

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LODI UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2016100923

DECISION

On October 21, 2016, Lodi Unified School District filed a request for due process hearing with the Office of Administrative Hearings naming Parents on behalf of Student. On November 7, 2016, OAH granted Mother's request to continue the hearing dates.

Administrative Law Judge Theresa Ravandi heard this matter in Lodi, California on November 29 and 30, 2016.

Aimee M. Perry, Attorney at Law, represented Lodi. Jonathan Martin, Special Education Local Plan Area Director for Lodi, attended each day of hearing.

There was no appearance on behalf of Student.¹

¹Both Parents participated in the November 7, 2016 telephonic prehearing conference during which the original hearing date was continued, at Mother's request, to November 29 and 30, 2016. OAH served Parents with a copy of the November 7, 2016 Order Following Prehearing Conference. Father participated in the November 21, 2016 PHC which confirmed the hearing dates. Although Mother did not participate in the November 21, 2016 PHC, OAH served her with the PHC Order that same date by overnight mail at her address of record. Lodi informed the ALJ at the start of hearing

At the conclusion of the hearing, the matter was continued at Lodi's request to January 6, 2017, to allow time to file written closing briefs. The record closed with Lodi's timely submission of a closing brief and the matter was submitted for decision.²

ISSUE

Did Lodi's May 11, 2016 individualized education program offer Student a free appropriate public education in the least restrictive environment such that Lodi may implement the IEP without Parent consent?³

PRELIMINARY MATTERS

LODI'S MOTION TO LIMIT ISSUE

At the start of the hearing, Lodi moved to limit its issue based on having obtained Mother's consent on November 28, 2016, to the May 11, 2016 IEP, with the

that it had sent email and text messages to both Parents the night prior to and the morning of the hearing reminding them that the hearing would proceed as scheduled. The ALJ delayed the start time of the hearing by 20 minutes, but the Parents failed to appear or contact either OAH or Lodi.

²Parents did not submit a closing brief.

³The ALJ has slightly changed the wording of the issue 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.)

exception of the plan to fade the non-public agency behavior services. Lodi requested that its issue for hearing be as follows:

May Lodi implement the May 11, 2016 IEP, specifically the May 11, 2016 "fade plan" offered as part of the May 11, 2016 IEP, absent parental consent?

Lodi's proposed re-phrasing of the issue did not limit the original issue. To the extent Lodi sought to limit the issue to its ability to implement the fade plan absent parent consent, the ALJ denied Lodi's motion on the grounds that the ALJ would not be able to determine whether Lodi could implement the IEP absent evidence that the entire May 11, 2016 IEP offered Student a FAPE both substantively and procedurally. Lodi chose to proceed to hearing on its original issue.

SUMMARY OF DECISION

Student is an intelligent, social child with educational needs in the areas of language including pragmatic reasoning, and self-regulation, related to his diagnosis of autism. Based on his success academically and socially in his general education classroom, Student no longer requires the provision of intensive behavior services from a non-public agency to receive educational benefit. Lodi proved that the development of the May 2016 IEP, including the plan to systematically fade Student's non-public agency behavior services, met all necessary procedural requirements. Further, the May 2016 IEP was reasonably calculated to provide Student educational benefit in the least restrictive environment at the time it was offered. Therefore, Lodi may implement the IEP without Parents' consent.

FACTUAL FINDINGS

JURISDICTION

1. At the time of hearing, Student was an eight-year-old boy who lived predominantly with his Mother within Lodi's jurisdictional boundaries.⁴In January 2010, Student was diagnosed with autism when he was 19 months old. In May 2011, Lodi found Student eligible for special education and related services pursuant to the category autistic-like behaviors.⁵

2. Student was attending a general education, second grade class at Woodbridge Elementary School at the time of hearing. By all accounts, Student was an intelligent, young boy performing above grade level academically and demonstrating age-appropriate social behaviors. Student required and responded to teacher redirection and sensory strategies including movement breaks and the use of a fidget, such as silly putty. With these supports, Student was able to access, attend to, and participate in the general education curriculum.

EARLY INTERVENTION BEHAVIOR SERVICES

3. Beginning in November 2009, the Early Start Autism Intervention Program provided Student several hours per week of in-home behavior treatment and parent training services.⁶In August 2010, a non-public agency called Genesis Behavior Center,

⁴Father and Mother maintained separate residences.

⁵Effective July 1, 2014, the eligibility category of "autistic-like behaviors" was renamed "autism" and the criteria were redefined. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

⁶Under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.), states receive funding to provide Part C "early start services" to enhance the

Inc. became the service provider. Genesis continued to provide behavior services to Student through August 2016.

4. At the time of Student's initial IEP in May 2011, Lodi offered intensive individual behavior services. Beginning in October 2011, Student received these services through the Early Intensive Behavior Treatment Program, a collaborative program involving Lodi, Valley Mountain Regional Center, Genesis, and Parents.⁷ This program provided systematic instruction and intensive services to preschool students from ages three to five years, and their parents, based upon the principals of Applied Behavior Analysis. The Early Intensive Behavior Treatment Program developed and implemented multiple goals for Student in the areas of language and pragmatics; school readiness; play skills; motor skills; and aggressive and non-compliant behaviors. Pursuant to his initial IEP, Student received 35 hours per week of individual non-public agency behavior services at home and school, as well as 16 hours per month of behavior consultation services. This IEP also offered Student occupational therapy services through a non-public agency and speech and language services provided by Lodi.

development of infants and toddlers with disabilities up to three years of age. (20 U.S.C. § 1433 et seq.)

⁷Regional Centers are private, non-profit entities that operate pursuant to the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) and provide specified services to help individuals with developmental disabilities to live at home to the extent possible and access the community. (Welf. & Inst. Code, §§ 4501, 4620.)

