

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CONEJO VALLEY UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2016030817

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on March 17, 2016, naming Conejo Valley Unified School District. The matter was continued for good cause on April 29, 2016. Student filed an amended complaint on August 2, 2016. OAH issued an Order Granting Motion to Amend Complaint on August 4, 2016, which is the date the amended complaint was deemed filed. The matter was continued for good cause on September 20, 2016. Administrative Law Judge Christine Arden heard this matter in Thousand Oaks, California, on November 2, 3, 8, 9, 10, 17 and 29, 2016.

Henry Tovmassian and George Crook, Attorneys at Law, represented Student. Student's Mother attended the entire hearing. Student did not attend the hearing.

Wesley Parsons and Siobhan Cullen, Attorneys at Law, represented District. Michelle Morse, Director of Special Education, attended the hearing on behalf of District on November 2, 17, and 20, and a portion of each day on November 8, 9 and 10, 2016. Lisa Miller, Special Education Coordinator, attended the hearing on behalf of the District on November 3, 2016, and for a portion of each day on November 8, 9 and 10, 2016.

A continuance was granted to allow time for the parties to file written closing arguments and the record remained open until December 20, 2016. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

1. Did District deny Student a free appropriate public education from April 26, 2015 through February 10, 2016, by failing to:

- a. meet its “child find” obligations with respect to Student;
- b. assess Student in all areas of suspected disability;
- c. find Student eligible for special education and related services;
- d. offer and provide measurable goals and appropriate present levels of performance in all areas of need;
- e. offer and provide appropriate placement and services, including appropriate accommodations and modifications, speech and language services, occupational therapy, behavioral interventions, psychotherapy, social skills, and extended school year services;
- f. offer and provide Parents training addressing Student’s behavioral and emotional difficulties; and
- g. make a “formal, specific” offer of FAPE?

2. Did District deny Student a FAPE, from February 11, 2016 through the end of the 2016 extended school year by failing to:

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

- a. meet its "child find" obligations with respect to Student;
- b. assess Student in all areas of suspected disability;
- c. find Student eligible for special education and related services;
- d. offer and provide measurable goals and present levels of performance in all areas of need;
- e. offer and provide appropriate placement and services, including appropriate accommodations and modifications, speech and language services, occupational therapy, behavioral interventions, psychotherapy, social skills, and extended school year services;
- f. offer and provide Parents training addressing Student's behavioral and emotional difficulties; and
- g. make a "formal, specific" offer of FAPE?

## SUMMARY OF DECISION

Mother had informed District of Student's history of social, emotional and behavioral difficulties when he started kindergarten. District failed to timely assess Student after Mother first requested he be assessed for special education eligibility at an initial Student Study Team meeting on September 16, 2015. Instead of promptly assessing Student, District held two more Student Study Team meetings and attempted to address Student's social, emotional and behavioral deficits with interventions in the general education curriculum over the next four and one-half months. District eventually assessed Student, found him eligible for special education and offered him a FAPE in the April 2016 IEP.

District denied Student a FAPE for four and one-half months due to its delay in assessing Student. However, Student did not establish that District failed to offer him a FAPE in the April 2016 IEP. Student proved that when District eventually assessed him, it failed to assess him in all areas of suspected disability by failing to timely administer a

functional behavior assessment to him, even though his negative behavior was his primary suspected area of disability. Student failed to establish that District should have assessed him prior to Mother's request for an assessment on September 16, 2016. Student is awarded remedies of compensatory education and training for District personnel in the area of assessment obligations under the IDEA and functional behavior assessments.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is a six-year-old boy who resided with his Parents in the District at all relevant times. District found Student eligible for special education on April 20, 2016, under the primary category of emotional disturbance and the secondary category of other health impairment. Parents consented to Student's eligibility for special education on August 24, 2016.

2. Parents adopted Student when he was seven weeks old. Student's birth mother had schizoaffective disorder and his biological father had bipolar disorder. Student's birth mother smoked cigarettes, drank alcohol and may have used drugs recreationally during her pregnancy with Student.

### STUDENT'S PRESCHOOL YEARS

3. Starting when Student was two years old he exhibited behavior problems and received behavior services at home. He also participated in individual speech therapy sessions to remediate a mild stutter and speech disfluency, and occupational therapy to treat low muscle tone.

4. Student attended a private preschool between the ages of two and five. In the 2013-2014 school year, when Student was three years old, he was accompanied by a 1-to-1 aide throughout the school day due to his physically aggressive behaviors.

Around the middle of the following school year he hit a classmate in the face. After that incident an adult “shadow” accompanied Student during unstructured times in the school day, such as recess. He was not accompanied by an aide during classroom time because he behaved better during highly structured activities.

5. During summer 2015, he attended a day camp. He frequently hit, kicked and pinched other campers. In summer 2015, Parents and Student participated in family therapy with psychologist, Dr. Andrea Aucoin, to deal with Student’s aggressive behaviors at home. Student also consulted with psychiatrist, Dr. Derek Ott, for pharmaceutical intervention.

6. On February 6, 2015, Mother enrolled Student at Madroña Elementary School in anticipation of Student beginning kindergarten in fall 2015. Mother completed multiple forms and one of Mother’s responses stated Student “is NOT currently enrolled in a special program” and “has NEVER BEEN enrolled in a special program.” Student had, in fact, previously received individual speech therapy sessions to remedy his disfluency and stuttering. Mother did not consider individual speech therapy sessions to constitute a “special program.”

7. On or about April 26, 2015, Mother completed a District Permanent Health History form about Student and submitted it to District. Some of the information Mother provided was inaccurate. She inaccurately responded on the form that Student did not appear restless or overactive; present unusual discipline problems; or have problems getting along with others. Mother provided incorrect responses to avoid causing school personnel to develop negative preconceived notions about Student before meeting and working with him. In response to the question seeking “other pertinent information about your child” Mother responded “low muscle tone – receives O/T, disfluency-speech.”

8. A clerical employee at Madroña reviewed parent responses on all of the Permanent Health History forms for incoming kindergarteners. This employee flagged forms that contained responses which raised concerns that a child might have special needs. This employee then gave the flagged forms to the Madroña principal for her attention. The employee reasonably did not flag Student's health history form based upon Mother's responses.

#### KINDERGARTEN AT MADROÑA ELEMENTARY SCHOOL - 2015-2016 SCHOOL YEAR

9. On August 25, 2015, one day before classes began for the 2015-2016 school year, Mother met with the Madroña principal, Ms. Hallie Chambers to inform her about Student's history and behavioral problems. Mother's conference with Ms. Chambers was the first time she provided any information about Student's behaviors, background and emotional health to District. Mother told Ms. Chambers that Student was adopted and both his birth parents suffered from a variety of serious mental health disorders. Mother also informed Ms. Chambers that Student had previously exhibited aggressive behaviors both at home and at preschool, such as hitting and punching others, and he had been accompanied by aides in preschool. Mother also told Ms. Chambers that Student and Parents were seeing a psychiatrist, but Student had not yet been diagnosed with any specific disorder. Mother also mentioned that Student had worked with a behaviorist, received speech therapy for disfluency, and occupational therapy for his low muscle tone. After the meeting Ms. Chambers promptly sent an email to Ms. Meiron, Student's kindergarten teacher, and the Madroña professional staff members who participated in Student Study Team meetings. Ms. Chambers also sent a separate email to Mother scheduling an initial Study Team meeting for Student for September 16, 2015, to address Student's history of behavior problems and interventions that could be used to assist if they occurred in kindergarten. Ms.

Chambers' response to the information she had received from Mother on August 25, 2015, was reasonable.

10. Student began attending Pamela Meiron's general education kindergarten class at Madroña on August 26, 2015, the first day of school. That day Student raised his fist to hit another child, but did not make contact. Student performed well in class academically. He occasionally stuttered, particularly when he was tired, but his stuttering did not impact his educational performance. During the first week of school Student drew all over a peer's face and hair with a red marker. Student frequently had problems with other children because he encroached upon their personal spaces. Student also had difficulty keeping his hands to himself. He sometimes touched, poked, hit or kicked other children. Student's aggressive behaviors caused him social problems with peers.

11. On September 9, 2015, Ms. Meiron sent Student to Ms. Chambers' office because he had punched and kicked other children during recess and in class. At Madroña, teachers sent children to the principal's office for discipline only for more serious behavior problems. Minor discipline issues were routinely handled directly by teachers or para-professionals. Ms. Meiron regularly communicated with Mother about Student's aggressive behaviors. She reported to Mother that Student often hit, kicked, pinched, pulled hair and annoyed other children.

12. Starting early in the school year, Mother volunteered in Ms. Meiron's classroom for two hours on four mornings each week for a four month period of time. Mother did not work directly with Student when she volunteered in Ms. Meiron's classroom.

## First Study Team Meeting on September 16, 2015

13. An initial Student Study Team<sup>2</sup> meeting for Student was held on September 16, 2015. Ms. Chambers; school psychologist, Miriam Carmona; speech and language pathologist, Caitlin Templeman; Ms. Meiron; special education teacher, Noelle Jordan; and Parents attended the meeting. The team discussed Student's negative behaviors, short attention span, fidgeting, lack of impulse control and inappropriate physical contact with others. The team also addressed Student's recent discipline referral to Ms. Chambers, and the incident in which Student drew on another child with a marker. Ms. Meiron reported Student had impulse control problems. He often touched, poked or hit other children. Student's classmates made up a song calling Student a bully. Parents told the team Student was seeing Dr. Andrea Aucoin, a neuro-clinical psychologist, who had opined Student may have a mental disorder, but it was difficult to diagnose due to his young age, and treatment was difficult without a diagnosis.

