

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN RAMON VALLEY UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2016110105

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on October 24, 2016, naming San Ramon Valley Unified School District.

Administrative Law Judge Rebecca Freie heard this matter in Danville, California on December 8, 13 and 14, 2016.

Father represented Student and was present throughout the hearing. Mother was present the first day of hearing and a portion of the morning of the second day of hearing. Student was not present at the hearing.

Alejandra Leon, Attorney at Law, represented San Ramon. Jean Anthony, Director of San Ramon's Special Education Local Plan Area was San Ramon's representative and was present throughout the hearing.

The matter was continued at the parties' request to January 12, 2017, to allow the parties to submit written closing arguments. The matter was submitted for decision on January 12, 2017, upon timely receipt of written closing arguments.

## ISSUES<sup>1</sup>

1) Did San Ramon commit procedural violations resulting in the denial of a free appropriate public education to Student by:

- a. failing to discuss individual goals at the IEP team meetings on October 10 and 24, 2016, and November 14, 2016;
- b. failing to offer Student placement at a specific nonpublic school at individualized education program team meetings on October 10 and 24, 2016; and
- c. failing to consider input from Parents, reports they provided and alternative placements they recommended at IEP team meetings on October 10, and 24, 2016, and on November 14, 2016?

2) Did San Ramon deny Student a FAPE at IEP team meetings on October 10 and 24, 2016, and November 14, 2016, by failing to offer him a placement and services that would address his unique needs and provide him educational benefit for the 2016-2017 school year?

## PROCEDURAL MATTER

Student's complaint contained claims related to IEP team meetings in May 2016, and on October 10 and 24, 2016. On December 2, 2016, OAH granted San Ramon's

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<sup>1</sup> For the sake of clarity, the issues have been slightly reworded and reordered. 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.)

<sup>2</sup> Spectrum has several facilities in the San Francisco Bay area. However, as used in this Decision, "Spectrum" refers to the Oakland facility unless otherwise noted.

motion to dismiss claims related to the May IEP team meetings, only keeping claims related to the October 10 and 24, 2016 IEP team meetings. This was because Parents waived all claims accrued prior to August 2, 2016, when they signed a settlement agreement on that date.

On the first day of hearing the parties stipulated to expand the issues to include the IEP team meeting held on November 14, 2016, because this was last in the series of IEP team meetings that resulted in an offer of placement at a nonpublic school, Spectrum Center in Oakland, California<sup>2</sup> and other services for the 2016-2017 school year. The parties agreed that this proposed placement is disputed and at issue. Both parties addressed the November 14, 2016 offer of placement and services in their closing arguments.

## SUMMARY OF DECISION

In his complaint and at hearing, Student alleged procedural violations which he claimed denied Parents meaningful participation in the IEP process, and thus denied him a FAPE and educational opportunity. Student claims other alleged procedural violations in his closing argument, but these are not addressed in this Decision because they were not at issue at hearing. San Ramon denies committing the procedural violations at issue. Student also claims that the offer of placement at Spectrum is not an offer of a FAPE. San Ramon argues that it is.

In this Decision, it is found that San Ramon did not commit the alleged procedural violations at two IEP team meetings in October 2016, and one on November 14, 2016, and thus did not deny Student a FAPE. In regards to San Ramon's offer of placement at Spectrum on November 14, 2016, it is found that this is not a placement that will provide Student with a FAPE. This is because the classroom in which Student

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would be placed does not have a fulltime credentialed special education teacher in the classroom for more than an hour or two each day. Although it is expected that much of the individual instruction for students in the classroom would be provided by paraprofessionals, the credentialed special education teacher assigned to the classroom would not have sufficient time to prepare adequate lesson plans and materials for Student and his classmates, or devise appropriate instructional strategies. Therefore Student would not receive a FAPE if placed at Spectrum. However, for reasons discussed below, Student is not entitled to further relief.

## FACTUAL FINDINGS

### JURISDICTION

1. Student resides with Parents within the boundaries of San Ramon, and has done so at all times in this matter. He is nine years of age and is eligible for special education under the primary disability category of autism, and the secondary disability of speech and language impairment. He was diagnosed with autism spectrum disorder at the age of three. At the time of hearing, Student attended a moderate special day class at San Ramon's Creekside Elementary School. He began attending this class in December 2014. It is unknown if Student is still attending this class. The parties did not dispute at hearing that this placement was inappropriate for Student.

## 2015-2016 SCHOOL YEAR

### Lindamood Bell Program

2. Parents had Student assessed at the Berkeley Lindamood Bell Center<sup>3</sup> on May 14, 2015. The assessment concluded that Student had deficits in the area of language development. Based on the results of its own assessment, Lindamood Bell staff recommended that Student participate in their Visualizing and Verbalizing program which trains subjects to visualize what they are reading. Student began sessions at Lindamood Bell for several hours a day, five days a week in June 2015, using the Visualizing and Verbalizing program. However, after two weeks, staff advised Parents that Student would be better served by their Talkies program, which is geared towards children two to three years of age, and addresses language acquisition. Student attended the Talkies Program at Lindamood Bell through the summer of 2015.

3. In March 2016, Student resumed the Talkies program. San Ramon funded Student's program at Lindamood Bell from mid-March through June 30, 2016. For the rest of the spring 2016 semester, Student attended the program at Lindamood Bell from 8:00 a.m. to 11:00 a.m., Monday through Friday, and after eating lunch at home, he returned to his special day class at Creekside during the afternoon.

4. It was unclear how Student was instructed at Lindamood Bell during the summer of 2015. However, when he resumed instruction there in March 2016, he was accompanied by Mother, who always sat within arms' reach. Mother received training in positive behavioral interventions from Jason Jennings, a Board Certified Behavior Analyst employed by San Ramon. Mother functioned as Student's behavioral aide at Lindamood

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<sup>3</sup>Lindamood Bell has centers in many locations. All references to Lindamood Bell in this Decision are to the Berkeley center.

Bell. Student requires the services of a behavioral aide because he frequently displays maladaptive behaviors of hair-pulling, biting, grabbing, and kicking both adults and other students when at school. He also tries to escape the area where he receives instruction. These behaviors were present when Student resumed attendance at Lindamood Bell in the spring of 2016.

5. That spring, Student received instruction in an office at Lindamood Bell with only Student, the instructor, and Mother in the room. He was separated from the other students receiving Lindamood Bell services. A different instructor served Student each hour, which, according to Parents, was for generalization purposes. At Lindamood Bell Mother utilized the strategies in Student's behavior intervention plan developed by San Ramon to keep him focused and on-task, and to control his behavior in his Creekside classroom. Although monthly written reports from Lindamood Bell written in the summer of 2015 are devoid of behavioral comments, all the monthly reports beginning after Student resumed services there in mid-March 2016 to June 30, 2016, document Student hitting, kicking, screaming, and getting up from the desk to avoid completing a task. Student did not dispute this information.

#### Triennial Assessment

6. San Ramon conducted a triennial assessment of Student in the spring of 2016, resulting in a multidisciplinary report that reflected testing results in the areas of psychoeducation, academics, speech and language, and occupational therapy. The parties stipulated at hearing that the resulting report was an accurate portrayal of Student's strengths and weaknesses at the time it was prepared up until the time of hearing. They further stipulated that whether or not the testing and report were legally compliant was not at issue, and no findings are made in this regard.

## PSYCHO EDUCATIONAL TESTING RESULTS

7. For the purposes of the triennial assessment, the school psychologist administered the Wechsler Nonverbal Scale of Ability to measure Student's cognitive functioning. However, Student was unable to complete the Picture Arrangement subtest due to inattentiveness and lack of motivation. Therefore, a full scale score could not be given.