TRANSITION TO KINDERGARTEN: APRIL 21, 2014 ANNUAL IEP

5. Lodi convened Student's annual IEP team meeting on April 21, 2014. At that time, Student was attending a general education preschool for three hours each day. Genesis was supporting Student in the classroom, utilizing 15 hours of the 35 hours of individual behavioral services that had previously been offered in the home setting. In the March 31, 2014 Early Intensive Behavior Treatment Program Report, Genesis detailed Student's progress in the area of classroom readiness skills. With some prompting and a reinforcement system, Student was able to sit during circle time, attend to the teacher for eight minutes, follow routines, and complete tasks. Genesis also reported that Student made "excellent progress" in his socialization skills, responding appropriately the majority of the time.

6. By March 31, 2014, Student had met 83 percent of his behavior program goals and was generalizing 80 percent of his skills. Even so, Genesis recommended that Student continue to receive 35 hours per week of intensive one-to-one assistance, and behavior consultation to ensure consistency across environments. The aim of the Behavior Treatment Program was for Student to be able to independently participate in the least restrictive environment. Therefore, Genesis recommended that the intensity of intervention be systematically faded based upon Student's success, with transfer of instructional control to people more natural to his environment, for example the teacher in a classroom or his parent at home.

7. As reflected in the April 2014 IEP, Student's fine and gross motor skills were age-appropriate. With prompting, he could attend to activities for 30 minutes, was able to produce complete sentences, and demonstrated emerging conversational skills. Student's areas of need were pragmatic language (use of language for social needs), expressive language, and peer interaction. To address these needs, the IEP team agreed on three goals which focused on Student expanding his conversational skills; using

appropriate grammatical forms including pronouns while asking and answering questions and making predictions; and appropriately ending or declining a peer interaction. The team also agreed to a positive behavior support plan targeting Student's tantrum behaviors, which occurred on average 2 times per week, and aggressive behaviors, which occurred on average 1.3 times weekly.

8. For the 2014-2015 school year, Lodi offered Student a general education kindergarten program with 50 sessions of individual and group speech and language services at 25 minutes per session, and 300 minutes per year of individual, occupational therapy services by a non-public agency. Based on Genesis' recommendation, Lodi also offered non-public agency intensive, individual behavior services at school for 220 minutes per day, and at home for 200 minutes per day, as well as behavior consultation services. The April 2014 IEP included the following supplementary aides, services and program accommodations: visual schedule, use of visuals including scripts; sensory diet to support regulation and attending skills; and occupational therapist collaboration with parent and school for sensory regulation strategies. Lodi offered extended school year services consisting of a general education preschool summer program with behavior support. The extended programming did not include speech and language services. Mother consented to the April 2014 IEP, which remained Student's operative IEP until November 28, 2016. On that date, Mother signed consent to the May 2016 offer, with exception, as discussed below.

STUDENT'S 2014-2015 KINDERGARTEN YEAR

9. Student transitioned easily from preschool to kindergarten. For the 2014-2015 school year, he attended kindergarten at Woodbridge for four hours a day. His teacher described him as a happy child who liked to interact with peers and participate in class discussions. Academically, Student was above grade level in reading, and he

understood math concepts. The teacher noted that Student's behavior reinforcement system distracted Student from his class work as he focused on earning a reward.

10. Genesis prepared a written update report dated January 15, 2015, on Student's progress in the Early Intensive Behavior Treatment Program. Genesis described Student's progress as "amazing." He was able to independently and appropriately engage with peers, and his aggressive and tantrum behaviors decreased as his functional communication skills increased. Student met 90 percent of his program goals. Genesis did not propose new goals. Rather, Genesis proposed a four-phase, systematic, data-driven transition plan to gradually fade Student's intensive behavior services.

11. On January 15, 2015, Lodi convened an IEP team meeting to review Student's progress and Genesis' most recent report, and to discuss Genesis' proposal to implement a transition plan to fade Student's behavior services. Lodi team members agreed Student needed more intrinsic reinforcement and recommended fading his token reward system to encourage self-regulation. Student was compliant, and even when he appeared distracted, he was listening and able to participate. Student had met his peer interaction goal early and was making good progress on his conversational and expressive language goals. Lodi proposed a new pragmatic language goal to assist Student with understanding another's perspective and making inferences.

The January 2015 Proposed Fade Plan

12. Genesis' proposed fade plan consisted of four phases, each covering a two-week period. If Student displayed a 20 percent increase in maladaptive behavior or a drop in skill noted in his progress reports, he would not advance to the next phase until he demonstrated acceptable behavior and skill maintenance 80 percent of the

time. Student's behavior therapist⁸ or consultant would collect data as to Student's readiness to proceed to the next phase. In Phase One, Student's behavior therapist would not be present the first hour of class, and when present, would decrease his/her level of involvement, allowing the teacher to prompt Student or request intervention. The behavior therapist would continue to work one-to-one with Student at home for approximately three hours per day. The behavior consultant would continue to train and support the teacher on implementing behavior techniques for up to 10 hours for this two-week period. In Phase Two, the behavior therapist would arrive at school for the second half of the morning, would not be present during lunch, and would assist Student at home for 90 minutes per day. The consultant would provide eight hours of consultation services. For Phase Three, the aide would only be present for the home services for 90 minutes per day, and there would be six hours of behavior consultation. During Phase Four, the behavior therapist would no longer be involved, and the behavior consultant would provide a total of two hours of consultation for the final two-week period.

13. At the January 2015 IEP team meeting, Mother did not consent to any reduction in behavior services. She informed Lodi that Student continued to require one-to-one support by a non-public agency, throughout the day. Mother also did not consent to the new speech goal.

April 2015 Annual IEP

14. On April 13, 2015, Lodi convened Student's annual IEP team meeting to discuss his upcoming transition to first grade. The team reviewed Genesis 'April 8, 2015

⁸The terms behavior therapist, behavior tutor, and aide were used interchangeably throughout the hearing and in documentary evidence. These terms all refer to Student's one-to-one behavior support person.