14. The Study Team agreed at the meeting to have two District behaviorists observe Student in class and on the playground for the purpose of developing constructive behavioral suggestions for working with Student. The Study team also referred Student for school based counseling. Ms. Carmona agreed to confer with Dr. Aucoin. Mother credibly testified at hearing that she requested an IEP for Student at the September 16, 2015 Study Team meeting. Ms. Meiron was the only District team member who expressed the opinion that Student should be assessed for special education. The rest of the team overruled Ms. Meiron and responded that they wanted to take a few months to get to know Student. They felt it was too early to assess Student

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<sup>2</sup> Student Study Team meetings are held to address whether a pupil should be referred for assessment for special education, evaluated for a section 504 plan, or if other interventions in the general education curriculum are recommended by the team.



for special education eligibility. Mother expressed her concern that the assessment process would take a long time. Other Study Team members assured Mother that a quick “diagnostic placement” in the learning center could be made while Student was being assessed. The Study Team decided to meet again to discuss information gathered about Student and a proposed special education assessment plan was not developed for Student.

15. Shortly after September 24, 2015, Ms. Meiron put Student on a behavior contract to encourage him to keep his hands to himself. After the Study Team meeting Ms. Chambers asked school counselor Lorena Rojas to meet with Student. Ms. Rojas telephoned Mother, who told Ms. Rojas that Student’s birth parents suffered from mental illness and that Student was being treated by a therapist. In the first week of October 2015, Ms. Rojas met with Student once. They discussed Student’s anger and physically aggressive behavior toward other children at school. Student told Ms. Rojas that he always tried to remind himself not to hurt others or say mean things but he could not stop himself. Ms. Rojas did not see Student for further counseling sessions, even though she would have liked to, because her schedule did not permit it.

16. Shortly after the September 16, 2015 Study Team meeting, while volunteering in Ms. Meiron’s classroom, Mother told Ms. Meiron that she was frustrated with the delay in obtaining needed services for Student because early intervention was important for children with special needs. Ms. Meiron told Mother that, even though Ms. Meiron also believed in early intervention for children with suspected disabilities, District took the position that young children grow out of some behaviors and should usually not have an IEP before first grade. Ms. Meiron’s comment caused Mother to believe Ms. Meiron was “between a rock and a hard place” about recommending Student for assessment. On October 1, 2015, Ms. Meiron sent Student to Ms. Chambers’ office for discipline because he was playing rough and hit two children at recess.

## Second Study Team Meeting on October 7, 2015

17. District held a second Study Team meeting for Student on October 7, 2015. Ms. Chambers, Ms. Carmona, Ms. Templeman, Ms. Meiron, Ms. Jordan, Parents and an intern school psychologist attended the meeting. Ms. Meiron reported Student's behavior had improved slightly in class. However, Student had started spitting in the faces of his classmates, instead of hitting them. Ms. Meiron had implemented a daily behavior chart for Student, which allowed him to earn rewards for good behavior. Student had responded well to this technique. To address his social difficulties the Study Team placed Student in a multi-tiered system of supports, also called PRIDE time, which consisted of a social skills/communication small group led by Ms. Templeman. The PRIDE time group met multiple times each week for seven weeks. The objective was to teach group members needed social and communication skills. The Study Team did not refer Student for assessment for special education during this meeting. District behaviorists never presented collected data about Student or behavioral suggestions for working with Student to the Study Team.

18. Ms. Carmona, who has been licensed in California as a school psychologist for 11 years, did not believe Student had a suspected disability which warranted his assessment for special education as of October 7, 2015. Ms. Carmona and other members of the Study Team believed at the time District should first attempt accommodations and interventions in a general education setting to address Student's recurring behavior problems before District referred him to be assessed for special education. This approach was consistent with the daily behavior chart Ms. Meiron was already implementing. The Study Team did not act reasonably by failing to refer Student for referral for assessment for special education at its second meeting.

19. Student performed above grade level in most academic areas in kindergarten. His reading, math and vocabulary skills were developing well. He

continued to have problems with impulse control and social skills. He sometimes threw things across the classroom without provocation or because he did not get his way.

20. On October 14, 2015, Student pulled another child's lip down while in class. On November 16, 2015, Ms. Meiron sent Student to meet with the interim principal for discipline after he hit a girl in the face.

#### Escalation of Aggressive Behaviors

21. In December 2015, Student's impulsive and aggressive behaviors escalated significantly at both school and home. He hit and kicked children at school, particularly during unstructured times of the day, such as recess. Student's aggressive behaviors were unpredictable. Most of the time, no discernible triggers preceded his aggressive conduct. On December 1, 2015, Student hit a child with his lunch box. Student frequently squeezed the wrists of other children in class if they had an item Student wanted or if they said something Student did not like. By December 11, 2015, Ms. Meiron had started a request for a follow up Study Team meeting for Student, and she informed Mother that Mother could request an evaluation for special education.

22. At home Student behaved aggressively toward Parents at least once a day, particularly with Mother, who was usually stricter with Student than Father. Student hit Mother on multiple occasions. He poked Mother in the eye with a pencil because he was mad about doing homework; he urinated on Mother; he pulled Mother's glasses off of her face, threw them on the ground, and stomped on them. He threw objects at Mother; he threw a remote at a television, breaking the television. He once threatened Father with a pair of scissors. He threw at least one cell phone in the toilet. Student's behaviors were worse at home than at school. Student's mood sometimes changed from calm and happy, to angry and violent very quickly with little or no provocation. Student's aggressive conduct was sometimes triggered when he was told to do a non-preferred task, such as homework, or to stop doing a preferred task. His anger was often

immediate and very intense and he could not be soothed. His angry outbursts lasted from 10 minutes to two hours. Over the winter break from school Student's behavior at home was violent and angry. Student was often physically aggressive and mean with the small family dog, even though Student claimed he loved the pet. He trapped the dog in a dresser drawer, threw it across the room by its collar and poured water on it. On another occasion, Student urinated on the dog. For the dog's well-being, Parents had to find another home for the dog. Mother informed Ms. Meiron about Student's escalating violent behaviors at home when school resumed after the Winter break.

23. Early in 2016, psychiatrist Derek Ott diagnosed Student with attention deficit hyperactivity disorder. Dr. Aucoin diagnosed Student with conduct disorder, childhood onset limited pro-social, disruptive mood dysregulation disorder and mood disorder.

24. At school Student participated in a second PRIDE time class consisting of another seven-week small group which met multiple times weekly and focused on development of social skills and communication. From December 2015 through February 2016, Student was referred by District staff to the principal's office for discipline for his aggressive behavior toward other children on six different occasions. Student had hit, kicked, scratched, choked and spit at his peers. He did not usually demonstrate remorse after hurting another child.

25. On January 11, 2016, Student licked his finger and put it on a child's face and grabbed a child's hair. Mother wrote an email to Ms. Meiron that day asking Ms. Meiron to be "as honest as possible so we can try to get an IEP." On January 12, 2016, Ms. Chambers advised campus supervisors to pull Student aside immediately if he was aggressive on the playground and "[i]f it is more serious, i.e.: punching in the face, he will be sent to me." On January 26, 2016, Student "jerked hard on a child's hand/arm" in class. Student had been disruptive and disrespectful in PRIDE that day. Mother wrote in

an email to Ms. Meiron that day: "I hope you will feel comfortable speaking up to advocate on [Student's] behalf – I realize you are in a difficult position." On January 27, 2016, Ms. Chambers told Student that he was making the school unsafe by "hitting/kicking/etc." Student was prohibited from going to recess for four days that week due to his physically aggressive behavior toward other children. On February 3, 2016, Ms. Carmona observed Student hit a child in the groin for no apparent reason. Student also acted disruptively and defiantly with Ms. Templeman in PRIDE time.

26. Throughout January 2016, Student was frequently physically aggressive with children at school. Student was disciplined at school for his conduct. During that same time period he also often behaved aggressively with Parents, particularly Mother, at home. Mother reported some of these incidents to school personnel. Mother told District personnel that Student could be dangerous. Despite all of these escalating harmful behaviors, no one from District referred Student for a special education assessment.

#### February 2016

27. On February 8, 2016, psychiatrist Dr. Derek Ott prescribed medication to Student for his ADHD. Behavioral pediatrician, Dr. Spadaro, prescribed other medications, including a mood stabilizer, to Student.

28. District held a third Study Team meeting for Student on February 8, 2016. Ms. Chambers, Ms. Carmona, Ms. Templeman, Ms. Meiron, Ms. Jordan, Mother and Crystal Wilson, an intern school psychologist, attended the meeting. Mother requested that District assess Student for special education. The team discussed Student's recent diagnoses by Dr. Ott and Dr. Aucoin. The team addressed Student's escalated physically aggressive behaviors over the past two months. Although Ms. Meiron reported Student was behaving better in class, Student had lost interest in the behavior chart, rendering it an ineffective tool to encourage his good behavior. He was having behavior problems in

physical education class. The team discussed the unpredictability of Student's aggressive behaviors and that other children avoided Student at school. At this meeting the Study Team recommended Student be assessed for special education.

29. At the Study Team meeting dated February 8, 2016, Ms. Carmona testified that she believed Student had a suspected disability, warranting his assessment for special education. At the two previous Study Team meetings Ms. Carmona testified that she did not believe Student had a suspected disability as to warrant assessment for special education. While testifying at hearing, Ms. Carmona was unable to articulate specifically what about Student's condition had changed by the February 8, 2016 Study Team meeting that had caused her to revise her opinion that Student should be assessed for special education. This undermined the credibility of Ms. Carmona's opinion that Student should not have been assessed earlier.