8. Mother and Student's special day class teacher, Julie Promes, completed the Behavior Assessment Scale for Children, Second Edition. This instrument measures a child's social/emotional functioning. "Clinically Significant" suggests a high level of maladjustment and is the highest scoring range for the instrument. Mother and Ms. Promes scored Student in the "Clinically Significant" range in the domains of Hyperactivity, Aggression, Conduct Problems, Atypicality, Withdrawal, Social Skills, and Functional Communication.

9. Mother and Ms. Promes also completed the Vineland II Adaptive Behavior Scale. This instrument measures the subject's day-to-day living skills. Mother's scores were generally higher than Ms. Promes's scores which indicated that Mother found Student to function at a higher level than Ms. Promes in terms of adaptive behavior. Mother's composite standard score was 79, (85-115 is average), which is in the moderately low range, placing Student in the eighth percentile for his age. Ms. Promes's composite score for Student was 20, placing him in the low range and in the less than first percentile for his age.

10. Mother and Ms. Promes also completed the questionnaires for the Gilliam Autism Rating Scale, Third Edition, which measures the likelihood that a child is on the autism spectrum. The results from both were "very likely" that Student was on the autism spectrum, although Ms. Promes's score of 114 was higher than Mother's score of 92, and showed a greater likelihood that Student was on the spectrum.

## ACADEMIC TESTING

11. To assess Student's academic functioning for the triennial assessment, Ms. Promes administered the Brigance Comprehensive Inventory of Basic Skills, Second Edition, as well as the Wechsler Individual Achievement Test, Third Edition. Although the Brigance is normed for children under the age of seven, and Student was eight when tested, Ms. Promes administered the Brigance because she believed it would give a more accurate picture of Student's functioning, level of knowledge, and readiness for reading, writing, and math. In the area of general knowledge, Student could not provide his exact address (including the city), his birthday, or his telephone number.

12. Student could write the alphabet in both upper and lower case, and could write numbers to 100. However, he could not distinguish which item was "different" in a field of four pictures, letters, or words. Student struggled with rote counting to 100, and could complete only one single digit addition problem on a test of math skills.

13. Ms. Promes administered the standard battery of tests for Wechsler Individual Achievement Test, Third Edition. This test measures a student's academic achievement in comparison to other children at the same grade level. There were 15 subtests, and Student's scores were in the "Low" range, which is the lowest measurement for this test, with the exception of his score on the Alphabet Writing Fluency subtest, in which Student scored in the "Below Average" range.

## SPEECH AND LANGUAGE TESTING

14. Student can speak, but has serious deficits in both receptive and expressive language. He has difficulty understanding directions, both in the classroom and at home. A picture communication system is used in both environments, as well as verbal communication, but Student's responses are inconsistent, making it difficult to determine what he understands and what he does not. This is very frustrating for him.



15. For the 2016 triennial evaluation, the speech pathologist administered the Peabody Picture Vocabulary Test, Fourth Edition, the Expressive Vocabulary Test, Second Edition, and the Oral and Written Language Scales, Second Edition. Student scored in the third percentile on the Peabody, and in the second percentile on the Vocabulary Test. The Oral and Written Language Test measures the subject's abilities in two areas, Listening Comprehension, and Oral Expression. Student's scores on both subtests placed him in the below one-tenth percentile range.

16. The speech pathologist also interviewed Mother, Ms. Promes, and Student's one-to-one behavioral aide to complete a Functional Communication Profile. Attentiveness, receptive language, expressive language, pragmatic social language, and voice were all considered. Student showed varying levels of attention in all environments, but generally required verbal and physical prompts to keep from being distracted, and showed little awareness of peers. In the area of receptive language, Student comprehended simple nouns, verbs, and attributes. However, his response to spoken language was inconsistent; at times he would not respond to his name. In the area of expressive language, all responders reported that Student had limited verbal communication both at home and in school. In the area of social language/pragmatics, Student was unable to initiate conversation with peers or teachers. He was reported to be working on turn-taking. Student does not and cannot socialize with other children without intense adult prompting and modeling. Student speaks with a very soft voice and is difficult to hear.

#### OCCUPATIONAL THERAPY TESTING

17. Student's occupational therapist, Andree Sehrt also administered testing in the spring of 2016. Student has low muscle tone which affects his posture and fine motor skills at school. He has difficulty independently performing basic tasks at school,

such as traveling around the campus, eating and drinking, climbing and descending stairs, and cutting and writing, as well as other tasks.

18. Ms. Promes completed a form titled Sensory Processing Measure for Ms. Sehart. This revealed "Definite Dysfunction" in the areas of Social Participation, Balance, and Planning. He also had problems in the areas of Visual Processing, Auditory Processing, and Body Awareness. His only typical score was in Processing Tactile Information, or touch.

#### IEP Team Meetings in May 2016

19. The initial IEP team meeting to develop an IEP for the 2016-2017 school year was held on May 18, 2016. Father attended the meeting. San Ramon team members included Ms. Promes; a general education teacher; two speech and language therapists; Mr. Jennings; Ms. Sehart; the school psychologist who assessed Student for the triennial multidisciplinary assessment; a program specialist; an assistive technology specialist; an augmentative alternative communication specialist; and the Creekside principal. The psycho educational, speech and language, and occupational therapy sections of the San Ramon interdisciplinary assessment report were reviewed at this meeting. Historically, more than one IEP team meeting was required to develop Student's IEP's, so a second meeting had already been scheduled for May 20, 2016.

20. Mother and Father, Ms. Promes, one speech and language therapist, Mr. Jennings, another general education teacher, and a program supervisor attended the May 20, 2016 IEP team meeting. Parents excused, in writing, the attendance of the school psychologist, the assistive technology specialist, and the augmentative alternative communication specialist. Ms. Promes presented the academic assessment results, and Mr. Jennings presented a behavior intervention plan to which Parents

consented.<sup>4</sup> Parents discussed the Lindamood Bell program Student had been attending since mid-March 2016. His speech and language therapist and Ms. Promes indicated that they had not seen significant progress in Student's communication skills that could be attributed to the Lindamood Bell program. Ms. Promes testified credibly at hearing that this continued to be true at that time.

21. The team discussed progress on prior goals that had been developed in October 2015, but had not been consented to until January 2016. New goals were then proposed for the 2016-2017 school year. Several were similar to the previous goals because they had only been worked on for a few months. There were three speech and language goals: two for expressive language and one for receptive language. There were five language arts goals: four related to reading, and one for sentence writing. There were two math goals, an adaptive living skills goal, a social skills goal, and three behavior goals. Parents and San Ramon staff all believed these goals were appropriate for Student and met his needs both at the time of the May 20, 2016 IEP team meeting, and at hearing, and the goals were measurable. Parents agreed to the goals at that IEP team meeting, and based on their testimony the goals are still appropriate for Student. Following the discussion of goals, accommodations and modifications were then reviewed and discussed, and Parents agreed with them, both at the time of the May 20, 2016 IEP team meeting, and at the time of hearing.

22. The team then discussed placement. Continued placement in a San Ramon moderate special day class, with and without a one-to-one aide was discussed, as was placement in an intensive special day class, again with and without a one-to-one aide. San Ramon team members proposed that Student attend a nonpublic school for the coming school year. Parents disagreed with this proposed placement, and asked that

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<sup>4</sup>Some documents referred to it as a behavior support plan.

Student continue with Lindamood Bell for four hours a day, with perhaps partial attendance at Creekside or a nonpublic school.