Update Report which referenced Student's "great advancements" in academics and "excellent progress" in his social interaction. Student required minimal prompting, responded to his teacher's re-direction, and demonstrated strong peer referencing skills. Student maintained his previously mastered skills and continued to meet 90 percent of his prior goals. Genesis again recommended that Student's behavior services be systematically faded to allow him to independently function in the least restrictive setting.

15. Student's teacher reported that Student attended to instruction for 30-40 minutes, but the behavior therapist inappropriately prompted Student when he was already on task. Student's handwriting was above grade level and legible, and his sensory needs were not interfering with class participation and progress. Student met his IEP goals and had generalized his social language and interaction skills to the class setting. Lodi identified pragmatic language as Student's sole area of educational need and, with Mother's input, developed a goal on perspective taking. This goal required Student, when given a picture or video clip of group interactions, to identify the problem, the possible cause, and what will happen next, and to explain how he reached his answers.

16. Lodi team members agreed that Student's occasional non-compliance was age-appropriate and that his behavior no longer impeded his learning or that of others. The April 2015 IEP attached and referenced Genesis' fade plan and incorporated the major components into Lodi's offer of related services. For instance, Student's daily one-to-one behavior therapist services would be systematically reduced at home and in class consistent with the four-phase fade plan so long as Student was maintaining 80 percent acceptable behaviors and his skill level. Similarly, behavior consultation services would decrease with the final two-week phase consisting of two hours of home consultation during the extended school year.

17. Shelley Banks, Student's occupational therapist, informed the IEP team that she determined that Student no longer required her direct therapy services.⁹ Therefore, Lodi offered occupational therapist consultation services to address sensory regulation strategies for 45 minutes each quarter. Lodi also offered autism specialist consultation services for 120 minutes for the first and final months of the academic year, and 60 minutes per month for the remaining months. The April 2015 IEP offered Student placement in a general education first grade class for the 2015-2016 school year with 30 individual and small group speech and language sessions of 25 minutes duration. Mother did not consent to the April 2015 IEP.

18. Student's 2014-2015 report card reflected a successful kindergarten year. Student demonstrated mastery or met expectations in all subjects on the common core curriculum assessments. In terms of his class performance, he earned an advanced score in reading and proficient scores in writing, listening and speaking, and mathematics. With regards to his responsibility ratings, Student "consistently" or "often" demonstrated effort, followed directions, showed respect, used time appropriately, worked independently, cooperated, and completed homework.

19. On August 6, 2015, Mother provided Lodi with a parent addendum to the April 2015 IEP detailing her concerns. Mother shared that Student had deficits in attention, comprehension, communication, pragmatics, and sensory processing and that he required extended programming to maintain his skills over the summer. She

⁹Ms. Banks has nearly 30 years of experience as a pediatric occupational therapist. As the co-owner of Lodi Children's Therapy for the past 16 years, she has contracted with school districts to provide occupational therapy services to students. She became licensed by the California Board of Occupational Therapy in 2003.

expressed her concern that Student's communication journal noted compliance and attention issues leading to aggression which was not captured in Genesis' behavior data. Mother reported that Student relied on his behavior therapist and she would not agree to a fade plan prior to Student's transition to first grade, to see if he could maintain for a full school day. Mother requested that the IEP team meet six weeks after the start of Student's first grade year.

STUDENT'S 2015-2016 FIRST GRADE YEAR

20. Student attended Elizabeth Wickland's first grade class at Woodbridge beginning in August 2015.¹⁰ He transitioned to a full day of instruction without incident. On September 22, 2015, Lodi convened an IEP team meeting in response to Parent's request and to address her concerns. Student was excelling academically in all areas and performing above grade level in math and reading. Mother's concern about Student's comprehension and writing was not shared by Ms. Wickland or Student's service providers. Ms. Wickland was a dedicated and skilled teacher and persuasive witness. Student was the only one in her class capable of reading chapter books, so Ms. Wickland individually discussed literature with him and worked with him to accelerate his writing skills to match his reading skills. Student provided higher level answers and made detailed predictions about grade level material. He participated in class and interacted appropriately with peers. Student responded to Ms. Wickland's classroom incentive system and redirections 99 percent of the time. An effective sensory strategy that helped Student maintain attention was the "stim stick" which Ms. Wickland had

¹⁰Ms. Wickland holds a multiple subject teaching credential for elementary grades and a reading recovery and early literacy teaching certificate. She has been a teacher for over 30 years, the past 26 years with Lodi.

available for all her students.¹¹Ms. Wickland informed the IEP team of two of her concerns with Student's behavior services. Namely, Ms. Wickland noted that Student engaged in attention-seeking behavior when his behavior therapist was in close proximity; and the behavior therapist intervened too quickly without allowing Student the chance to redirect himself.

21. At the September 2015 IEP team meeting, Genesis reviewed its September 2015 report which documented an increase in Student's behaviors and a reduction in his use of acceptable replacement behaviors. Genesis shared possible reasons for Student's increased behaviors including the intervention style of one of its aides and inconsistent implementation of replacement behaviors, and the transition to first grade with its longer day and increased expectations. Even so, Genesis continued to recommend implementation of its fade plan. Mother did not consent to the April 2015 IEP, the fade plan, or the perspective-taking goal at the September 2015 IEP team meeting.

22. On February 2, 2016, Lodi sent Parent an evaluation plan for Student's triennial re-evaluation, proposing a comprehensive assessment in the following areas: academics; communication development; psycho-motor development; reasoning and problem-solving ability; social and adaptive behavior; health; career and vocation; and occupational therapy needs. Mother signed consent to the proposed evaluations, but did not date the form. Lodi did not establish when it received this written consent to assess. Under her consent signature, Mother handwrote a request that Genesis staff participate in Student's behavior assessment along with the school psychologist because of their longevity in implementing Student's behavior program. Mother valued Genesis'

¹¹A stim stick is a small rounded wooden stick that students rolled in their hands.

involvement and assessment. Even so, she refused to accept their recommendation that Student no longer required their services.