30. District provided Mother with an assessment plan on February 10, 2016. The plan proposed to assess Student in the following areas of suspected need: (1) pre-academic/academic achievement (given by special education teacher); (2) social/emotional behavior (given by psychologist); (3) self-help/adaptive skills (given by psychologist); (4) motor skills development (given by psychologist); (5) language/speech/communication development (given by speech pathologist); (6) intellectual development (given by psychologist); and (7) vision and hearing screening (given by nurse). Mother consented to the proposed assessment and returned the signed assessment plan to Madroña on February 17, 2016.

31. On February 11, 2016, at the class Valentine's day party, Student choked another boy, leaving red marks on the child's neck. On February 16, 2016, Student scratched another child so hard the child bled, and Student was suspended from school for a day. After Student was suspended from Madroña in February 2016, Mother contacted the Ventura County Health Department for behavioral services. Student

received and completed a five month therapeutic behavioral service program provided to him at home by the Ventura County Health Department. The County behaviorist referred Student for a second five-month therapeutic behavioral service program.

32. Throughout the 2015-2016 school year Mother communicated frequently with Ms. Meiron and other District personnel working with Student, regarding his behaviors and consequences and strategies used at school to address Student's emotional and behavioral difficulties.

#### Private Neuro-psychological Assessment of Student by Dr. Mary Large

33. On March 4, 2016, Mother informed Madroña in an email that she was obtaining a private psychological assessment of Student. She did not ask District to fund that assessment. Parents were concerned about Student's increasing aggressive outbursts and his inability to regulate his emotions and behaviors. They hired licensed neuropsychologist, Dr. Mary Large, to conduct a neuropsychological evaluation of Student. Dr. Large performed her evaluation over a five-day period between March 7, 2016, and March 21, 2016.

34. Dr. Large, who has been a licensed neuropsychologist since 2004, testified very credibly at hearing regarding her assessment of Student because she was very experienced and knowledgeable regarding assessment instruments and their protocols. Therefore, her testimony regarding the assessments of Student was given significant weight. She administered the following tests to Student: Behavior Assessment System for Children, Second Edition; Behavior Rating Inventory of Executive Functioning, Second Edition (parent and teacher report forms); California Verbal Learning Test, children's version; Children's Memory Scale; Continuous Performance Test, Gordon Diagnostic Systems, delay and vigilance modes; Development Test of Visual Motor Integration; Grooved Pegboard; Neuropsychological Developmental Evaluation, Second Edition; Weschler Preschool and Primary Scales of Intelligence, Fourth Edition; and Woodcock

Johnson Tests of Achievement, Fourth Edition. She also observed Student in his kindergarten class.

35. Dr. Large's assessment results were summarized in a report dated April 8, 2016. The report indicated Student's intellectual functioning was in the average to high average range. His sensori motor processing skills were significantly slower than typical children of the same age. His language processing skills were in the typical range, indicating his language skills were solidly developing. His test responses indicated he may have challenges with organization or differentiating details in items. His visual motor scores fell within typical limits. He had some difficulty recognizing varying facial expressions of others, but was able to adequately understand the perspectives and intentions of others. His attention was within typical limits, although he revealed a tendency to be distracted and miss key information. His memory was adequate. He had difficulty with verbal inhibitory control. He was more frustrated with reading than typical of children his age. His writing was below average. His math skills varied from average to borderline low.

36. Dr. Large's report indicated that Parents' responses about Student revealed him to being either "at risk" or falling in the "clinically significant" range for hyperactivity, aggression, social problems with peers, and depression. Ms. Meiron's responses about Student revealed him to fall into the "typical" range for hyperactivity and attention, but that he was "at risk" range for aggression, withdrawal and social problems with peers.

37. Dr. Large concluded that Student had deficits in executive functioning, poor self-control with his emotions and behaviors and he had problems adequately managing his impulses. She further opined that Student had a hard time keeping rules and social conventions in mind and he was unable to apply such conventions and rules



to guide his behaviors. His ability to regulate or exert adequate control over his behavior and emotions was markedly compromised.

38. Dr. Large noted in her report that, even though Student did not meet all the criteria to meet a diagnosis of fetal alcohol syndrome, his temper, impulsive behavior and aggression were consistent with the symptoms of fetal alcohol syndrome. She found many of his symptoms were consistent with a diagnosis of disruptive mood dysregulation disorder, a condition which is characterized by frequent temper outbursts and irritable or angry moods, although she did not diagnose Student with a mood disorder because of his young age. Dr. Large noted that Student lacked remorse for his poor treatment of others. Dr. Large recommended behavioral and mental health interventions both at school and home.

39. Dr. Large thought a general education classroom was the appropriate placement for Student. She recommended Student be given a functional behavior assessment. She also believed he needed a positive behavior intervention plan that provides clearly defined limits and consequences, and immediate reinforcement for his good behaviors. Dr. Large opined that a full time 1-to-1 aide should be considered for Student due to the safety risk posed by his unpredictable aggressive behaviors toward peers. Dr. Large recommended Student receive four to six hours a week of home based behavioral intervention, as well as behavioral services at school. Dr. Large also endorsed training for Parents to assure that consistent expectations, limits and consequences for Student would be used at home and school. She further opined Student needed mental health intervention services at school. Dr. Large was neither experienced, nor trained, with regard to developing IEP's. Therefore, her testimony regarding Student's IEP was less credible and given less weight.

## District's Assessment of Student for Special Education

40. Ms. Carmona, Ms. Jordan and Ms. Templeman administered a battery of standardized assessment instruments to Student over 10 days from March 7, 2016 through April 13, 2016. They jointly drafted a Psycho educational Report dated April 20, 2016, summarizing the testing administered and results.

41. Ms. Carmona administered the following to Student: Kaufman Assessment Battery for Children Second Edition; Weschsler Intelligence Scale for Children fourth Edition (coding & symbol subtests); Adaptive Behavior Assess System, Third Edition; Bender Gestalt II; Test of Auditory Processing Skills, third Edition (selected subtests); Comprehensive Test of Phonological Processing (selected subtests); Teacher Evaluation of Student for Special Education; Behavior Assessment System for Children, Third Edition; Psychological Processing Analyzer; Children's Psychological Processes Scale; Devereux Scales of Mental Disorders; Devereux Behavior Rating Scale; Reynolds Child Depression Scale, Second Edition (informal interview format); Roberts Apperception Test Two (selected subsections); Draw-A-Person: Screening Procedure for Emotional Disturbance; My Self-Check List/Sentence Completion Test; and Three Wishes. Additionally, Ms. Carmona and her intern observed Student and interviewed Student and Ms. Meiron.

42. Ms. Jordan, special education teacher, administered the Weschsler Individual Achievement Test, Third Edition, to Student. Ms. Templeman administered the Comprehensive Assessment of Spoken Language, and the uttering Severity Instrument, Fourth Edition, to Student. She also observed Student and analyzed an informal speech sample from him.

43. The District's April 20, 2016 Psycho educational Report revealed the following about Student. His intellectual functioning fell into the high average and average ranges across all areas tested, except for the sequential test, on which Student

fell into the low average range. Mother and Ms. Meiron completed the Adaptive Behavior Assessment System III questionnaires. Mother's responses ranked Student as average in all areas, except practical, in which she ranked him as superior. Ms. Merion's responses ranked Student as average in all areas measured. Student demonstrated overall average attentional skills and executive functioning. He also demonstrated average fluid reasoning, phonological processing and auditory processing skills. Student's fine motor skills fell into the high average range. His long-term recall and visual-spatial skills fell into the average range. Overall, Student's processing skills fell into the average range.

44. Ms. Meiron's responses on the Behavior Assessment System for Children, Third Edition placed Student "at risk" for depression, hyperactivity, aggression, conduct problems, adaptability, and functional communication. Mother's responses on the same instrument placed Student as "clinically significant" for aggression and leadership skills, and "at risk" in a typicality, depression, attention problems, hyperactivity, functional communication, daily living activities and social skills. Mother's responses on the Devereu Behavior Rating Scale indicated Student's behaviors fell in the "overall significant" and "very significant" range for emotional disturbance. On the same instrument Ms. Meiron's responses scored Student's behaviors as "normal."

45. On the Weschsler Individual Achievement Test, Third Edition, Student scored a total achievement score in the average range. His scores were in the high average to superior range in math, expressive vocabulary and oral expression. His scores on the Comprehensive Assessment of Spoken Language fell in the moderately high to high average range. He demonstrated mild speech disfluency on the Stuttering Severity Instrument, Fourth Edition. Overall, Student presented with developmentally appropriate speech and language skills.

46. District assessors recommended that Student should be found eligible for special education and related services under the primary category of emotional disturbance and the secondary category of other health impairment.

#### Dr. Large's Opinions of District's Assessments

47. At hearing Dr. Large opined that the results of certain tests administered by Ms. Carmona to Student were questionable because she failed to follow some of the publishers' protocols. For example, the test versions Ms. Carmona gave to Student of the BASC, Connors Three, Draw a Person and Roberts Two were intended for a child a few months older than Student when he was assessed. Also, Ms. Carmona gave the school form, rather than the parent form, to Parents on the Devereux Behavior Rating Scale. Also, only six of the required sixteen pictures were used in the Roberts Two. Dr. Large also opined that Draw a Person is not a good assessment tool. Because Dr. Large was very experienced and knowledgeable regarding assessment instruments and their protocols her testimony regarding District's assessments of Student was credible and given significant weight.

48. District assessors and Dr. Large both recommended Student should be provided with special education services based on their separate evaluations of Student. Dr. Large did not disagree that the recommendations of District's assessors were appropriate, although in her opinion, some of District's testing protocols were not strictly followed and she did not approve of the Draw a Person instrument.