23. On May 20, 2016, San Ramon did not have a specific nonpublic school at which it proposed to place Student. The program supervisor (specialist) needed to contact Parents to arrange for observations of nonpublic schools. Although San Ramon offered Student an extended school year program, Parents refused. Parents did not consent to the entire IEP because they disagreed with the proposed placement at a nonpublic school.<sup>5</sup>

#### SUMMER AND EARLY FALL 2016

24. Parents filed a due process complaint with OAH on June 24, 2016, because San Ramon was refusing to provide further funding for Student to receive services from Lindamood Bell after June 30, 2016.

25. Toward the end of July 2016, Randy Linscheid, a program supervisor with San Ramon's Special Education Department, emailed Parents to begin the process of finding an appropriate nonpublic school for Student to attend for the 2016-2017 school year.<sup>6</sup> Mr. Linscheid's responsibilities include oversight over all San Ramon students placed in nonpublic schools and County Office of Education programs. He has a special education teaching credential, and has worked in the field of special education for

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<sup>5</sup>San Ramon's failure to name a specific nonpublic school in the May 20, 2016 IEP is not at issue due to the settlement agreement signed by the parties on August 2, 2016.

<sup>6</sup>There was no testimony to explain why there had been more than a two-month delay after the May 20, 2016 IEP team meeting before San Ramon began looking for a nonpublic school for Student. However, any delay is not at issue due to the August 2, 2016 settlement agreement.

several school districts since 1999. He also has an administrative credential. Mr. Linscheid also has extensive training and experience working with children on the autism spectrum, and has significant experience working with nonpublic schools. In his email in July 2016, Mr. Linscheid asked Parents to sign release of information forms so he could search for a nonpublic school that could meet Student's needs, which would entail releasing information about Student to prospective schools. Father responded to this email by asking questions about nonpublic school placement in general and did not sign the release of information forms.

26. On August 2, 2016, San Ramon agreed to fund Lindamood Bell services from August 15, 2016, to October 31, 2016. Parents also signed several release of information forms so that Mr. Linscheid could send information packets concerning Student to nonpublic schools and find one that had room for Student and could meet his needs.

27. The information packets sent to nonpublic schools contained Student's May 2016 IEP, including the recent behavior intervention plan, and the triennial evaluation report. With this information, a nonpublic school could determine if it could implement Student's goals, provide him with the IEP accommodations and modifications, as well as related services, and specialized academic instruction, and thus meet his unique needs. By mid-September Mr. Linscheid had contacted several nonpublic schools. In addition, Parents had told him about their own efforts to find a nonpublic school that Student could attend, but they were unsuccessful. None of the nonpublic schools contacted by Mr. Linscheid would accept Student, either because they could not meet his needs, or because they did not have room. Mr. Linscheid then obtained additional signed release forms from Father in mid-September, and began sending out packets to additional nonpublic schools. By mid-October 2016, Mr. Linscheid

had sent information packets concerning Student to approximately a dozen nonpublic schools in the Bay Area.

28. Student resumed services at Lindamood Bell on August 15, 2016, and received services in the same manner and location as in the spring of 2016. Again, the Linda mood Bell written progress reports described Student's maladaptive behaviors as interfering with instruction. Parents attribute Student's maladaptive behaviors to the fact that he lacks language and communication skills.

### STUDENT'S BEHAVIORAL NEEDS

29. The main reason San Ramon believes Student requires a nonpublic school is due to his intense behavioral needs. As previously discussed, he frequently displays maladaptive behaviors of hair-pulling, biting, grabbing, and kicking both adults and other students when at Creekside. He also tries to escape the area of the classroom where he receives instruction. Student engaged in similar behaviors when he attended Lindamood Bell in 2016. Student has always had a one-to-one behavioral aide at Creekside.

30. At the IEP team meeting held on October 10, 2016, Mr. Jennings showed the IEP team charts he created from behavioral data. Five separate periods of time were charted as follows: spring of 2015, fall of 2015, spring of 2016, late spring of 2016, and fall of 2016 (up to October 10, 2016).

31. During the spring of 2015, Student had a little over eight behavioral incidents during the eight hours he was at school each day, and in the fall of 2015 he had slightly less than eight incidents in the same amount of time. In early spring 2016, he averaged approximately 12 incidents for an eight-hour day. However, after Student began attending Lindamood Bell for three hours in the morning in March 2016, he averaged nearly 20 incidents of maladaptive behavior, although he was only at

Creekside for two hours each day. The number of incidents increased to nearly 22 in the fall of 2016, when Student again was only in school two hours each day.

32. Two additional charts prepared by Mr. Jennings and presented at the October 10, 2016 IEP team meeting, showed the frequency and duration of Student's maladaptive behaviors for the fall of 2016. There was a significant decrease in maladaptive behaviors after San Ramon provided Student two adults for support in the fall of 2016. However, the evidence showed that this support was not sufficient, and Student was suspended several times for behavioral incidents prior to the time of the due process hearing.

33. Student's behavior intervention plan had been updated in May 2016, and Parents consented to it. However, this intervention plan was ineffective. From September 7, 2016, and at least through the time of hearing, from the time he arrived at school Student was always accompanied by two adults. They escorted him from the school lobby when he arrived to his classroom, and from his classroom back to the school lobby when he left. Student was not allowed access to certain parts of the Creekside campus.

34. In the classroom Student not only had a dedicated one-to-one behavioral aide, but also required at least one other adult to be with him for instructional purposes and to assist in controlling his maladaptive behaviors and protect other students. Without this supervision, Student would likely attack other students in his class; even with this supervision, he frequently attempted to attack the adults who were with him, often with success.

35. Student was unable to sit in the semi-circle of desks in front of the teacher like his classmates. Instead he sat at a separate table behind them with at least one adult flanking him. When he had outbursts he was removed to a separate area of the

classroom that was an empty cubicle with partitions that did not reach the ceiling. Often he attempted to climb out of this area.

36. Student was usually unavailable for instruction and related services due to his behaviors, even with the behavioral supports that were being implemented. For example, his speech and language services provider, Candace Wheatley, calculated that since the beginning of the 2016-2017 school year, due to his maladaptive behaviors, Student was unavailable 78 percent of the time for the 90 minutes of weekly speech and language services that were part of his IEP. Student was similarly unavailable for other instruction and services throughout the school day when he was present at Creekside, both before and after the Lindamood Bell services ended on October 31, 2016.

37. Student's maladaptive behaviors are not volitional or malicious. A manifestation determination team found that the maladaptive behaviors which led to Student being suspended more than 10 days before the commencement of the due process hearing, were a manifestation of his disabilities.

38. By the time of the hearing in December 2016, Student had made little or no progress meeting the goals developed at and consented to by Parents during the May 20, 2016 IEP team meeting. However, there was no evidence that the goals were inappropriate, or that San Ramon was not trying to implement them. Since Parents had not consented to nonpublic school placement pursuant to the May 2016 IEP, Student's placement continued to be the moderate special day class at Creekside which was the placement from his previous consented to IEP for the 2015-2016 school year.

39. San Ramon has intensive special day classrooms at other elementary schools, which are designed to serve students with serious maladaptive behaviors. However, the behavior supports in these classrooms would not meet Student's needs, because they are no more intense than the supports he received in the moderate special day classroom at Creekside during the fall of 2016. These supports were ineffective in



curbing his maladaptive behaviors so he could access the instruction and services called for in his IEP.

### IEP TEAM MEETING OCTOBER 10, 2016

40. An IEP team meeting occurred on October 10, 2016. Father attended this meeting, as did Mr. Jennings, Creekside's principal, Mr. Linscheid, a school psychologist, an assistive technology specialist, a program supervisor, a general education teacher, Ms. Promes, Ms. Wheatley, and Ms. Sehrt.

