District failed to file for a due process hearing with OAH following Parent's refusal to sign the January 24, 2017 IEP. District contends that it made numerous attempts to continue and complete the IEP and obtain Parent's consent to the IEP, that the IEP process was ongoing, and that any duty to file for a due process hearing was never triggered.

62. The IDEA provides that if the parent refuses to consent to services offered in an IEP, other than an initial IEP, the school district may initiate a due process hearing. (20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.300(b)(3); *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1167-1168 (*I.R.*)). The California Education Code requires that “as soon as possible following development” of the IEP, “special education and related services shall be made available” to the student in accordance with the IEP. (Ed. Code § 56344(b).) If the parent consents to some, but not all, of the components of an IEP, the school district must determine whether the proposed special education program component is determined to be necessary to provide a FAPE. If the school district “determines that the proposed special education program component to which the parent does not consent is necessary to provide” a FAPE, “a due process hearing shall be initiated.” (Ed. Code. § 56346(f).) The school district cannot opt to hold additional IEP team meetings, or continue the IEP process in lieu of initiating a due process hearing; rather, the school district must initiate a due process hearing expeditiously. (*I.R., supra*, 805 F.3d at p. 1169.)

63. *I.R.* clarified that Education Code section 56346, subdivision (f), requires a school district to “expeditiously” request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE. (805 F.3d at p. 1169.) The Ninth Circuit explained, “If, in the school district’s judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime.” (*Id.* at p. 1170.)

64. A school district’s failure to comply with a procedural requirement, such as Education Code section 56346, subdivision (f), denies a child a FAPE when the

procedural inadequacy results in the loss of educational opportunity or causes a deprivation of educational benefit. (*I.R., supra*, 805 F.3d at p. 1170.) To the extent a student loses an educational opportunity and was deprived of educational benefits for an unreasonably prolonged period, the school district can be held responsible for denying the child a FAPE for that period. (*Ibid.*) In *I.R.*, the school district's delay of more than a year and a half in requesting a due process hearing following the parent's failure to consent to a provision of the IEP determined to be necessary to provide the student a FAPE was unreasonable. (*Ibid.*)

65. Here, Student did not prove that District failed to comply with the holding of *I.R.*, or that he was denied a FAPE by District's failure to file for a due process hearing after Parent's refusal to consent to the January 24, 2017 IEP. Parent voluntarily and unilaterally removed Student from District on January 5, 2017. Within a matter of two weeks and before the January 24, 2017 IEP team meeting could even begin, Student was thriving academically and behaviorally in his new school placement. He was receiving grades of "A" in all his classes. He began to flourish and "became his old self." Student presented no evidence that he lost any educational opportunities or was deprived of any educational benefits for an unreasonably long period of time, or any time at all, as a result of District's failure to file for a due process hearing after Parent refused to consent to the January 24, 2017 IEP.

## ORDER

All relief sought by Student is denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due

process matter. District prevailed as to all issues that were heard and decided in this case.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATE: December 13, 2017

/s/

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VERNON BOGY

Administrative Law Judge

Office of Administrative Hearings