The May 4, 2016 Multidisciplinary Evaluation

23. School psychologist Sharon Siu¹² and speech pathologist Anne Marie Snyder¹³ co-authored a multidisciplinary report dated May 4, 2016, based on their triennial assessments of Student. They reviewed Student's educational records, including past assessments, conducted independent classroom observations of Student, and administered 17 standardized assessments over the course of 10 days from March 2016 through early May 2016. Student did not require the assistance of his behavior therapist during any of his assessment tasks. Ms. Siu spent over four hours observing and testing Student. Over her 27-year career, she has conducted in excess of 1,500 psycho-educational evaluations of students. Ms. Snyder has completed close to 2,000 speech and language assessments over her career, and had provided speech and language services to Student since April 2014.

24. At the time of this assessment, Student was doing well in the class setting, meeting or exceeding academic standards in all courses. Student often or consistently displayed positive behaviors in class such as working independently and cooperatively,

¹²Ms. Siu obtained her school psychology-pupil personnel services credential in 1989, and became licensed by the state of California as an educational psychologist in 1998. She has served as a school psychologist with Lodi for the past 28 years.

¹³Ms. Snyder has been a licensed speech pathologist with Lodi for the past 27 years. She obtained a clinical rehabilitative credential in the schools in 1984, and holds a Certificate of Clinical Competence in speech-language pathology from the American Speech-Language-Hearing Association.

and showing respect. On the Woodcock Johnson Tests of Achievement, Fourth Edition, Student scored in the average range in all academic areas except for listening comprehension, in which his standard score of 86 fell in the low average range. On the Gray Oral Reading Tests, Fifth Edition, Student's oral reading comprehension was in the average range. Student had no academic deficits.

25. During the assessors' observations, Student demonstrated some off-task behavior. However, even when he appeared to be distracted, he was able to correctly respond to Ms. Wickland's questions which showed he was attending. Student did not need to look at his teacher to process the information presented. Student used a fidget to help him focus. He was responsive to his teacher, and she was able to successfully redirect him as needed. Student was verbal, had lots of friends, and engaged in reciprocal social play, showing the ability to maintain eye contact and conversational exchanges. During testing, Student had difficulty concentrating and was frequently in motion.

PSYCHOLOGICAL TESTING RESULTS

26. On the Wechsler Intelligence Scale for Children, Fifth Edition, Student received a full score intelligence quotient of 97, within the average range. On the working memory index, which is influenced by the ability to sustain attention and concentrate, Student's standard score was an 82, which is in the low average range and was significantly lower than his other index scores. Student displayed a weakness on one auditory short-term memory subtest, likely impacted by his short attention span. Ms. Siu administered further tests to look at this relative area of weakness.

27. On the Test of Auditory Processing, Third Edition, Student's memory index standard score of 76 and cohesion index score of 75 both fell in the poor range. Student's difficulty concentrating affected his performance. The cohesion index measures auditory comprehension and reasoning, including the ability to understand

implied meanings, make inferences, and draw logical conclusions, which were areas of difficulty for Student. To obtain further information, Ms. Siu administered the Child and Adolescent Memory Profile. On this instrument, Student's total memory index score fell in the high average range and his verbal auditory memory index score was in the average range. This test instrument differs from the other memory instruments in that it uses three different trials to obtain a total score. Ms. Siu reasonably concluded that auditory memory was not an area of need for Student but that he would benefit from repetition. In her experience, second graders are taught skills through repetition, practicing the same skill over time and in various manners.

28. Ms. Siu administered the Developmental Test of Visual Perception, Third Edition. Although Student's scores on the general visual-perceptual and motor-reduced visual perception indices fell in the average range, his score on the visual motor index was in the poor range (standard score of 79). Ms. Siu concluded that Student's hasty approach to the copying subtest affected this score. To explore this weakness further, she administered the Koppitz Developmental Scoring System for the Bender Gestalt Test, Second Edition, which measures visual perception and fine motor coordination. On this measure, Student received a standard score of 96, which is in the average range. Even so, he completed his designs in an impulsive manner, pointing to his difficulty concentrating and slowing his work pace.

29. On the Behavior Assessment System for Children, Third Edition, Father and Ms. Wickland noted that Student's social and emotional functioning in all areas was within the average range, including the areas of attention, learning problems, social skills, behavior, and functional communication. Ms. Siu did not receive Mother's rating scales until May 25, 2016. She prepared a May 25, 2016 addendum to the multidisciplinary report which included Mother's results from this scale and two other scales. Mother rated Student as having several at-risk behaviors including the areas of

attention and social skills, and some clinically significant behaviors such as hyperactivity and adaptability.

30. On the Connors Rating Scales, Third Edition, Ms. Wickland's rating scales noted that Student's inattention and impulsivity scores were very elevated, although she rated his difficulties as only having a minor impact on his academic and social functioning at school. On the Autism Spectrum Rating Scales, teacher and Father rated Student as average in the measured domains of social/communication, unusual behaviors, and self-regulation, meaning he demonstrated behaviors typical of most children with autism. Mother also rated Student as average in social/communication, but slightly elevated in self-regulation, and very elevated in unusual behaviors.

31. On the Scales of Independent Behavior-Revised which measures adaptive functioning skills, teacher, Father, and Mother all agreed that Student's highest level of functioning was in social interactions and communication. On the maladaptive behavior index, all three raters found Student's overall behavior index to be in the normal range. Mother and Ms. Wickland rated Student's internalized maladaptive behaviors, which includes inattention, to be in the marginally serious range. Mother reported mild problems with uncooperative, hurtful, and disruptive behaviors.