49. Dr. Large credibly opined that District should have assessed Student promptly after Parents told District about their concerns regarding Student's aggressive behaviors at the first Study Team meeting. Dr. Large considered Student's aggressive behaviors to be "red flags," which should have triggered a social-emotional and a behavioral assessment of Student. She also credibly opined that a functional behavior assessment would be needed before an appropriate behavior intervention plan could be

developed for Student. Dr. Large additionally opined that District should have assessed Student as to whether he needed an aide. However, Dr. Large's opinion regarding the assessment for an aide was not given much weight because she failed to address that the issue of the appropriateness of an aide for Student was not raised until the April 2016 IEP meeting, so District did not have notice to assess for the appropriateness of an aide prior to the initial IEP meeting. Dr. Large further opined that District should have assessed Student in the areas of occupational therapy and speech and language by the time school started at the beginning of the 2015-2016 school year because of Mother's brief mention of past occupational and speech therapy on Student's health history form. However, this last opinion from Dr. Large is not given much weight because she failed to address the fact that District had almost no information regarding those areas of suspected disability before Student began kindergarten.

#### Initial IEP Meeting- April 20 and 25, 2016

50. District held an IEP meeting for Student on April 20, 2016, to consider whether Student was eligible for special education. All required District IEP team members attended, as well as Mother, Dr. Large and Mother's attorney. Parents gave District Dr. Large's report. Team members had copies of Dr. Large's assessment report and District's assessment report prior to the meeting. Ms. Carmona presented the District's assessment results. District's assessments found Student to be "at risk" for depression, hyperactivity, aggression, conduct problems, adaptability and functional communication. The District members of the IEP team concluded Student's social-emotional-behavioral problems were more elevated at home than at school. Student's stuttering/disfluencies were not an area of deficit for Student at school.

51. Dr. Large presented her assessment results to the IEP team. Student's attention and visual processing were adequate. His executive functioning was a deficit. Student displayed problems with inhibitory control and following rules. He did not

demonstrate good cognitive control over his behaviors and impulses. Dr. Large reviewed Student's history of being aggressive towards his peers. Dr. Large also reviewed the mental health history of Student's biological parents and suggested that his birth mother's use of alcohol and possibly drugs during her pregnancy with Student could have had a significant impact on Student's brain development. Student was diagnosed with ADHD and he presented with symptoms of fetal alcohol effects, in addition to conduct disorder and dysregulated mood disorder. Dr. Large opined that Student's impulsivity impacted his academic performance.

52. At the April 20, 2016 IEP meeting Ms. Chambers reported that Student had been sent to the office 12 times to be disciplined for his aggressive behaviors. Additionally, less intense, smaller behavior incidents had occurred about one to two times weekly in the classroom. Ms. Meiron reported that Student's behavior had recently improved in class. He tended to exhibit aggressive behaviors during unstructured times in the school day. The IEP meeting was not completed on April 20, 2016; and reconvened on April 25, 2016.<sup>3</sup>

53. At the April 2016 IEP meeting, the team discussed and documented Student's present levels of performance in academics (reading, written language and mathematics), cognitive functioning, communication, motor abilities, self-care, social-emotional/behavioral functioning, and health status, which were obtained in District's assessments. The team also discussed and developed four proposed measurable goals in the following areas of need: social, emotional and nonverbal communication. The first goal addressed Student's growth in independently using appropriate coping strategies

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<sup>3</sup>The IEP developed on April 20 and 25, 2016, is referred to hereafter as the April 2016 IEP.

when frustrated or angry. The second goal addressed Student's growth in identifying and expressing his feelings in counseling sessions. The third goal addressed Student's growth in identifying the emotions of others by examining and interpreting facial expressions and body language. The fourth goal addressed Student's growth in differentiating between situations that are a "big deal" versus a "small deal" in counseling sessions. Each of these four goals included specific measurement guidelines to determine when Student achieved the goal. For example, goal two provided that Student will identify his feelings and express them to others in three out of five situations as reviewed by his designated instructional service counselor.

54. The IEP team also developed appropriate accommodations, strategies, and a proposed positive behavior intervention plan for Student. A district behaviorist would further develop the positive behavior intervention plan for Student and the team would meet again to review and approve it.<sup>4</sup>

55. The April 2016 IEP offered: placement in a general education classroom; 30 minutes a week of consultation/collaboration between District behaviorist and Student's classroom teacher on social/behavioral skills; 60 minutes a week of designated instructional service individual counseling; 240 minutes monthly of speech and language therapy; 300 minutes yearly of behavior intervention services to be provided to Student by a District behaviorist; 90 minutes daily of intensive instructional services, consisting of 1-to-1 adult support for Student during unstructured times in the school day (both recesses, lunch and priming before and during recess). At the meeting Parents and their attorney requested a full time 1-to-1 board certified behavior analyst trained and

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<sup>4</sup> No finding is made regarding District's delay, if any, of a behavior intervention plan.

supervised aide from a non-public agency. District denied Parents' request. District's attorney explained that District behaviorists train and supervise paraprofessionals employed by the District to serve as aides. District did not offer extended school year services to Student because the District team members believed Student had not regressed following extended school breaks during kindergarten.

56. District behaviorist Megan Henderson, a board certified behavior analyst, is responsible for training some of the District paraprofessionals who serve as aides. This aide training is individualized to address the needs of the applicable child. It is her practice to continue to consult with the aides regarding appropriate strategies to use with a child.

57. On April 25, 2016, District gave Mother an assessment plan proposing additional assessments of Student in the following areas of need: social/emotional behavior intensive social emotional services, referred to as ISES; occupational therapy/motor skills development, including sensory needs; functional behavior; and special circumstances paraprofessional support, which assesses whether Student needed an aide. Mother signed the assessment plan that day but there was confusion regarding an unchecked box indicating she consented to the assessment plan. Ms. Carmona followed up with Mother a few times asking her to again return a signed and properly checked consent form. Mother returned the properly checked and signed assessment plan to District after May 27, 2016, and by June 9, 2016, which was the last day of the 2015-2016 school year.<sup>5</sup> District did not unreasonably delay in administering the ISES assessment. The ISES assessment was a reasonable follow-up to District's psycho educational assessment and Dr. Large's assessments. District also did not unreasonably

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<sup>5</sup>These proposed assessments were given to Student when the 2016-2017 school year started.



delay in administering the occupational therapy/motor skills development and sensory needs assessment because Student had not exhibited motor skills or sensory problems in kindergarten. Also, District did not unreasonably delay in administering the special circumstances paraprofessional support assessment because the possibility of an aide for Student was not addressed until the April 2016 IEP meeting. However, District unreasonably delayed in administering a functional behavior assessment because behavior was Student's primary problem area.

58. Mother consented to the April 20, 2016 IEP on or about August 24, 2016, before the 2016-2017 school year started. The program and services offered to Student in the April 20 and 25, 2016 IEP were first implemented by District at the start of the 2016-2017 school year. Mother did not consent to the IEP earlier because she believed the services offered were not adequate.

59. Dr. Large opined that the present levels of performance of Student's social emotional/behavioral functioning documented in the April 20, 2016 IEP understated Student's aggressive behaviors. However, Dr. Large failed to provide a convincing rationale to support her opinion that the IEP understated Student's aggressive behaviors. Also, Dr. Large did not have experience developing IEPs. Therefore, less weight was given to her opinion doubting the accuracy of Student's present levels of performance as expressed in the April 20, 2016 IEP.

60. Dr. Large further opined that the four goals developed for Student were partially, but not completely, sufficient to address Student's issues with behaviors, executive functioning, attention and interactions with peers. However, her opinions were conclusory and lacked adequate detail as to how the goals were insufficient. She did not opine how the offered goals should have been revised or what additional goals should have been offered in order to sufficiently meet Student's needs. Dr. Large admitted she is not an expert on developing measurable Student goals for an IEP. She is not

credentialed as a school psychologist and she has never worked in a public-school setting. Dr. Large's criticism of the offered goals lacked credibility in that she was not trained or experienced in developing appropriate measurable IEP goals. Therefore, her opinions regarding the goals developed in the April 2016 IEP was given less weight.

61. Dr. Large further opined that the District's offer of FAPE was inadequate because it should have included: home-based intervention services, parent training and a 1- to-1 trained aide for Student throughout the school day. Dr. Large did not describe the nature or extent of the home-based intervention services or the parent training she referred to with any specificity. She only opined that it was essential that school personnel and Parents be consistent with strategies used with Student to extinguish his negative behaviors. She also recommended Student receive mental health services, but she did not specifically describe those services, or explain if such mental health services differed materially, or at all and in what way, from the 60 minutes a week of designated instructional service individual counseling that District offered Student. Any weight given to Dr. Large's recommendations was undermined by the absence of material specificity regarding the nature, and for some recommendations the extent (duration and frequency) of the services she endorsed for Student. Also, her report stated that a full time aide should be only considered for Student. However, she testified at hearing that Student should have a full time aide because he presented a safety risk. This inconsistency also undermined her recommendation that Student needed a full time aide.

62. Parents paid \$3,500 for Dr. Large's assessment of Student and her report, and \$300 for her participation in the April 20, 2016 IEP meeting.

#### First Grade - 2016-2017 School Year

63. Student began first grade in Ms. Karen Tokin's class on August 24, 2016. District implemented the April 2016 IEP. Ms. Tokin, who has taught lower elementary

grade classes in the District for 17 years, credibly testified that Student was progressing well in first grade and that his behaviors were not worse than those of any other child in the class. Student did not have an aide with him during class time. Ms. Token did not think that Student presented a safety risk in her class.