41. Father described the progress Parents believed Student was making at Lindamood Bell, although he also told the team that for approximately one hour of the three-hour session, Student engaged in the maladaptive behaviors previously described. Father shared progress reports from Lindamood Bell, as well as video of Student working independently on math at home to demonstrate how much progress he believed Student was making.

42. Mr. Jennings showed the IEP team the charts discussed above that he had created from behavioral data, which showed a significant increase in maladaptive behaviors when Student attended Lindamood Bell in the morning and Creekside in the afternoon. However, Father said behavioral incidents had decreased at home.

43. Mr. Linscheid advised the team that nine nonpublic schools had refused to take Student either because they had no space, or they believed they could not meet his needs. Mr. Linscheid informed the team that Spectrum in Oakland and Spectrum in Hayward might have space and wanted to observe Student at Creekside to determine if they could meet his needs.<sup>7</sup> He also wanted Parents to visit these nonpublic schools, and Father agreed to tour both campuses.

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<sup>7</sup>At hearing there was evidence that Spectrum schools in Oakland, Concord, and Hayward were considered for possible placement of Student, but Father only toured the

44. Father expressed Parents' frustration with how long it was taking to find an appropriate nonpublic school placement. He wanted the same schedule to continue after October 31, 2016, with Student going to Lindamood Bell in the morning and Creekside during the afternoon. The team discussed the possibility of a slow transition back to Creekside if an appropriate nonpublic school could not be found for Student after the end of October. However, Mr. Jennings thought that it would make no difference in Student's behavior if Student were slowly transitioned back to fulltime attendance at Creekside rather than having the schedule instantly transformed to fulltime attendance at Creekside. San Ramon did not offer to continue funding Lindamood Bell after October 31, 2016.

45. Father was also concerned that Student was no longer being mainstreamed into a general education class at Creekside as he had been during the previous school year. San Ramon members of the team pointed out that Student's extreme maladaptive behaviors raised safety concerns for the other students in a general education class.

46. Ms. Sehrt expressed concern that Student appeared exhausted when he returned to Creekside after spending the morning at Lindamood Bell. She repeated this concern at hearing, and was extremely credible. Ms. Sehrt has nearly 30 years of experience as an occupational therapist, providing services in a school setting since 2009. She is obviously fond of Student and concerned for his well-being. She described some of the ideas she had shared with other staff members in the school setting for managing Student's behavior at specific times, and giving him opportunities to

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Oakland and Concord Spectrum schools. There was no evidence as to why only Spectrum Oakland was offered.

participate in activities she was doing with the rest of the class, but she was unsuccessful.

47. At the October 10, 2016 IEP team meeting, the IEP team did not specifically discuss Student's IEP goals previously developed in May 2016. Father did not ask that they do so, and there was no need to do so because Parents had agreed with them at the May 20, 2016 IEP team meeting, and had consented to them being implemented. Also, there was no need to discuss the goals in regards to possible placement at a nonpublic school at the October 10, 2016 IEP team meeting, because the intake packets Mr. Linscheid provided to all the nonpublic schools that he thought might be able to serve Student contained the May 2016 IEP, with all of the goals. Therefore, all the nonpublic schools knew what Student's goals were, and understood that they would need to be implemented if Student was enrolled. Ms. Promes informed the team that Student was not making progress on his goals because his behavior rendered him unavailable for instruction much of the time.

48. The IEP team agreed to meet again on October 24, 2016 after Parents had toured the two Spectrum campuses that had expressed a potential interest in enrolling Student.

#### PARENTS' OPINION ABOUT SPECTRUM

49. Father and Mr. Linscheid visited Spectrum Oakland on October 17, 2016. Father observed two classrooms, one called the "academic class," and the other referred to as the "nonacademic class." Father was able to talk to Laura Hunnicutt, teacher in the nonacademic classroom. Father was not impressed with Spectrum and sent an email to Mr. Linscheid expressing his concerns. Among them was his impression that there was little academic instruction in the non-academic class, and little or no opportunity for

children in that class to interact with typically developing peers.<sup>8</sup> Further, Father had the impression that the primary goal of the nonacademic classroom was for the students to learn manding (the ability to make a request), something he believed Student had learned before kindergarten. Father's opinion was contradicted by Mother's and Ms. Promes' responses on the Behavior Assessment in May 2016; they both rated Student in the "clinically significant" range in the Functional Communication domain. The evidence established that Student has difficulty making requests of others, such as asking for a break.

50. Mother also did not support placement at Spectrum. Although she never went to Spectrum, she has two friends with children who attended Spectrum in the past, and both friends believed placement at Spectrum had not resulted in any positive changes for their children.

#### IEP TEAM MEETING OCTOBER 24, 2016

51. Father attended the October 24, 2016 IEP team meeting. When he arrived for the meeting, he initially expressed displeasure that the program supervisor who attended the October 10, 2016 IEP team meeting was not present. This was because the program supervisor no longer held that position. The program supervisor had been replaced by San Ramon's Special Education Director, Cynthia Loleng-Perez. Creekside's principal, Ms. Promes, the general education teacher who had attended the previous meeting, the assistive technology specialist who attended the previous meeting, Mr. Jennings, Mr. Linscheid, Ms. Wheatley, Ms. Sehrt, and the school psychologist who had attended the previous meeting were all present for the October 24, 2016 IEP team meeting. Ms. Hunnicutt, who was now described as a behavior analyst from Spectrum,

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<sup>8</sup>Most, if not all students at Nonpublic schools have IEPs.

was also present. With the exception of Ms. Hunnicutt and Ms. Loleng-Perez, everyone else at the meeting had attended the October 10, 2016 IEP team meeting.

52. Mr. Linscheid invited a representative from Spectrum, Ms. Hunnicutt, to the meeting because he thought it would be helpful for the IEP team members to learn more about Spectrum, and nonpublic schools in general. Most of the San Ramon members of the IEP team had little experience with nonpublic schools and children who attend them, and had never visited Spectrum or any nonpublic schools.

53. Immediately following introductions and initial remarks, Father reminded the team that San Ramon's funding for Lindamood Bell would be ending, and it was important that a decision be made at this meeting concerning Student's future placement. At this point Ms. Hunnicutt was asked to describe the Spectrum program. Father then interrupted and asked if a placement offer was going to be made at the meeting, and demanded that it be made immediately. Ms. Loleng-Perez explained that San Ramon team members needed to be educated about nonpublic schools, and Spectrum's program, and needed to discuss whether it would be an appropriate placement for Student. The agenda for the meeting contained a "Process Agreement" which included provisions that participants "listen carefully[,] . . . respect the views of others [and] [a]llow others to complete their thoughts and feelings before responding." Ms. Loleng-Perez reminded Father about the process agreement, and Father responded that he did not agree with it. Ms. Loleng-Perez explained that if Father would not comply with the process agreement the meeting would end, and Father abruptly left the meeting. The meeting then ended.

#### IEP TEAM MEETING NOVEMBER 14, 2016

54. The IEP team reconvened on November 14, 2016. Father, Mr. Jennings, Mr. Linscheid, Ms. Promes, Ms. Sehrt, Ms. Wheatley, the school psychologist, Creekside's principal, an assistive technology specialist, and a general education teacher attended.

Rain Johnson, Director of Spectrum, also attended. The IEP team reviewed the process agreement and Father agreed with it.