SPEECH AND LANGUAGE TESTING RESULTS

32. In terms of his articulation and vocal patterns, Student was fully intelligible; his fluency was within normal limits; and his voice was marked by an occasional monotone which did not adversely impact his social or academic activities. Ms. Snyder administered several tests to measure Student's receptive and expressive language abilities, and Student scored well within the average range on these measures. On the Comprehensive Assessment of Spoken Language, Student scored in the average range in the areas of vocabulary, grammar, and comprehension. However, he had difficulty in pragmatic judgement (determining the appropriate use of language in a specific

situation) and in making inferences, scoring in the low average range on both these subtests. Student's greatest difficulty was in the area of non-literal language, where he scored below the average range. He had significant difficulties understanding and responding to abstract language.

33. On the Test of Problem Solving, Third Edition, Student's critical thinking skills were below the average range. His test results showed weaknesses in creative decision making, problem solving, determining cause and effect, and critical thinking in social situations. The Social-Emotional Evaluation measures expressive and receptive language skills that define social-emotional competence such as identifying emotions and understanding conflicting messages. This assessment is normed on children with autism as well as on typically-developing children. As compared to typical peers, Student scored in the average range. He scored in the high average range compared to children with autism. On the Social Language Development Test, Elementary, Student scored in the average range overall for making inferences, with a strength in expressing someone's thoughts and a significant weakness in explaining behavior. In terms of interpersonal negotiation, Student was able to identify a problem and propose a solution but was not able to negotiate a mutually acceptable solution. He similarly struggled to provide multiple interpretations of a social situation.

34. In summary, the multidisciplinary assessment showed that despite Student's difficulty sustaining attention and tendency to rush through his work, he responded well to redirection, verbal prompts, and visual cues. Student performed well on verbal memory tasks when information was repeated. He showed age-appropriate receptive and expressive language skills and vocabulary, syntax, and comprehension skills were areas of strength. He demonstrated lower average ability in his social language competence in making inferences, interpersonal negotiations, and multiple interpretations. Student exhibited difficulty with higher-level processing, reasoning, and

problem-solving skills, and interpreted information in a concrete manner. These weaknesses adversely affected his social interactions with peers within the school setting. As such, Student met the eligibility criteria of autism. Ms. Siu recommended prompting to sustain attention, repeating information, providing sensory items, allowing movement, and fading his behavior services to increase his independence. Ms. Snyder recommended group speech therapy to address non-literal language, inferential reasoning, and problem solving.

Occupational Therapy Assessment

35. Ms. Banks completed an occupational therapy assessment of Student in April 2016. Over her 30-year career she has conducted over 800 assessments in her field. Ms. Banks was knowledgeable of Student and his occupational therapy needs as she had worked with him since he was a preschooler. During the 2015-2016 school year, Ms. Banks supported Student in class by providing fidgets and other sensory items, developing visual supports which showed the proper use of sensory items and expectations for written assignments, and collaborating with school staff and providers to ensure Student's access to class curriculum and activities.

36. As part of her assessment, Ms. Banks reviewed educational records; interviewed Ms. Wickland; observed Student in class; collected behavior data to determine if he exhibited sensory behaviors impeding his ability to access the curriculum; and administered a standardized assessment. During observations, Student used his silly putty fidget appropriately; sought movement to self-regulate; followed instructions even when he appeared inattentive; independently used his writing visual to self-correct an assignment; responded to his teacher's non-verbal prompts; and shared materials. Student presented as a typical first grader, though more fidgety than most.

37. Ms. Wickland completed the Sensory Processing Measure which looks at classroom functioning in the areas of social participation; vision; hearing; touch; body

awareness; balance and motion; planning and ideas; and total sensory systems.

Ms. Wickland rated Student as typical in all areas except hearing and balance, where he showed some problems. Based on her evaluation and long-term experience working with Student, Ms. Banks reasonably concluded that Student's sensory processing differences were not adversely impacting him at school. Heused movement to self-regulate and required sensory strategies in class. Ms. Wickland provided whole-class movement breaks, and Ms. Banks knew what sensory strategies worked for Student in the general education class. Ms. Banks determined that Student's teacher and service providers required quarterly occupational therapy consultation to make sure they understood how to implement Student's visual supports and sensory strategies to help him self-regulate. She recommended that direct occupational therapy services end as Student no longer required sensory or fine motor support from an occupational therapist to access his education.

MAY 2016 IEP TEAM MEETINGS

38. On April 21, 2016, Lodi noticed Student's annual IEP team meeting for two dates in May 2016, to allow sufficient time to review the results of his triennial assessments and discuss his transition to second grade. Lodi began Student's IEP team meeting on May 11, 2016. The following individuals attended: Mother; Student's attorney; Student's general education teacher Ms. Wickland; speech-language pathologist Ms. Snyder; occupational therapist Ms. Banks; school psychologist Ms. Siu; special education teacher Robin Grossman, who administered Student's academic testing; Karen Honkala, who served as Lodi's administrative designee; autism specialist Michele Liebelt; a program specialist; Lodi's coordinator of special services; a Genesis provider; a representative of Valley Mountain Regional Center; and Lodi's attorney. These same team members attended part two of Student's annual IEP meeting on May 26, 2016, though Student's attorney participated by telephone. A second Genesis

provider also joined the team for the second meeting. The two meetings resulted in one IEP offer which is referred to as the May 2016 IEP.

May 11, 2016 IEP Team Meeting

39. At the start of the meeting, Lodi provided Mother a copy of the procedural safeguards along with an explanation. Lodi gave all team members the multidisciplinary and occupational therapy assessment reports, an updated report from Genesis, progress reports on Student's past goals, and a draft of his present levels of performance. Parent's and Student's attorney previously received copies of the assessment reports and the update from Genesis. All team members agreed to the written meeting agenda. Lodi encouraged and discussed Mother's input throughout the meeting, answered her questions and those posed by Student's attorney, and included their input within the IEP document.