64. District behavior intervention specialist, Ms. Henderson, conducted a functional behavioral assessment of Student in September 2016. She summarized her findings and recommendations in a report dated September 20, 2016. The report recommended that staff should continue to implement behavioral strategies which were already being used with Student, including reinforcement with "token economy" and redirection. Ms. Henderson did not recommend that Student have a behavior intervention plan because Student's observed negative behaviors occurred infrequently at school, and were low in intensity and brief in duration.

65. In the first half of September 2016, District assessed Student for his need for special circumstances paraprofessional support. Student demonstrated appropriate behaviors throughout the school day, although the written report noted that an aide supported Student during recesses and lunch time. The report did not recommend whether the amount of time Student was accompanied by an aide should be reduced or increased. The results of the functional behavior assessment indicated that Student's aide support only during unstructured times in the school day was adequate to allow Student to access his education. District held an IEP meeting on October 6, 2016, to discuss the results of the assessments of Student administered in fall 2016. That IEP and the offer of FAPE is not at issue in this due process proceeding.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>6</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (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 (2006)<sup>7</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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

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<sup>6</sup>Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>7</sup>All subsequent references to the Code of Federal Regulations are to the 2006 version.

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 (*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 p. 200, 203–204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful

educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)& (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).)

5. 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].) Student is the party petitioning for relief and has the burden of proving the essential elements of his claim. (*Schaffer, supra*, 546 U.S. 49, at p. 62.)

#### ISSUES 1A, 1B, 2A, AND 2B: CHILD FIND AND DUTY TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY

6. In issues 1a, 1b, 2a and 2b, collectively, Student contends District denied Student a FAPE from April 26, 2015, through the end of the 2016 extended school year, by failing to meet its child find obligation with respect to Student, and by breaching its duty to assess Student in all areas of suspected disability. Student argues District failed to timely assess Student, even though it had notice of Student’s emotional and

behavioral problems. Student further asserts Mother had requested an IEP for Student at the Study Team meeting on September 16, 2015. Student also contends that when District eventually assessed Student, it failed to do so in all areas of suspected disability. District asserts it did not breach its child find obligation to Student because it did not have notice of Student's disabilities prior to February 8, 2016, when Mother requested an assessment at a Study Team meeting. District contends it promptly provided Mother an assessment plan following her request and timely assessed Student. District also asserts that when it assessed Student in spring 2016, District's assessment was thorough and covered all areas of Student's suspected disability.

#### Legal Authority

7. Student's complaint concerns District's child find obligation specifically as to Student only. Student does not challenge District's affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within its boundaries who may need special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) District's child find obligation to Student is almost the same as District's duty to assess Student. However, District's duty to assess also raises the additional inquiry of whether District assessed Student in all areas of suspected disability. Student's issues 1a, 1b, 2a and 2b are very similar in that all four raise the question of whether District denied Student a FAPE by failing to timely assess him for eligibility for special education during different specified time periods. However, issues 1b and 2b involve the additional inquiry of whether District denied Student a FAPE by failing to assess him in *all areas of suspected disability* during the two specified time periods. Because the analysis of issues 1a, 1b, 2a and 2b require application of shared law and facts, these four issues are analyzed together below in chronological order.

8. The ongoing duty of public schools to seek and serve children with disabilities is referred to as child find. California law specifically incorporates child find in Ed. Code, § 56301. (Ed. Code, § 56301, subds. (a) & (b).) "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School Dist.* (8th Cir. 2006) 439 F.3d 773, 776.) A school district's duty is not dependent on any request by the parent for special education testing or referral for services. A district's child find obligation toward a specific child is triggered where there is knowledge of, or reason to suspect a disability, and reason to suspect that a student may need special education services to address that disability. (*Dept. of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041.) However, the law does not preclude consideration of evidence of subsequent events. This evidence may be considered if it provides significant insight into the child's condition and the reasonableness of the school district's action at an earlier date. *E.M. v. Pajaro Valley Unified School District* (9<sup>th</sup> Cir. 2011) 652 F. 3d 999, 1006.

9. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA. (*Department of Educ., State of Hawaii v. Cari Rae S.* (D. Haw. 2001) 158 F. Supp. 2d 1190, 1196.) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural



denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

10. The legal analysis of a school district's compliance with the IDEA has two parts: (1) whether the district has complied with the procedures set forth in the IDEA and (2) whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Rowley, supra*, 458 U.S. 176 at pp. 205-207.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i)-(iii); Ed. Code, § 56505, subds. (f) and (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)(superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).)

11. A pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) Although a district is required to utilize the resources of its regular education program, where appropriate, to address a student's exceptional needs, it may not delay its assessment of a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in the regular education program. A district may deny a request to evaluate a student if it does not suspect a disability, but it must notify the parent of the basis of the decision and that basis cannot be that the district is waiting to see how the student responds to general education interventions. (Office of Special Education Programs (OSEP) *Memorandum to State Directors of Special Education* (January 21, 2011) 56 IDELR 50.) The law defines an individual with exceptional needs as

one who, because of a disability, requires instruction and services that cannot be provided with modification of the regular school program in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd.(b).)

12. A request for an initial evaluation to determine whether a student is a child with a disability in need of special education and services can be made by either the parent or a public agency. (34 C.F.R. § 300.301(b).) A district's child find duty is not dependent on any request by the parent for special education testing or referral for services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301; *Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) The child find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade, and regardless of the severity of the disability. (*Department of Educ., State of Hawaii, supra*, 158 F.Supp.2d at p. 1194; 34 C.F.R. § 300.111(a)(1) & (c)(1).)

13. Child find does not guarantee eligibility for special education and related services under the IDEA. It is merely a locating and screening process that is used to identify those children who are potentially in need of special education and related services. Once a child is identified as potentially needing specialized instruction and services, the public agency must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R. § 300.301; Ed. Code, § 56302.1.) A child is deemed "found" when the local educational agency determines a child needs special education and related services. (See, 71 Fed. Reg. 46593 (August 14, 2006).)

15. When a student is referred for special education assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days to

consent in writing to the proposed assessment. (Ed. Code, § 56321, subd. (c)(4).) The district has 60 days from the date it receives the parent's written consent, excluding days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56043, subds. (c) & (f).

16. A student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (c) (e), (f).) Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)<sup>8</sup> Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).)

#### Analysis

ISSUES 1A(CHILD FIND) AND 1B (ASSESS IN ALL AREAS OF SUSPECTED DISABILITY) FOR  
THE TIME PERIOD BEGINNING APRIL 26, 2015 THROUGH SEPTEMBER 15, 2015

17. Student failed to establish by a preponderance of evidence that District violated its child-find and duty to assess obligation by failing to assess him for special education between April 26, 2015, the day Mother submitted Student's Permanent

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<sup>8</sup>An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

Health History form to District, and September 15, 2015. On April 26, 2015, Mother provided to District inaccurate information about Student on the health history form because she did not want District personnel to develop negative preconceived notions about Student. The only hint on the health form that Student might have a suspected disability was contained in Mother's response to the query for "other pertinent information about your child," to which Mother responded "low muscle tone – receives O/T, disfluency-speech." This response did not provide adequate information about Student's suspected disabilities to trigger District's child find obligation and duty to assess Student for special education, particularly in light of all the other responses on the health form, which portrayed Student as a typical five-year-old without any significant deficits.

18. Mother first informed District of Student's behavioral difficulties at her meeting with Ms. Chambers on August 24, 2015. Ms. Chambers responded to this information reasonably by immediately alerting the Madroña Study Team members and Ms. Meiron of the information Mother had provided about Student and by setting up a Study Team meeting for September 16, 2015. Ms. Chambers promptly instructed them to pay attention to Student's behavior and be ready to discuss him at the Study Team meeting. Student's first day at Madroña was August 25, 2015, when he started kindergarten. Student exhibited a few negative behaviors in his first few weeks of kindergarten. However, District was entitled to a reasonable amount of time to elapse after these behaviors occurred before it referred Student for an assessment for special education. Therefore, District did not breach its child find and duty to assess obligation to Student from April 26, 2015 through September 15, 2015.

ISSUES 1A(CHILD FIND) AND 1B (ASSESS IN ALL AREAS OF SUSPECTED DISABILITY)FOR

THE TIME PERIOD BEGINNING SEPTEMBER 16, 2015 THROUGH FEBRUARY 10, 2016

19. Student met his burden of proof by a preponderance of the evidence as to issues 1a and 1b, for the time period from September 16, 2015 through February 10, 2016. Mother credibly testified that, at the Study Team meeting on September 16, 2015, she told the team she wanted an IEP for Student. Mother's testimony is corroborated by the minutes of the meeting, which acknowledged that: the team discussed assessment for special education eligibility; Mother expressed concern that the process was lengthy; and the team stated it needed to get to know Student better before it would refer him for assessment. The team also reassured Mother that Student could be placed in the learning center once an assessment plan was started. Mother's request for an IEP on September 16, 2015, was tantamount to a request to assess Student for special education. District had an obligation to treat Mother's statement that she wanted Student to have an IEP as a parental request for assessment. The District Study Team members acted improperly when they told Mother they needed more time to get to know Student before they would refer him for an assessment for special education. Moreover, the team overruled Ms. Meiron, the staff member who knew Student best at this point, when she suggested Student should be assessed. District improperly failed to acknowledge Mother's request for an IEP for Student as a request to assess Student. The team should have informed Mother she had a right to immediately request an assessment of Student and get the assessment process underway.