55. Ms. Johnson provided the team with an overview of the program at Spectrum and responded to questions from members of the team, including Father. There are several classrooms at Spectrum, most with approximately six students and four to five adult staff members. There is a sensory room for students who require it. In the "non-academic" classroom, students are taught for short periods of time with frequent reinforcement, and most instruction is provided on a one-to-one basis. Students receive academic instruction and work on IEP goals. At Spectrum every staff member is trained in crisis intervention and applied behavior analysis strategies. A token economy is provided for all students. Staff for each classroom meet weekly to discuss the behavior of each student and to determine if changes need to be made in behavioral strategies or instruction.

56. Father expressed his concerns about Spectrum. He believed the San Ramon IEP team members were looking at Spectrum placement with a focus on remediating Student's maladaptive behaviors rather than concentrating on academic instruction. Father was concerned that as a student in the nonacademic classroom, Student would not be exposed to the other students who were placed in the academic classroom.

57. Ms. Johnson explained that students did move between the two classrooms. Ms. Johnson told the team that in terms of discipline, a student would be suspended only for life-threatening behavior, and stressed the fact that at Spectrum all staff have behavioral training, including the school secretary, whereas at Creekside only staff in the special day classroom have this training. What this means is that wherever a student is on campus at Spectrum, there is trained staff present to deal with

maladaptive behaviors appropriately. Placement at Spectrum is not permanent for most students.

58. The team then moved on to a discussion about Student's program at Lindamood Bell, and Father shared its reports with the team. Father asked the team to consider having Student attend Lindamood Bell as he had previously. He felt it was the most appropriate placement for Student. There was discussion about this, but ultimately San Ramon formally offered placement at Spectrum.

59. The IEP of November 14, 2016, offered Student a nonpublic school placement at Spectrum for 315 minutes each day, where he would receive specialized academic instruction daily for 240 minutes. Accommodations and modifications remained unchanged as agreed to by Parents in May 2016, and goals also remained unchanged. Student was to be provided with speech and language therapy for three weekly 30-minute sessions for a total of 90 minutes each week, occupational therapy for 900 minutes annually, and 120 minutes of assistive technology services. Extended school year was also offered for the summer of 2017. Parents only disagreed with the offer of placement at Spectrum, although both testified credibly that possibly another nonpublic school might be acceptable to them.

60. Following the IEP team meeting of November 14, 2016, Father sent the team his own version of notes reflecting what he believed happened at the meeting and what was said. Father's notes are more detailed than the San Ramon notes attached to the IEP, and contain additional statements from various meeting participants that are not contained in the San Ramon notes, as well as Father's additional input and interpretation as to what was said and occurred. Nothing in Father's notes contradicts the San Ramon notes, his notes just add more detail. San Ramon attached Father's notes to the IEP.

61. Progress reports concerning the May 16, 2016 goals were issued by San Ramon on November 16, 2016. At that time it was reported that Student had not made any meaningful progress toward meeting his goals because he was rarely available to work on them due to his maladaptive behaviors.

62. At hearing it was clear that Parents believe the most appropriate educational environment for Student is several hours of instruction each weekday at a Lindamood Bell Learning Center. They believe Student exhibits maladaptive behaviors due to his lack of communication skills and functional language deficits. They also believe that he cannot experience academic success until he gains communication and language skills. Parents want Student to continue receiving intensive services at Lindamood Bell. However, the instructors at Lindamood Bell are not credentialed special educational teachers, and the Berkeley Lindamood Bell Center is not certified by the California Department of Education to provide services to special education students as a nonpublic agency, or as a nonpublic school.

#### ADDITIONAL INFORMATION ABOUT SPECTRUM

63. Ms. Hunnicutt testified on the last day of hearing about the program at Spectrum. She received her special education credential in 2014, and is halfway through training to be a Board Certified Behavior Analyst. She testified in an open and straightforward manner, and her testimony was credible.

64. There are seven separate classrooms at Spectrum. Ms. Hunnicutt is the credentialed special education teacher for the nonacademic elementary school level classroom, where it is anticipated that Student will be placed. Each of the Spectrum classrooms is also staffed by an Instructional Supervisor II. This person has a bachelor's degree, and has passed the California Basic Education Standards Test, which is required for a person who wishes to be a substitute teacher in California public schools, but does not possess a California teaching credential. Passing the Standards Test is not the



equivalent of a California teaching credential in special education, or any other area. Other staff members in Spectrum classrooms are designated as Instructional Supervisor I. These individuals have a high school diploma and have passed a test administered by Spectrum for employment purposes.

65. Ms. Hunnicutt is the only special education credentialed teacher for the nonacademic elementary classroom at Spectrum in which Student would be placed. She is also the credentialed special education teacher for the nonacademic classroom for middle and high school students, and the credentialed special education teacher for the elementary level academic classroom. There was no evidence that this is a temporary assignment due to a staffing emergency at Spectrum Oakland.

66. As the teacher for the nonacademic classroom in which Student would be placed, Ms. Hunnicutt supervises classroom personnel, devises lesson plans (which are individual for each student in the classroom), decides what instructional materials will be used, as well working with the instructional supervisors in the classroom in deciding what instructional strategies are effective for a specific student. If a student is not making progress in meeting goals, Ms. Hunnicutt will try to determine why, and if necessary will work on devising new goals. Ms. Hunnicutt also conducts academic assessments.

67. Ms. Hunnicutt is also the only behaviorist for Spectrum. She is supervised by a doctoral level Board Certified Behavioral Analyst who is retired and rarely, if ever, present at Spectrum. As the behaviorist at Spectrum Oakland, Ms. Hunnicutt conducts behavioral assessments and creates behavior intervention plans for students. She is on-call during the day to handle behavioral emergencies that might arise in any of the seven classrooms. Because of these duties, as well as her position as credentialed special education teacher for three classrooms, Ms. Hunnicutt averages one to two hours per day in the classroom in which San Ramon proposed to place Student.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>9</sup>

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (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 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

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<sup>9</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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

ISSUE 1A: FAILING TO DISCUSS INDIVIDUAL GOALS AT THE IEP TEAM MEETINGS ON OCTOBER 1, AND 24, 2016, AND ON NOVEMBER 14, 2016

5. The parties participated in a prehearing conference with another ALJ on November 28, 2016. The parties and ALJ framed the issues for hearing, and there was no disagreement at hearing that those were the issues to be determined. In regards to the first issue stated in this Decision, Student alleged a failure of the IEP team to discuss goals at the two IEP meetings in October 2016, and at hearing this claim was extended to the IEP team meeting on November 14, 2016. Student believed this alleged failure denied Parents meaningful participation in the IEP process. However, in his closing brief, Student claims the procedural violations at issue were failing to have a Lindamood Bell teacher at the IEP team meetings in the fall of 2016, and predetermining Student's placement at Spectrum. The claims in Student's closing argument concerning these specific procedural violations are not addressed in this Decision, because they were not at issue during the hearing. San Ramon argues that because Parents had approved goals in May 2016 and any disagreement regarding them was waived in the August 2, 2016

settlement agreement, there was no need for further discussion; rather the later IEP team meetings were held to determine the appropriate placement for Student.

#### Procedural Violations

6. A procedural violation 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 decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded in part by statute on other grounds.)

#### Parent Participation

7. Parents are required and vital members of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education. (20 U.S.C. § 1414(c)(1)(B) [during assessments], (d)(3)(A)(i) [during development of the IEP], (d)(4)(A)(ii)(III) [during revision of an IEP]; Ed. Code, § 56341.1, subds. (a)(1) [during development of an IEP], (d)(3) [during revision of an IEP], & (e) [right to participate in an IEP].) The requirement that parents participate in the IEP process ensures that the best interest of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.*(9th Cir. 2001) 267 F.3d 877, 891.)