40. The team discussed Student's strengths and interests and Mother's concerns. Student was strong academically, especially in reading, comprehension, and vocabulary. He liked reading, researching, and discussing topics of interest and had started making class presentations. Student tutored his classmates, and they looked up to him. He took pride in his work and had improved his handwriting. Mother agreed that Student was intelligent and loved to read. Her main concern was Student's aggressive behaviors and inability to self-regulate when upset. She had observed him at school and was concerned he was not socializing with peers or understanding class rules. Ms. Wickland's only concern was Student's coping skills; it was her experience that he was friendly with many students and they were friendly with him.

41. Ms. Siu presented the results of her psycho-educational assessment. Student was intelligent and a quick learner. He showed more attending skills with hands-on activities, but even when he appeared off-task, he was able to follow instructions and answer questions which showed he was paying attention. During

testing, Student was frequently in motion but compliant. Ms. Siu reviewed her testing data with the team. With regards to the teacher ratings on the Behavior Assessment Scales, Ms. Wickland reported that attention was not an area of concern, but on the Connors she noted Student's inattention was very elevated, particularly at the end of April. Student's attorney asked if anything had changed for Student at the end of April. Ms. Wickland noted two changes: Student was being pulled from class for his assessments which disrupted his routine; and his behavior therapist had changed.

42. On the Scales of Independent Behavior, Ms. Wickland reported that Student did not display aggressive behaviors. Student's attorney contrasted the teacher rating scales with Genesis' report documenting seven aggressive behaviors per week by Student, based on data collected from January through April 2016. The nature of these reported behaviors was mild and the duration was no more than one to two seconds. Lodi disagreed with Genesis' reporting of certain acts as aggressive, such as when Student tapped his desk, threw his book down, or kicked a trash can. Lodi instead characterized such acts as protest behaviors. Mother shared that when Student banged a table or shoved a chair at home she considered this aggressive behavior. Lodi also disagreed with Genesis characterizing acts of children running and accidentally bumping into each other, as aggressive. At the request of Student's Attorney, Lodi agreed to send her the raw data underlying Genesis' behavior report prior to the next meeting. Student's attorney needed to leave, so the IEP team agreed to meet again on May 26, 2016, to complete the annual review.

May 26, 2016 IEP Team Meeting

43. Student's IEP team reconvened on May 26, 2016. Prior to this meeting, Lodi provided Student's attorney with Genesis' behavior data. Ms. Siu shared her addendum report and the results from Mother's ratings on the Behavior Assessment Scales, the Autism Spectrum Rating Scales, and the Scales of Independent Behavior. Mother rated

Student as having several behaviors in the clinically significant and at-risk range which Father and Ms. Wickland reported as average. Mother's total score on the Autism Scale was elevated, indicating that Student had many behavior characteristics associated with autism, whereas Father and teacher rated Student as average in all areas. Student's attorney asked Ms. Siu about the discrepancy among the raters. Ms. Siu explained to the team, and her testimony at hearing established, that all three raters provided valid scores based on their experiences with Student and their perceptions, and that it was not unusual to have different ratings across different environments.

44. Ms. Grossman reviewed Student's academic testing and answered a question from Student's attorney about his listening comprehension score. Student's results did not indicate any academic needs. Ms. Snyder reviewed her speech and language assessment and the results from all seven of the tests she administered. Student's attorney asked several questions about Student's identified weaknesses in social language, including problem solving, his below average score in pragmatic judgement, and his score in the very low range on the making inferences subtest. Ms. Snyder provided testing examples and explained the significance of Student's scores.

45. Ms. Banks presented the results of her occupational therapy assessment. Mother participated in a team discussion of Student's sensory accommodations. Ms. Banks and Ms. Wickland answered questions from Student's attorney about the use of fidgets. Student used a fidget daily and it was not a distraction to anyone, as he followed the rules for appropriate use. Ms. Wickland explained that Student had a daily goal regarding his use of fidgets, and she used a reinforcement system to encourage appropriate use. Mother shared that the implementation of fidget rules resolved her prior concern that Lodi had restricted Student's use of fidgets.

46. The IEP team also considered Student's benchmark assessments, which measured his instructional progress on the common core curriculum, and his 2015-2016

first grade report card, which identified his class academic performance levels, responsibility ratings, and attendance. Student met or exceeded the first grade common core standards with the exception of writing applications, where Student nearly met standards. The writing applications common core assessment required students to write to an unknown prompt in one sitting. In the classroom, students engaged in what Ms. Wickland termed “more authentic writing” with a chosen prompt and time to plan their writing, use a graphic organizer, and write over several days with time to self-edit and add descriptors. Ms. Wickland had no concerns with Student’s writing abilities and established that this was not an area of need. Student met or exceeded all class academic standards, and consistently or often demonstrated responsible class behavior. For instance, Student ended the year consistently demonstrating academic effort; following rules and directions; showing respect; working independently; working cooperatively; completing homework; and participating in music.

47. The team, including Mother, discussed Student’s behaviors. Genesis reported on Student’s off-task and aggressive behaviors, and described for Student’s attorney what off-task behavior looked like. Student was responsive to teacher redirection, but Genesis reported that he required double the amount of prompts as his peers. Ms. Wickland’s testimony established that Student responded equally well to her class management system as his peers. Although Genesis’ report indicated that Student engaged in aggressive behaviors in class, Ms. Wickland persuasively established that Student was not aggressive. In response to Mother’s example that Student was restricted from playing with two classmates, Ms. Wickland reported that the other two children played aggressively, so all three were not allowed to play together. Lodi witnesses credibly established that Student’s behaviors were not impeding his learning or that of others. While a Genesis provider did not testify as to Student’s behaviors, the

documents showed that Genesis remained committed to terminating its behavior services as Student did not require that level of intervention.