20. The testimony of Ms. Carmona and Ms. Chambers, and to some extent, Ms. Meiron, left the impression that they felt compelled to hold multiple Study Team meetings and exhaust various interventions before referring Student for assessment, or acknowledging that Mother's request for an IEP at the first Study Team meeting was actually a request for an assessment. This is not consistent with District's obligations under the IDEA and California Education Code. District inappropriately delayed agreeing

to assess Student until Mother again requested Student be assessed at the third Study Team meeting on February 8, 2016. Two days later, on February 10, 2016, District provided Mother with a proposed assessment plan and consent form. Because Mother's request for an IEP for Student at the September 16, 2015 Study Team meeting constituted a parental request for assessment, all applicable timelines to assess and hold an initial IEP meeting started to run on September 16, 2015. Therefore, District should have provided Mother with an assessment plan by October 1, 2015. If Mother had returned the signed consent to the proposed assessment plan to District immediately, District would have been obligated to complete the assessments and hold an initial IEP meeting within 60 days, which was by December 1, 2015.

21. As a result of District's delay in assessing Student, he was denied an offer of FAPE until April 20, 2016, four and one-half months after December 1, 2015, when he should have been offered a FAPE if District had started the assessment process timely on September 16, 2015, when Mother first requested an IEP for Student. District's failure to timely assess Student from September 16, 2015 through February 10, 2016, constitutes a procedural violation under the IDEA. This procedural violation denied Student a FAPE because District's unreasonable delay in assessing Student, caused Student to be deprived of services District eventually offered him for four and one-half months. Also, District's unreasonable delay in assessing Student also deprived Parents of important information about his disabilities and, therefore, significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of FAPE to Student.

ISSUES 2A (CHILD FIND) AND 2B (ASSESS IN ALL AREAS OF SUSPECTED DISABILITY) FOR THE TIME PERIOD BEGINNING FEBRUARY 11, 2016, THROUGH APRIL 19, 2016

22. Student met his burden of proof by a preponderance of the evidence as to issues 2a and 2b, for the time period from February 11, 2016, through April 19, 2016.

District started assessing Student on March 7, 2016, and completed the assessments on April 13, 2016. On April 20, 2016, District held an initial IEP meeting, at which Student was found eligible for special education and was offered a FAPE. As discussed in the analysis of issues 1a and 1b above, Student's assessments should have been completed and an initial IEP meeting should have been held by December 1, 2015. Due to District's improper delay in starting the assessment process Student was deprived of a FAPE from February 11, 2016, through April 19, 2016.

ISSUE 2A (CHILD FIND) FOR THE TIME PERIOD BEGINNING ON APRIL 20, 2016,  
THROUGH THE END OF 2016 EXTENDED SCHOOL YEAR

23. Student failed to meet his burden of proof on issue 2a for the time period beginning on April 20, 2016, through the end of the 2016 extended school year. By April 20, 2016, District held an initial IEP meeting and found Student eligible for special education under the primary category of emotional disturbance and developed an IEP. Therefore, Student was "found" by April 20, 2016, and District had met its child find obligation to Student by that date through the end of the 2016 extended school year.

ISSUE 2B (ASSESS IN ALL AREAS OF SUSPECTED DISABILITY) FOR THE TIME PERIOD  
BEGINNING ON APRIL 20, 2016 THROUGH THE END OF 2016 EXTENDED SCHOOL YEAR

24. Student met his burden of proof by a preponderance of the evidence as to issue 2b, for the time period from April 20, 2016 through the end of the 2016 extended school year because District failed to give Student a functional behavior assessment until September, 2016. A school district's failure to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (Ed. Code, § 56320, (f); (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

25. Mother informed District staff at the first Study Team meeting on September 16, 2016, that Student's primary problem was impulsive and aggressive physical behaviors toward his peers. The Study Team discussed Student's behavior

triggers at the September 16, 2015 Study Team meeting. District had notice by that date that Student's behavior was a suspected area of his disability. District reasonably should have anticipated that results of a functional behavior assessment might be needed to develop effective behavior strategies for Student. Therefore, District should have included a functional behavior assessment in the untimely proposed assessment plan District gave to Mother on February 10, 2016.

26. At Student's initial IEP meeting in April, 2016, a proposed behavior intervention plan was discussed. Also, Parents demanded Student be given a full time aide from a non-public agency. District denied that request and agreed to only a part time District aide. If District had included a functional behavior assessment in the battery of assessments it administered to Student in spring 2016, the IEP team would likely have had valuable information about Student's behavior patterns and antecedents to his aggressive behaviors. The absence of results, findings and recommendations from a functional behavior assessment at the April 2016 IEP meeting impeded Parents' opportunity to participate in the decision making process regarding the provision of FAPE to Student.

27. When District eventually administered a functional behavior assessment to Student in September 2016, Ms. Henderson concluded that staff should continue to implement behavioral strategies which were already being used with Student, including reinforcement with "token economy" and redirection. Ms. Henderson's report did not recommend that Student have a behavior intervention plan because his observed negative behaviors occurred infrequently at school, and were low in intensity and brief in duration. If District had administered a functional behavior assessment to Student earlier, District and Parents would have had the results and recommendations from it by the April 2016 IEP meeting. This material information would have assisted Parents in deciding what services Student reasonably needed in order to access his education.



Therefore, District's failure to administer a functional behavior assessment to Student until September 2016, significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of FAPE to Student between April 20, 2016 through the end of the 2016 extended school year. Consequently, District's delay in administering a functional behavior assessment to Student constitutes a denial of FAPE for the period from April 20, 2016 through the end of the 2016 extended school year.

## ISSUES 1C AND 2 C: ELIGIBILITY FOR SPECIAL EDUCATION

### Legal Authority

28. The law defines an individual with exceptional needs as one who, because of a disability requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).) A student is eligible for special education if he or she is a "child with a disability" such as an emotional disorder, specific learning disability, or language and speech disorder, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability that cannot be met with modification of the regular instruction program, and related services that may be required to assist the child to benefit from the specially designed instruction. (20 U.S.C. § 1401(29); Cal. Code Regs., tit. 5, § 3001, subd. (a).) "Related services" (referred to as designated instruction and services or DIS in California) are defined as transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a))

29. To be eligible for special education and related services under the category of emotional disturbance, a child must exhibit one or more of five characteristics over a long period of time, and to a marked degree, and the child's educational performance must be adversely affected as a result. The characteristics are: (1) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; and (5) a tendency to develop physical symptoms or fears associated with personal or school problems.(Cal. Code Regs., tit. 5, § 3030, subd. (B)(4),34 C.F.R. § 300.8(c)(4)(i), (ii).)

30. The eligibility category of other health impairment is defined, in relevant part, as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that...is due to chronic or acute health problems such as...attention deficit disorder or attention deficithy per activity disorder...and [a]dversely affects a child's educational performance." (34C.F.R. § 300.8(c)(9); Cal. Code Regs., tit. 5, § 3030, subd. (9).)

### Analysis

#### ISSUE 1C: ELIGIBILITY FOR THE PERIOD FROM APRIL 26, 2015 THROUGH NOVEMBER 30, 2015

31. Student failed to meet his burden of proof on issue 1c for the time period from April 26, 2015 through November 30, 2015. District did not breach its obligation to find Student eligible for special education during that period because it did not have notice of Student's suspected disabilities, triggering District's child find and duty to assess obligations to Student prior to September 16, 2015.After that date District was

entitled to 15 days to offer Parents a proposed assessment plan. District had another 60 days after Parents consented to the proposed assessment plan to assess Student and hold an IEP meeting. As addressed in the Legal Conclusions set forth in paragraphs 17 and 18 above in the analysis of issues 1a and 1b for this same time period, District should have held Student's first IEP meeting on December 1, 2015. Therefore, from April 26, 2015 through November 30, 2015, District did not deny Student a FAPE by failing to find him eligible for special education.

ISSUE 1C: ELIGIBILITY FOR THE PERIOD FROM DECEMBER 1, 2015, THROUGH FEBRUARY 10, 2016

32. Student met his burden of proof on issue 1c and established that District denied him a FAPE by failing to find him eligible for special education from December 1, 2015, through February 10, 2016. As discussed in the Legal Conclusions set forth paragraphs 20 and 21 above, District should have assessed Student earlier and held his initial IEP by December 1, 2015. District first found Student eligible for special education on April 20, 2016. The evidence establishes that Student's inability, to a marked degree, to build or maintain satisfactory interpersonal relationships with peers over a long period of time already existed when he first entered kindergarten. Therefore, by December 1, 2015, the date District should have held the initial IEP for Student if it had timely assessed him, District should have found Student eligible for special education under the primary category of emotional disturbance and offered him a FAPE. If Parents had the opportunity to consent to the offer of FAPE on December 1, 2015, Student would have been entitled to receive those services which were offered to him in the April 2016 IEP.

ISSUE 2C: ELIGIBILITY FOR THE PERIOD FROM FEBRUARY 11, 2016 THROUGH APRIL 19,

2016

33. Student met his burden of proof on issue 2c and established that District denied him a FAPE by failing to find him eligible for special education from February 11, 2016, through April 19, 2016. Based on the reasoning in the immediately previous paragraph and in the Legal Conclusions set forth paragraphs 20 and 21 above, District should have found Student eligible for special education by December 1, 2015. Since District did not find him eligible until April 20, 2016, Student was deprived of a FAPE from February 11, 2016 through April 19, 2016, because he was not offered or provided the placement and services he reasonably needed to access his education in that time period. Therefore, Student is entitled to remedies as discussed below.

ISSUE 2C: ELIGIBILITY FOR THE PERIOD FROM APRIL 20, 2016 THROUGH THE END OF THE 2016 EXTENDED SCHOOL YEAR

34. Since District found Student eligible for Special Education on April 20, 2016, Student failed to meet his burden of proof on issue 2c for the period from April 20, 2016, through the end of the 2016 extended school year.