## IEP Goals

8. An IEP must contain annual goals that are measurable, meet the student's unique needs, and allow him to make progress in the general education curriculum. (Ed. Code § 56345, subd. (a)(2)(A).) Goals may also meet other educational needs of the student. (Ed. Code § 56345, subd. (a)(2)(B).) "The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided." (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

## Analysis

9. Parents consented to goals at the May 20, 2016 IEP team meeting and these same goals were integrated into the October and November 2016 IEPs. There was no evidence that anyone at that time, or any time thereafter, believed the goals to be legally insufficient, or in dispute. The evidence established that after the May 20, 2016 IEP team meeting, neither Parent mentioned the goals in any discussions, verbal or via email, with San Ramon personnel. There was no need to revisit those goals at subsequent IEP team meetings because there was no indication that the goals themselves were inappropriate, or that anyone questioned them.

10. Mr. Linscheid sent packets containing the May 20, 2016 IEP, with the goals, to all of the nonpublic schools that he was considering for possible placement of Student. There was no evidence that any of them questioned the goals. There was no evidence that the goals needed to be discussed at the October and November 2016 IEP team meetings as part of the consideration for a nonpublic school placement.

11. There was no evidence to support Student's claim that San Ramon committed a procedural violation by not initiating a conversation about the goals at the IEP team meetings in October and November 2016, thus limiting meaningful parental participation at these meetings. Student could point to no requirement that further

discussion was mandated. Student did not meet his burden of proof concerning this issue.

#### ISSUE 1B: FAILING TO OFFER A SPECIFIC NONPUBLIC SCHOOL PLACEMENT AT THE OCTOBER 2016 IEP TEAM MEETINGS

12. In his complaint, Student contends San Ramon denied him a FAPE by committing the procedural violation of failing to offer a specific nonpublic school placement at IEP team meetings on October 10, 2016, and October 24, 2016. Student did not address this alleged procedural violation in his closing argument. San Ramon contends that there was no need to name a specific nonpublic school at the October 2016 IEP team meetings.

#### Description of an IEP

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

#### Requirement for a Clear IEP Offer

14. An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. (*Union School Dist. v. Smith* (9th Cir. 1993) 15 F.3d 1519, 1526 (*Union*).) In *Union*, the Ninth Circuit observed that the formal

requirements of an IEP are not merely technical, and therefore should be enforced rigorously.

15. The Ninth Circuit has not adopted a position that a specific school must be identified in the IEP as possible placement for a Student. In an unpublished case, the Ninth Circuit affirmed a district court decision finding that a school district is not required to identify a specific school in its IEP offer. (*Marcus I. v Dep't of Educ., State of Hawaii* (9th Cir. 2014) 583 Fed. Appx. 753, 2014 WL 3610722.) There are a number of administrative and logistical reasons why a school district may not want to identify a specific school as a placement. In the case of a district placement, such as a special day class, the district may not know at the time of the IEP team meeting where space is available for the student or even where the special day class will be located if the IEP decision is before the start of a new school year. In the case of a nonpublic school placement, the school district will likely not know if a given school has space for the student or even if the school will accept the student. The district can suggest a nonpublic school placement but it cannot force the school to enroll the student.

#### Requirements when a District Recommends Nonpublic School Placement

16. The Code of Federal Regulations states, in pertinent part, that a district must ensure that a representative of a nonpublic school attends the IEP team meeting required when a district refers a child to a nonpublic school. If the representative cannot attend, the agency must use other methods, such as telephone conference calls, to ensure participation by the nonpublic school. (34 C.F.R. § 300.325(a).) California Education Code section 56342.1 requires an IEP team meeting be held, and an IEP be developed prior to referral to or placement in a nonpublic school. This gives the IEP team an opportunity to ensure that when the nonpublic school makes a determination to receive a student, it has reviewed the current IEP, including goals, accommodations and modifications, and the type of instruction and services that are to be provided to



the student, and determined that it can meet the student's needs and provide him with a FAPE.

### Analysis

17. At the May 18, 2016 IEP team meeting, the IEP team was able to review only a part of the triennial multidisciplinary assessment. During the May 20, 2016 IEP team meeting, the IEP team completed review of the triennial assessment, developed 15 goals, reviewed modifications and accommodations, and discussed possible placement for the upcoming school year. San Ramon team members recommended placement in a nonpublic school, but it was unclear whether Parents would consent to this placement. The IEP document and testimony of witnesses did not establish that any specific nonpublic school was considered by the team, or discussed. Rather, the parties agreed that San Ramon would look at potential nonpublic school placements and contact Parents when a nonpublic school was found that could meet Student's needs.

18. Multiple federal and state statutes and regulations protect the confidentiality of student records for students with exceptional needs. (See, for example, 20 U.S.C. §§ 1412(a)(8) and 1417(c); 34 C.F.R. §§ 300.611 – 300.626; Ed. Code § 56515.) Mr. Linscheid required signed consent to release identifiable information about Student to nonpublic schools to begin the search for an appropriate placement, and on August 2, 2016, Father signed multiple consent forms for this purpose. Mr. Linscheid provided packets concerning Student to multiple nonpublic schools after receiving the signed consent forms on August 2, 2016. However, additional consent forms needed to be signed by Parents by mid-September 2016, since the nonpublic schools contacted by Mr. Linscheid either had no room for Student, or believed they could not meet his needs.

19. Pursuant to the August 2016 settlement agreement, an IEP team meeting was convened on October 10, 2016, to determine an appropriate nonpublic school

placement for Student. On this date Mr. Linscheid presented two potential nonpublic school placements for Student, and he invited Parents to observe them and discuss possible placement after that had occurred. A continuation IEP team meeting was set for October 24, 2016.

20. San Ramon did not have sufficient information at the October 10, 2016 IEP team meeting to make specific placement offer. Parents had not had an opportunity to visit the two potential nonpublic schools that might be offered, nor was there any indication that these schools had agreed to accept Student. Further, there could not be a legally compliant team discussion of placement without a representative of the proposed nonpublic school being present. Therefore, San Ramon's failure to make a specific nonpublic school placement offer at the October 10, 2016 IEP team meeting was not a procedural violation of the IDEA.

21. The evidence established that Student's maladaptive behaviors were intense, and many of the nonpublic schools contacted by Mr. Linscheid turned down Student because they were unable to meet his behavioral needs. Other nonpublic schools contacted by Mr. Linscheid believed they could meet Student's behavioral needs, but did not have room for him. There was no evidence that the delay in finding a nonpublic school placement was due to a lack of effort on the part of San Ramon.

22. Before making a placement offer at the October 24, 2016 IEP team meeting, Mr. Linscheid wanted to educate Parents and San Ramon IEP team members about nonpublic schools in general, and Spectrum in particular. Therefore, he arranged for Ms. Hunnicutt to attend the IEP team meeting on October 24, 2016. Her attendance was necessary to comply with federal and state statutes and regulations governing offers of placement in nonpublic schools. In addition, Ms. Hunnicutt could answer questions team members might have about how Spectrum Oakland would implement Student's IEP, and meet his needs. Her presence would enable the team, including

Parents, to have a meaningful discussion, and in light of that discussion, possibly enable San Ramon to name a specific nonpublic school as the offered placement.