ELIGIBILITY AND PRESENT LEVELS

48. All IEP team members agreed that Student continued to be eligible for special education and related services pursuant to the category of autism. Student's behaviors associated with his autism significantly affected his verbal and non-verbal communication and social interaction, which adversely affected his educational performance. The IEP team reviewed Student's draft present levels of academic achievement and functional performance. Lodi incorporated input from Mother and Student's attorney into the present levels written into the final document. The May 2016 IEP document included 13 pages accurately detailing Student's present levels of performance in all areas. The levels included testing data from Student's triennial assessments; an interpretation of the results; a review of Genesis' behavior data; a discussion of recommendations; and input from Mother and service providers.

49. In the area of academics, Student was reading at a fourth grade level, spelling and writing at a second to third grade level, and performing math at a third grade level. He had no areas of academic need. Student did not have any health needs. As for vocational and daily living skills, he was able to keep up with work in class and completed his homework. Regarding motor development, Student's gross motor skills were at grade level with no areas of concern, and he was able to write neatly although his work was sloppy at times when he rushed to be the first one finished. As for sensory and attention needs, Student struggled to remain on-task but he responded to teacher redirection and was able to redirect himself. Both Mother and Ms. Wickland noted concerns with Student's self-regulation. Student used movement to self-regulate and appropriately accessed sensory strategies such as fidgets. Ms. Wickland provided her students stim sticks and class-wide movement breaks. Based on Ms. Banks' assessment,

Lodi originally determined that self-regulation was not an area of need as Student was able to access his educational program with the accommodations of movement breaks, fidgets, and visuals. Given Mother's concerns, Lodi determined it was an area of need and offered a self-regulation goal, as discussed below.

50. Student continued to have needs in the area of language, including pragmatics. His ability to make inferences, negotiate interpersonally, and provide multiple interpretations of a social situation was low average. Student struggled with higher-level language skills such as reasoning, problem solving, and understanding non-literal language.

51. With regards to his social-emotional and behavioral functioning, Student related well with peers and adults, and could independently follow instructions, initiate conversations, and engage in appropriate play. Student engaged in non-compliant behavior an average of two and a half times per week and tantrums less than once per week. Student was aggressive, as noted and defined by Genesis, seven times per week. Student did not become easily frustrated in class, but Lodi incorporated Mother's observation that he became easily frustrated at home and when picked up from school into his present levels.

DETERMINATION OF NEEDS AND GOALS

52. Based on Student's assessment results and present levels of functioning, Lodi reasonably determined that Student had needs in the areas of language processing and reasoning, and expressive language. Lodi developed a self-regulation goal in response to Mother's concerns about Student. In developing this goal, Lodi further determined that Student had needs in the area of self-regulation. Language processing and reasoning, expression, and self-regulation were Student's sole areas of educational need. Lodi developed goals targeting each of Student's areas of need, and solicited input from Parent and Student's attorney in drafting the goals. The May 2016 IEP

required Lodi to provide quarterly updates to Parents on Student's progress toward his goals.

53. Ms. Snyder drafted Student's two proposed language goals. Each goal included Student's baselines of functioning based on his recent assessment. Student's baseline for the expressive language and reasoning goal referenced his scores on the Comprehensive Assessment of Spoken Language, specifically the subtest of non-literal language where his standard score of 74 was below average, and his standard score of 83 (low average) on the inference subtest. The baseline identified that Student was able to give two meanings for one multi-meaning word 50 percent of the time. The goal called for Student, by May 2017, to increase appropriate use of grade level vocabulary concepts of 20 multiple-meaning words, by using each word in three different sentences, to orally express the various meanings in four of five chances, with 80 percent accuracy, as measured by work samples, logs, and data. The individuals responsible for implementing this goal included the speech-language pathologist, aide, teacher, and Parent. The goal had three short-term objectives requiring Student to demonstrate appropriate use of an increasing number of words per report period. Given Student's baseline and the objectives, the evidence showed that Student was reasonably capable of meeting this goal in its entirety by May 2017.

54. Student's language processing and reasoning goal was based on his below average score on the Test of Problem Solving. Student had difficulty identifying the problem portrayed, evaluating the outcome of each solution, and choosing a solution. More specific to the proposed goal, the baseline indicated that Student was able to pick the correct explanation of a pictured social scene from a choice of two, with 50 percent accuracy. Without the stimuli choices, Student could not identify clues that suggested the cause of the pictured problem. The goal required Student, by May 2017, when given a pictured social scene or video clip of group interactions, to use reasoning skills to

answer questions identifying the problem, the possible cause, and what might happen next with 80 percent accuracy, four out of five times, as measured by logs, language sample or data. The goal had three short-term objectives calling for Student to demonstrate increased reasoning skills over time by answering the first question as to problem identification, then the first two questions (problem and cause), and then all three (problem, cause, and effect). Based on Student's baselines and the short-term objectives, Student was likely to be able to achieve this goal within one year. Once again, the speech therapist, aide, teacher, and Parent were identified as those responsible for implementing this goal.

55. Lodi proposed a final goal in the area of self-regulation based on behavior data that showed Student would become overactive, leading to increased frustration and inappropriate behaviors. Student's present behavior levels provided further baseline data for this goal. For example, the data showed the frequency and duration of Student's non-compliant behaviors and the rate at which he was able to independently use appropriate replacement behaviors to gain sensory input, gain attention, or access an item. This goal called for Student, by May 5, 2017, when presented with a break board of regulatory choices within a calming designated area, to choose a break option to regulate to an optimal level of alertness within 15 seconds, four of five consecutive opportunities as measured by teacher data charting. Both the teacher and the occupational therapist would implement this goal. This goal included three short-term objectives to measure Student's success over the course of the year. Student was reasonably able to achieve this goal within a one-year period.