ISSUE 1D AND 2D: GOALS AND PRESENT LEVELS OF PERFORMANCE

35. Student contends District denied him a FAPE from April 26, 2015 through the end of the 2016 extended school year, by failing to offer and provide him with measurable goals and appropriate present levels of performance in all areas of need because District did not offer him an IEP until April 20, 2016. Student further contends that the goals offered on April 20, 2016, were not measurable and the present levels of performance offered were not appropriate. District denies this contention and asserts it did not have an obligation to provide Student an IEP with measurable goals and appropriate levels of performance in all areas of need until April 20, 2016, because Parents had not requested Student be assessed and District did not have notice that

Student had suspected disabilities before February 8, 2016. District further asserts that, when it offered Student an IEP in April 2016, the goals it offered Student were measurable and addressed all his areas of need, and the present levels of performance offered were appropriate for all his areas of need.

#### Legal Authority

36. An IEP must contain a statement of measurable annual goals related to “meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum” and “meeting each of the child’s other educational needs that result from the child's disability.” (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must also contain the child’s present levels of performance and 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).)

#### ISSUE 1D: MEASURABLE GOALS AND PRESENT LEVELS OF PERFORMANCE FOR THE PERIOD FROM APRIL 26, 2015 THROUGH NOVEMBER 30, 2015

37. Student failed to meet his burden of proof on issue 1d for the period from April 26, 2015 through November 30, 2015. District did not breach its obligation to offer Student measurable goals and appropriate present levels of performance during that time for the reasons discussed in the Legal Conclusions set forth paragraphs 17, 18 and 19 above. District’s duty to assess Student arose on September 16, 2015. District was entitled to not more than 15 days to provide Parents an assessment plan, and 60 days after Parents consented to the plan to assess Student, hold an IEP meeting and make a FAPE offer. The applicable time expired on December 1, 2015. Therefore, Student was

not entitled to an IEP, including measurable goals and appropriate present levels of performance at any time prior to December 1, 2015.

ISSUES 1D AND 2D: MEASURABLE GOALS AND PRESENT LEVELS OF PERFORMANCE FOR THE PERIOD FROM DECEMBER 1, 2015 THROUGH APRIL 19, 2016

38. Student met his burden of proof on issues 1d and 2d for the period of time from December 1, 2015 through April 19, 2016, because he was entitled to eligibility for special education as of December 1, 2015, as discussed in the Legal Conclusions set forth paragraphs 20 and 21 above. Therefore, as of December 1, 2015, Student was entitled to an IEP containing measurable goals and appropriate present levels of performance in all areas of need. District denied Student a FAPE from December 1, 2015 through April 19, 2016, by failing to offer him an IEP until April 20, 2016.

ISSUE 2D: MEASURABLE GOALS AND PRESENT LEVELS OF PERFORMANCE FOR THE PERIOD FROM APRIL 20, 2016 THROUGH THE END OF 2016 EXTENDED SCHOOL YEAR

39. Student failed to meet his burden of proof that District denied him a FAPE by failing to offer and provide him with measurable goals and appropriate present levels of performance in all areas of need from April 20, 2016 through the end of the 2016 extended school year. Student's IEP dated April 20, 2016, offered Student four annual measurable goals in his areas of need, which were: social, emotional and nonverbal communication. Each of the goals were properly drafted with quantifiable measurements to be applied to the concrete skills described, which Student would work to master in the prospective year. Student failed to offer persuasive evidence that District failed to offer him adequate goals in all his areas of need, or that the offered goals were not measurable. Student also failed to establish evidence that the offered present levels of performance were not appropriate. Dr. Large gave the conclusory opinion, without further explanation, that Student's present levels of social/emotional

difficulties were understated. Her opinion on this issue is not given much weight. The present levels of performance were consistent with the District's assessment results and were not contradicted by the findings in Dr. Large's evaluation report.

ISSUES 1E AND 2E: OFFERED PLACEMENT, SERVICES AND ACCOMMODATIONS FROM  
APRIL 26, 2015 THROUGH THE END OF 2016 EXTENDED SCHOOL YEAR

40. Student contends District denied him a FAPE from April 26, 2015 through the end of the 2016 extended school year, by failing to offer and provide him an appropriate placement and services, including appropriate accommodations and modifications, speech and language services, occupational therapy, behavioral interventions, psychotherapy, social skills, and extended school year services, because District did not offer Student an IEP until April 20, 2016. Student further contends he should have been offered a full time aide and an extended school year program. District denies this contention and asserts it did not have an obligation to provide Student with an IEP offering placement, services and appropriate accommodations and modifications until April 20, 2016, because Parents had not requested assessment before February 8, 2016, and District did not have notice before that time that Student should have been assessed. District also asserts that its offer of FAPE in the April 2016 IEP offered Student an appropriate placement and services reasonably calculated to enable him to access his education.

Legal Authority

41. 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 School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) 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. (*Id.* at p. 1315.) 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 hind sight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann on Behalf of Fuhrmann, supra*, 993 F.2d at p. 1041.) However, subsequent events may be considered if they provide significant insight into the child's condition and the reasonableness of the school district's action at an earlier date. *E.M. v. Pajaro Valley Unified School District* (9<sup>th</sup> Cir. 2011) 652 F. 3d 999, 1006.

42. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028–1029.)

ISSUE 1E: OFFER OF PLACEMENT, SERVICES, AND ACCOMMODATIONS FROM APRIL 26, 2015 THROUGH NOVEMBER 30, 2015

43. Student failed to meet his burden of proof for the time period from April 26, through November 30, 2015, because, as discussed in the Legal Conclusions set forth in paragraphs 17, 18 and 19 above, District did not have an obligation to offer Student an IEP or a FAPE before December 1, 2015, because its duty to assess was first triggered by Mother's request for an IEP on September 16, 2015.



ISSUES 1E AND 2E: OFFER OF PLACEMENT, SERVICES, AND ACCOMMODATIONS FROM  
DECEMBER 1, 2015 THROUGH APRIL 19, 2016

44. Student met his burden and proved he should have been offered and provided an appropriate placement, services, accommodations and modifications from December 1, 2015 through April 19, 2016. Based on the reasoning in the Legal Conclusions set forth in paragraphs 20 and 21 above, District should have found Student eligible for special education by December 1, 2015. Therefore, by that date District should have offered Student the placement, services, accommodations and modifications reasonably calculated to meet his unique needs to enable him to access his education. Since District did not offer Student placement, services, accommodations and modifications until April 20, 2016, Student was deprived of a FAPE from December 1, 2015 through April 19, 2016. Therefore, Student is entitled to remedies as discussed below.

ISSUE 2E: OFFER OF PLACEMENT, SERVICES, AND ACCOMMODATIONS FROM APRIL 20,  
2016 THROUGH THE END OF THE 2016 EXTENDED SCHOOL YEAR

45. Student failed to meet his burden of proof that District denied him a FAPE by failing to offer and provide him with appropriate placement and services, including appropriate accommodations and modifications, speech and language services, occupational therapy, behavioral interventions, psychotherapy, social skills, and extended school year services from April 20, 2016 through the end of the 2016 extended school year. Student did not prove that District's offer of FAPE in the April 2016 IEP failed to offer Student a placement or any services reasonably calculated to meet his unique needs and enable him to access his education.

46. Student did not introduce persuasive evidence supporting a finding that District's April 20, 2016, offer of FAPE failed to offer him placement, services, accommodations and/or modifications that he needed to access his education and

receive educational benefit. Student did not prove he required a full time 1-to-1 trained aide from a nonpublic agency throughout the entire school day to access his education. Student also failed to prove he required speech therapy or occupational therapy or an extended school year program in order to meet his unique needs and access his education. Student's behavior problems had historically occurred primarily outside of the classroom and during unstructured settings, such as lunch and recess. Moreover, the support of a District aide for the unstructured portions of the school day worked successfully for Student once the IEP was implemented in the beginning of first grade. The evidence established Student behaved properly, for the most part, while he was in a structured classroom setting without the support of an aide. Once the April 2016 IEP was implemented at the beginning of the 2016-2017 school year, Student progressed well academically and behaviorally. This is additional proof that District's offer of FAPE in the April 2016 IEP was appropriate.

#### ISSUES 1F AND 2F: PARENT TRAINING

47. Student contends in issues 1f and 2f that District denied him a free appropriate public education from April 26, 2015 through the end of the 2016 extended school year by failing to offer and provide him Parent training addressing his behavioral and emotional difficulties. Student asserts that the District failed to timely assess and offer an initial IEP, and when District did eventually offer FAPE, the offer should have included Parent training to address Student's emotional and behavioral difficulties. District denies this contention and asserts it did not have an obligation to provide Student with an IEP offering services until April 20, 2016. District further asserts that its offer of FAPE conveyed in the April 2016 IEP, was appropriate and that Parent training addressing Student's behavioral and emotional difficulties was not necessary to meet Student's unique needs and to enable him to access his education.

48. Student failed to meet its burden of proof that District should have included parent training in its offer of FAPE to Student. District did not have an obligation to offer Student any related services prior to December 1, 2015. District's assessments did not recommend Parent training. Dr. Large emphasized the importance that Parents and District use consistent strategies with Student. However, Student failed to meet its burden to establish the specific nature and extent of Parent training which he claimed was necessary to constitute an offer of FAPE. Evidence established District personnel and Mother frequently communicated about Student's behaviors, strategies used at school and consequences. Student failed to establish that Parent training was necessary to create consistency between strategies used at school and at home. The continued frequent communication between school and Parents should reasonably suffice to assure that District and Parents consistently use strategies to address Student's behavioral and emotional difficulties. Also, Student offered no evidence proving Parents' dealings with Student at home was inconsistent with, or in any way undermined, the strategies used by District personnel with Student at school. Therefore, District did not deny Student a FAPE at any time from April 26, 2015 through the end of the 2016 extended school year by failing to offer him the designated related service of Parent training addressing his behavioral and emotional difficulties.