23. Father's demand for a placement offer at the beginning of the October 24, 2016 IEP team meeting, derailed the IEP development process. It placed San Ramon in the untenable position of announcing it would offer placement of Student at Spectrum before a meaningful team discussion that included Ms. Hunnicutt, a Spectrum representative, had taken place. And it would be speculation to assume an offer of Spectrum was a "sure thing" before that discussion occurred. As will be discussed below, there was testimony about Spectrum during the hearing, that does not appear to have been discussed at the IEP team meeting of November 14, 2016, when placement at Spectrum was offered. Had this information been known by San Ramon, it very well may not have offered Spectrum as placement, and would have resumed the search for an appropriate nonpublic school placement. In any case, Father's premature exit from the IEP team meeting of October 24, 2016, ensured the absence of an offer of placement at this IEP team meeting. Thus no procedural error occurred.

#### ISSUE 1C: FAILING TO CONSIDER PARENT INPUT AT THE OCTOBER AND NOVEMBER 2016 IEP TEAM MEETINGS

24. Student contends San Ramon failed to consider Parent input at the IEP team meetings on October 10 and 24, 2016, and on November 14, 2016. Specifically, Student complains that San Ramon team members ignored Parents' input about Student's progress at Lindamood Bell, and their desire that San Ramon continue to fund the Lindamood Bell Program. San Ramon argues it considered Father's input at those IEP team meetings, but nevertheless disputed Student's progress at Lindamood Bell, and did not believe he required services there to receive a FAPE.

## Meaningful Parental Participation

25. To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23 Missoula, Mont.*, *supra* 960 F.2d 1479, 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns were considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) However, an IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139 [IDEA did not provide for an "education . . . designed according to the parent's desires."].)

## Analysis

26. As discussed in greater detail below, Parents believe that Student had been, and would be, best served if he was able to continue to participate in the Lindamood Bell Talkies program, finish that program, and then move on to the Visualizing and Verbalizing program. Therefore, at the IEP team meeting on October 10, 2016, Father shared progress reports from Lindamood Bell, described Student's sessions at Lindamood Bell, and showed the team a video of Student working on math at home. In addition, he asked questions and made numerous comments during the meeting, bringing up the subject of Student no longer being mainstreamed,

for example. All of this information was reflected in the notes San Ramon prepared during the meeting, and Father's testimony confirmed the notes were accurate. Father's participation in the October 10, 2016 IEP team meeting was extensive and meaningful, and there was no evidence that his input was ignored or disregarded by the San Ramon IEP team members.

27. Meaningful participation in the October 24, 2016 IEP team meeting was impeded only by Father's insistence that San Ramon make a specific offer of placement prior to a team discussion of the placement with a representative from Spectrum. The meeting ended early when Father refused to abide by the process agreement and walked out. He himself impeded his participation and provision of input to the entire team. Accordingly, it cannot be found that Student was denied a FAPE because Parent input was ignored by the IEP team at the October 24, 2016 IEP team meeting.

28. Father very actively participated at the IEP team meeting on November 14, 2016. He extensively questioned Ms. Johnson about the Spectrum program. He expressed his concern that the rest of the team seemed focused on improving Student's behavior, rather than providing him with academic instruction. Father again reported on Student's progress at Lindamood Bell, and asked that San Ramon fund Student's participation in Lindamood Bell services, rather than placing Student fulltime at Spectrum. Father later sent his own version of notes reflecting what occurred at the IEP meeting, but nothing in those notes contradicts what is reflected in the San Ramon notes, nor did any witness dispute the accuracy of Father's notes that were attached to the final IEP document. Although Parents disagreed with the San Ramon offer of placement at Spectrum, there was no evidence that their concerns and Father's comments and information provided to the team were not considered or were disregarded at the November 14, 2016 IEP team meeting. Consideration of Parental input did not require San Ramon to acquiesce to Parents' desire to have San Ramon

continue to fund Student's receipt of services from Lindamood Bell for the remainder of the 2016-2017 school year. San Ramon did not violate the procedural requirements of the IDEA because it did consider Father's input at the October and November 2016 IEP team meetings.

## ISSUE 2: DID SAN RAMON'S OFFER OF PLACEMENT AND SERVICES AT SPECTRUM DENY STUDENT A FAPE?

29. Student contends that San Ramon's offer of placement at Spectrum denied him a FAPE because it does not address his unique communication needs, and will not provide him with appropriate academic instruction because the class is not taught by a fulltime credentialed special education teacher. San Ramon argues that it cannot meet Student's needs in any of its own special day classes, in light of his intense behavioral needs, because Student's behavior renders him unavailable for instruction. San Ramon asserts placement at Spectrum is appropriate because at Spectrum, Student would work in a classroom with similar peers, and have appropriate behavioral interventions in all school environments. San Ramon argues that one-to-one instruction of Student can be provided by someone who does not have a special education teaching credential.

### Evaluation of an IEP

30. An IEP is to be evaluated in light of information available at the time it was developed and offered, and is not to be evaluated in hindsight. (*Adams v. State of Oregon*, (9th Cir. 1999) 195 F.3d 1141, at 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that "[a]n IEP is a snapshot, not a retrospective." (*Ibid.*) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*; *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d

1213, 1236.) To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

31. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, must be reasonably calculated to provide the student with educational benefit, and must comport with the student's IEP. (20 U.S.C. § 1401(9).) Educational benefit is not limited to academic needs, but includes social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

32. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b)(2006); Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability.

#### Least Restrictive Environment

33. A local education agency must ensure that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." (20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) This "least restrictive environment" provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir.

1994) 14 F.3d 1398, 1403 (*Rachel H.*) A local education agency must have a continuum of alternative placements available that proceed from “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” (34 C.F.R. § 300.115(b); see also Ed. Code, § 56342, subd. (b).)

34. If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Bd. Of Ed.* (9th Cir. 1989) 874 F.2d 1036 at p. 1050.) Education Code section 56361 describes a continuum of placements for children with disabilities, beginning with subdivision (a), which calls for placement in a general education classroom. The continuum ends with subdivision (i) which permits instruction at home, or in hospitals or institutions, either directly or via telecommunication. This is the most restrictive placement on the continuum. In between these two ends of the spectrum are other options. Subdivision (d) of Education Code section 56361 is placement in a special day class, which is a classroom for special education students who have intensive needs. (Ed. Code, § 56364.2.) Subdivision (e) of the Education Code section 56361 is placement in a nonpublic school. A nonpublic school is a nonsectarian private school that serves students who have IEPs and more intensive needs than can be served by the public school district in which the child resides, and which is certified by the California Department of Education. (Ed. Code, § 56034.)

35. A nonpublic school must be staffed by individuals who hold the same credentials and or licenses or certifications as are required for public schools. (Ed. Code § 56366.1, subd. (n); Cal. Code. Regs. tit. 5, §§ 3064, 3065.) Special day classes and classrooms at nonpublic schools must be taught by a properly credentialed teacher, i.e., one who holds the appropriate special education credential for teaching the special



needs students in the class. (Cal. Code Regs., tit. 5, §§ 3051; 3064.) However, individual instruction may be provided by adults who do not have special education credentials, supervised by a teacher with the appropriate credential. (Ed. Code §§ 45330 and 45340.) In addition, in case of a staffing emergency, a nonpublic school can have non-credentialed personnel assigned to teach a class. (Cal. Code Regs., tit. 5, § 3064.)

### Analysis

36. At the heart of the dispute between Parents and San Ramon is Parents' unwavering belief that Student's maladaptive behaviors are due to his inability to communicate due to his speech and language impairment. Based on their testimony, Parents believe that Student will learn to understand language by attending Lindamood Bell programs for several hours each weekday for at least the next two years. Parents believe that Student can gain social skills by limited attendance/participation in a San Ramon special day class, or at a nonpublic school during this time. This is what Parents believe will afford Student a FAPE.