#### ISSUE 1GAND 2G: FORMAL SPECIFIC OFFER OF FAPE

49. Student contends District denied him a free appropriate public education from April 26, 2015 through February 10, 2016, by failing to make a formal, specific offer of FAPE. District denies this and contends it did not have an obligation to offer Student a FAPE until April 20, 2016, because Parents had not requested assessment before February 8, 2016 and District did not have notice that Student should have been assessed prior to February 8, 2016. District further contends that when District made an offer of FAPE in the April, 2016 IEP, such offer was adequately specific and formal.

## Legal Authority

50. A student's IEP must contain a clear written offer of placement. The offer must include a statement of the special education and related services and supplementary aids and services, including program modification or supports. *See Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; see also 20 U.S.C. § 1415(b)(3)(A). The offer must also include a statement of the anticipated frequency, location and duration of services, as well as sufficient information so that the level of the district's commitment of resources is clear, although the offer may be stated in a range if a range of services meets the student's needs. (34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

51. A FAPE offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. (*Union School Dist.*, *supra*, 15 F.3d 1519, (9th Cir. 1993) 15 F.3d 1519, 1526.) In *Union School Dist.*, *supra*, 15 F.3d 1519, the Ninth Circuit observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Ibid.*). The requirement of a formal, written offer alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Ibid.*; *Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union School Dist.*, *supra*, 15 F.3d 1519 15 F.3d at p.1526).)

ISSUE 1G: FORMAL, SPECIFIC OFFER OF FAPE FROM APRIL 26, 2015 THROUGH NOVEMBER 30, 2015

52. Student failed to meet his burden of proof for the period from April 26, 2015, through November 30, 2015. District did not breach its obligation to begin the assessment process prior to September 16, 2015. Based on the findings in the Legal Conclusions set forth in paragraphs 17, 18 and 19 above, District did not have an obligation to offer Student a formal, specific offer of FAPE prior to December 1, 2015.

ISSUES 1G AND 2G: FORMAL, SPECIFIC OFFER OF FAPE FROM DECEMBER 1, 2015 THROUGH APRIL 19, 2016

53. Student met his burden and proved he should have been offered a formal specific offer of FAPE addressing placement, services and accommodations and modifications from December 1, 2015 through April 19, 2016. Based on the reasoning in the Legal Conclusions set forth in paragraphs 20 and 21 above, District should have found Student eligible for special education by December 1, 2015 and made him a formal offer of FAPE by that date. District did not extend a formal, specific offer of FAPE until April 20, 2016. Therefore, Student was deprived of a formal, specific offer of FAPE from December 1, 2016, through April 19, 2016. He is entitled to remedies for District's breach, as addressed below.

ISSUE 2G: FORMAL, SPECIFIC OFFER OF FAPE FROM APRIL 20, 2016 THROUGH THE END OF THE 2016 EXTENDED SCHOOL YEAR

54. Student did not meet his burden to prove by a preponderance of the evidence that District failed to offer Student a formal, specific offer of FAPE from April 20, 2016 through the end of the 2016 extended school year. Student offered no evidence to support a finding that the District's offer of FAPE contained in the April 2016 IEP failed to include the requisite statement describing the program, related services, modifications and supports offered to Student. District's offer of FAPE in the April

2016 IEP included a description of the anticipated frequency, location and duration of the services offered. District's formal offer of placement and services included: placement in a general education classroom; 30 minutes a week of consultation and collaboration between the District behaviorist and Student's general education teacher regarding social/behavioral skills; 60 minutes a week of individual counseling; 240 minutes monthly of speech and language therapy; 300 minutes yearly of behavior intervention services given directly to Student by a District behaviorist; 90 minutes daily of 1-to-1 aide support for Student during both recesses, lunch and priming before and during recess. This formal offer of services was clear and contained the requisite specificity. The offered services are adequately described and the duration of each service is specified with particularity. Student offered no evidence that Parents did not understand the placement, services, accommodations and modifications which District offered to Student in the April 2016 IEP, or there was any confusion about the exact nature and extent of resources District had committed to Student in the offer of FAPE. Therefore, Student failed to meet his burden of proof on this issue for the time period from April 20, 2016 through the end of the 2016 extended school year.

## REMEDIES

1. Student prevailed on issues 1a, 1b and 2a for the period from September 16, 2015 through April 19, 2016. Student prevailed on issue 2b for the period from September 16, 2015 until the end of the 2016 extended school year. Student prevailed on issues 1c, 1d, 1e, 1g, 2c, 2d, 2e and 2g for the period from December 1, 2016 through April 19, 2016. Student failed to meet his burden on all other issues for other applicable time periods. As a remedy, Student requests compensatory education, reimbursement for charges Parents paid for Dr. Large's private assessment of Student, for therapy by Dr. Aucoin and medical services by Dr. Ott. District disagrees, and contends that Student is not entitled to compensatory education. District further contends that Student is not

entitled to reimbursement for a private evaluation because District was about to conduct its assessment of Student when Parents hired Dr. Large. Moreover, District claims Dr. Aucoin's therapy services and Dr. Ott's medical services are not District's obligations.

2. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); see *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11.)

3. 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* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

4. District improperly delayed its assessment of Student by four and one-half months, or 18 weeks. When Parents hired Dr. Large to assess Student, District had not yet started its assessment of Student. District's failure to start assessments in a timely manner deprived Parents of valuable information that would have given them an

opportunity to participate in a meaningful way in developing Student's educational program. Parents' decision to obtain a private assessment was reasonable, and District did not offer any evidence that the fees they paid to Dr. Large were unreasonable. Therefore, Student is entitled to reimbursement for the amount Parents paid Dr. Large to assess Student, prepare the assessment report and attend the April 20, 2016 IEP to report to the IEP team about her assessment of Student. However, Student failed to establish that Dr. Aucoin's and Dr. Ott's services were reasonably necessary for Student to access his education at the times at issue in this proceeding. Therefore Student is not entitled to reimbursement for out of pocket costs for their services.

5. Because District's delayed assessment of Student resulted in Student being denied the services and supports eventually offered to him by District in the April 2016 IEP by 18 school weeks, Student is entitled to an award of compensatory education as follows: 18 hours of individual counseling from a credentialed District counselor; 18 hours of speech and language therapy from a District speech and language pathologist; and 150 minutes of behavior intervention services from a District behaviorist. The amount of these compensatory services coordinates to the amount of services offered per week or year in the April 2016 IEP. If District is unable to provide the services through a qualified District staff member, then District shall fund the services through a District-contracted non-public agency of Student's choice. This compensates Student for the related services, other than provision of the aide during unstructured time in the school day, he would have received if District had timely assessed him and offered him the April 20, 2016 offer of FAPE by December 1, 2015. Student is not awarded additional time with an aide as compensatory education, because Student is already accompanied by an aide during the unstructured parts of his school day. District did not timely complete Student's functional behavior assessment until September 2016. However, since the functional behavior assessment has already been completed and considered



by the IEP team at the October 6, 2016 IEP meeting, no additional compensatory education is awarded to Student for District's delay in administering that assessment.

6. The evidence did not support an award of compensatory education to Student for District's failure to conduct a functional behavior assessment of Student earlier than it did because District administered a functional behavior assessment to Student in September 2016. However, the evidence did support an order for special education training of the special education administrative, teaching and other professional personnel who provide special education services to Madroña because they were unfamiliar with the obligations under the IDEA to timely assess Student in all areas of suspected disability. Thus, as a remedy, District shall provide at least two hours of special education training to the special education administrative, teaching and other professional personnel who provide special education services to Madroña in the area of the obligations under the IDEA to refer pupils for assessment for special education in all areas of suspected disabilities, and in the area of functional behavior assessments. This training shall be provided by an independent provider, not affiliated with the District, specializing in special education training to school districts, and shall be completed by December 31, 2017. District shall notify Parents in writing within seven days of the date District has completed such training.

## ORDER

1. Within 45 days of the date of this Order, District shall reimburse Parents \$3,800 for Dr. Large's private assessment and her attendance at Student's April 2016 IEP meeting.

2. District shall provide Student at District's expense with the following compensatory education: 18 hours of individual counseling provided by a credentialed District counselor; 18 hours of speech and language therapy provided by a District speech and language pathologist; and 150 minutes of behavior intervention services

provided to Student by a District behaviorist. If District is unable to provide the services through a qualified District staff member, then District shall fund the services through a District-contracted non-public agency of Student's choice. Student shall have access to those District-funded compensatory educational services through the end of the 2017-2018 school year. Not more than two hours of any compensatory educational services shall be provided to Student in any single week. The compensatory educational services shall not be provided to Student during the time he is regularly scheduled to receive instruction in his core curriculum academic classes so that Student will not miss his then current academic instruction in order to receive compensatory education. It is recommended that the majority of compensatory educational services be made available to Student during the 2017 extended school year if Student is available to receive those services at that time.

3. By December 31, 2017, District shall provide at least two hours of special education training to the special education administrative, teaching and other professional personnel who provide special education services to Madroña in the area of the obligations under the IDEA to refer pupils for assessment for special education in all areas of suspected disabilities, and in the area of functional behavior assessments. This training shall be provided by an independent provider, not affiliated with the District, specializing in special education training to school districts, and shall be completed by December 31, 2017. District shall notify Parents in writing within seven days of the date District has completed such training.

## PREVAILING PARTY

Pursuant to Ed. Code, § 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student fully prevailed on issue 2b. Student partially prevailed on issues 1a, 1b, 1c, 1d, 1e, 1g, 2a, 2c, 2d, 2e and 2g.

## 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: January 9, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
CHRISTINE ARDEN  
Administrative Law Judge  
Office of Administrative Hearings