37. San Ramon believes Student's maladaptive behaviors are such that they cannot be controlled in a public school environment, even with a one-to-one behavioral aide and other adult assistance. Instead, San Ramon believes that Student requires a behavior-centered placement in a nonpublic school setting where everyone, even the school secretary, is trained in behavior modification strategies and applied behavior analysis. Once Student is in control of his behavior, he will then be accessible for teaching additional academics and social skills. San Ramon believes that Spectrum is such an environment where, with behavioral strategies, Student can work on his goals each day, and make academic progress.

38. San Ramon established it did not have sufficient behavioral supports available to serve Student, in even its intensive special day classes. A nonpublic school such as Spectrum has personnel trained in behavior modification strategies both inside

the classrooms and on campus in general. With consistent behavior modification strategies, Student would gain increased self-regulation each day, and then he would be available for instruction. The parties did not dispute that Student could no longer remain in the less restrictive public school setting due to his behavioral issues. A nonpublic school was the least restrictive environment for Student at the time of the November 14, 2016 IEP team meeting, as well as at the time of hearing.

39. However, placement at Spectrum would not provide Student with a FAPE. Although at hearing Parents focused on their belief that the lack of a specific curriculum in the Spectrum nonacademic class would prevent Student from obtaining a FAPE, they did not meet their burden of proof in this regard. The reason Student would not receive a FAPE at Spectrum is because the "nonacademic class" in which Student would be placed by San Ramon at Spectrum, does not have a fulltime teacher with an appropriate special education credential to tailor instruction in such a way as to assist Student in meeting his goals.

40. Ms. Hunnicutt is the only credentialed special education teacher in the nonacademic class where Student would be placed. A credentialed special education teacher has the education and training to devise instructional strategies to meet the unique needs of students with IEPs. While it is legally sufficient for adults who do not have a special education credential to provide direct instruction in a nonpublic school, the determination of what should be taught, and how it should be taught, with detailed lesson plans for the adults who will be called upon to do the actual one-to-one instruction is a necessary function of a special education teacher, and cannot be delegated. Also, the instruction must be under the supervision of a credentialed teacher. Ms. Hunnicutt was also the credentialed special education teacher for two other classrooms at Spectrum, each of which, based on the evidence, has five to seven other

students. She is responsible for their education in the same way she would be for Student.

41. Further exacerbating the denial of a FAPE to Student by placement at Spectrum is that Ms. Hunnicutt is the only behaviorist at Spectrum. In this capacity she is on call to handle behavioral issues during the school day for all the 30 to 40-plus students at Spectrum Oakland. In addition, she is sometimes called upon to conduct behavioral assessments, and to create or modify behavior intervention plans, when necessary, for many of these students. Ms. Hunnicutt is spread too thin to provide Student with what he needs to obtain a FAPE.

42. It is true that there is a very high level of adult support in the classroom where Student would be placed. However, Ms. Hunnicutt is only able to be present in the classroom for one to two hours a day. Instruction for most of the day is supervised by someone who is a college graduate, but who does not have a special education credential. Other support staff in the classroom have only a high school education and have passed a Spectrum "test." Due to the lack of a fulltime special education teacher in the Spectrum classroom proposed by San Ramon for placement, the placement offer of November 14, 2016, will not provide Student with a FAPE.

## REMEDIES

1. Student prevailed in regards to Issue 2 in that San Ramon's offer of placement of Student at Spectrum on November 14, 2016, was not an offer of a FAPE. Student asks for San Ramon to reimburse Parents for Father's time at IEP team meetings and the due process hearing. In addition, Student asks for compensatory education "damages," and "punitive damages." OAH does not have authority to provide this relief. Further, Student asks that Parents be reimbursed for the cost of commuting to and from Lindamood Bell, and Mother's time as Student's aide during instruction at Lindamood Bell. However, this service was provided pursuant to the August 2, 2016 settlement

agreement, and was not related to San Ramon's failure to offer an appropriate placement in November 2016. At hearing Student did not establish that continued services at Lindamood Bell would provide him with a FAPE, or meet all of his needs, including academic, social, and behavior.

2. A nonpublic school seeking certification must submit an application to the California Department of Education, and provide specific information about the school to establish that it meets all legal requirements to operate as a nonpublic school. (Ed. Code § 56366.1, subd. (a).) If a nonpublic school conducts operations at more than one site, each site must be certified. (*Ibid.*, subd. (c).) In order to be certified, nonpublic agencies must also have appropriately licensed and credentialed personnel providing services for the students they serve. (Cal. Code Regs. tit. 5 § 3064.) An ALJ conducting a special education due process hearing cannot prospectively place a student at a nonpublic school that is not certified, nor order services from a nonpublic agency that has not been certified by the California Department of Education. (Ed. Code § 56505.2.)

3. Student's behavioral needs are intense, and the evidence established that he does require nonpublic school placement. It was assumed by the parties that Spectrum was a certified nonpublic school, and there was no testimony to the contrary. However, Spectrum does not meet the legal requirements for certification as a nonpublic school because it does not have a fulltime teacher with a special education credential in each of its classrooms. There was no evidence that this was due to a staffing emergency, or that Spectrum had received an exemption from this requirement. (Ed. Code § 56366.2.) Therefore, the ALJ cannot order that Student be placed at Spectrum in Oakland. Further, Lindamood Bell is not certified by the California Department of Education, so San Ramon cannot be ordered to pay for services to Student unless, as discussed below, Student is entitled to receive compensatory education.

4. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia, supra*, 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

5. Parents’ position regarding Student’s behavior has some merit to the extent that it is quite plausible that Student’s language deficits contribute to the cause of his maladaptive behaviors. However, Parents did not establish at hearing that participation in Lindamood Bell programs will result in significant remediation of Student’s language deficits. There was no expert testimony to support this premise. Further, when Student received services at Lindamood Bell in 2016, the means for Student to access the Lindamood Bell programming was to isolate him in a room with Mother present as his behavioral aide, and change instructors each hour. Even then, Lindamood Bell progress reports reflect significant behavioral outbursts, and these reports were not disputed by Parents.

6. There was no evidence that Lindamood Bell instructors have either special education credentials, are speech and language pathologists, occupational therapists, or have training in behavior modification. Student’s IEP requires that he receive instruction and services from all of these professions, and more. Lindamood Bell is not certified by

the California Department of Education as a nonpublic agency, nor a nonpublic school, and does not have the appropriately licensed and credentialed personnel to serve Student and meet his needs. Thus Parents' proposed placement for Student at Lindamood Bell will not offer him a FAPE.

7. The claim in Student's second issue was that San Ramon's offer of November 14, 2016, was not an offer of a FAPE. The legal finding that the offer was not an offer of a FAPE, does not in and of itself, under the circumstances of this case, entitle him to compensatory education. Nor did Student present any evidence concerning his need for compensatory education, and what type, frequency and duration of compensatory education would remediate San Ramon's failure to offer him a nonpublic school placement that would provide him with a FAPE. Student's second issue did not contain a claim that San Ramon denied him a FAPE from a certain date to another certain date. That specific issue was not pled in this case. Accordingly, based on the issues pled in this case, no compensatory relief can be ordered for Student.

## ORDER

San Ramon's November 14, 2016, offer of placement at Spectrum Center in Oakland is not an offer of a FAPE. Student's remaining requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, San Ramon prevailed on Issue 1. Student prevailed on Issue 2.

## 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: February 9, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
REBECCA FREIE  
Administrative Law Judge  
Office of Administrative Hearings