56. Student's attorney requested goals in the areas of working memory, aggression, and inattention. Lodi considered these requests and discussed Student's needs in these areas. Ms. Siu shared her opinion that inattention adversely impacted Student's memory and recommended accommodations including repetition, hands-on

tasks, sensory items, and movement breaks to assist Student. With regards to Student's inattention, Ms. Wickland was able to redirect Student with regular prompting. She shared that one-third of her students required the same level of prompting as Student. The evidence showed that Student's weakness in working memory and his attention difficulties could be addressed with accommodations in the classroom. Lodi team members did not observe Student to engage in aggressive acts, and his protest behaviors were mild. Student's behavior did not impede his learning or that of others as he was successfully accessing class activities, taking instruction directly from his general education teacher, and performing at or above grade level. As to Student's request for a goal to target aggression, Lodi expressed that it would re-evaluate the behavior data. As discussed below, Lodi declined Student's request in a subsequent prior written notice.

57. The three proposed goals within the May 2016 IEP addressed Student's areas of need; were measurable; contained a description of the manner in which Student's progress on the goal would be measured; identified the parties responsible for supporting the goal; and were reasonably capable of being met within one year. Parents would be provided with regular quarterly progress reports. To support Student's progress on his goals, Lodi offered supplementary supports and accommodations as well as speech and language services and behavior services, with a four-phase plan for fading the behavior services.

RELATED SERVICES AND PROGRAM SUPPORTS

58. Based on Ms. Snyder's assessment and proposed goals, Lodi offered Student 30 small group speech and language sessions per year, for 25 minutes per session, to occur outside the general education classroom. Lodi defined small group as between one to three additional students. The evidence showed that Student no longer required individual sessions as his greatest need was in the area of social communication, which required peer interaction in a group format. Ms. Snyder

thoughtfully and persuasively testified as to her recommendation for the amount of pull-out speech sessions. She carefully weighed his need for class interaction time and access to the core curriculum, with his language deficits and progress in working with her. Although Mother had not consented to the April 2015 proposed perspective-taking goal, Ms. Snyder continued to work on skill building at Student's developmental level based on his previously mastered 2014 speech and language goals. Ms. Snyder established that Student required specialized instruction to remediate his language deficits, at a frequency of approximately once per week, or 30 annual sessions of 25 minutes. Based on Student's progress, he no longer required 50 annual sessions. Lodi specified the start and end time for this service, from May 11, 2016, through May 10, 2017.

59. Lodi offered Student supplementary aids, services, and other supports including program accommodations. Specifically, Lodi offered visual schedules; use of visuals to help concept development; visual scripts, templates and models; social narratives during instruction and social times; use of fidgets including silly putty with fidget rules; movement breaks; and access to sensory strategies throughout the school day. Lodi offered consultation services by an autism specialist to provide support to Student's team in evidence-based practices for the use of visual supports and reinforcement systems and to increase understanding Student's autism-related needs. Based on Student's progress in first grade, Ms. Liebelt recommended a decrease in autism specialist consultation services from the amount she proposed the year prior, at Student's April 2015 IEP team meeting.¹⁴The consultation was structured to provide

¹⁴Ms. Liebelt taught special education for four years, then served as an autism coach for Lodi for two years, and had served as a behavior program specialist for Lodi since January 2016. Ms. Liebelt has a master's degree in special education, holds a level two educational specialist teaching credential for mild/moderate disabilities, and an

additional upfront support in the amount of 60 minutes the first month and 30 minutes per month thereafter. In response to comments and questions from Mother and Student's attorney, Lodi clarified that Genesis was not providing this type of proposed consultation, and that the autism specialist would also collect behavior data.

60. Finally, Lodi offered occupational therapy consultation services to the staff working with Student to ensure proper implementation of sensory and movement strategies; to ensure Student's access to these accommodations; and to support his self-regulation goal. Based on her direct work with Student and assessment results, Ms. Banks' testimony that Student did not require direct occupational therapy services, and had not required it for some time, was persuasive. Ms. Banks understood what worked for Student in terms of sensory strategies within the general education classroom, and Student knew how to use and access these strategies. The offer of consultation services was consistent with Ms. Banks' assessment results. Lodi offered occupational therapist consultation services on a quarterly basis for 90 minutes the first quarter and 60 quarterly minutes thereafter. This structure allowed additional upfront consultation time as Student transitioned into a new classroom to assist the teacher in understanding and implementing his supports. The increase in consultation minutes, from the 45 quarterly minutes offered at Student's April 2015 IEP team meeting, would allow time for the occupational therapist to implement Student's proposed self-regulation goal.

Behavior Services and Fade Plan

61. Student's attorney questioned whether the behavior data collected from April through May 2016 had been analyzed and whether it showed that Student's maladaptive behaviors had increased. At the May 26, 2016 IEP team meeting, Genesis

autism authorization certification. She completed the board certified behavior analyst coursework and anticipated taking the licensing examination in summer of 2017.

reported that there was no increase in Student's behaviors from April to May 2016. Mother rated Student in the normal range for asocial and externalized maladaptive behaviors on the Scales of Independent Behavior, which she provided to Ms. Siu on May 25, 2016. Based on Mother's rating scales, Student was not destructive to property and was hurtful to others one to three times monthly, which Mother identified as a mild problem. Further, on the Behavior Rating Scales, Mother rated Student as average on the scale of conduct problems and at risk (not requiring treatment but may warrant monitoring) on the aggression scale.

62. Genesis continued to recommend that its provision of behavior services to Student be systematically faded. Lodi attached Genesis' updated fade plan to the May 2016 IEP and specifically incorporated its major components into its offer of related services. The fade plan provided training and consultation to Student's teacher, and Lodi offered the services of its autism specialist to bridge the gap once the non-public agency services ceased. Lodi answered questions from Student's attorney about the plan. Lodi explained that once the non-public agency was no longer involved, Student's teacher, with assistance from the autism specialist, would be responsible for assisting Student in maintaining behaviors consistent with class expectations, implementing his accommodations, and using visual supports and schedules. Witness testimony established that this had already been occurring, and that Student responded to Ms. Wickland's prompts and classroom management strategy. This role re-assignment was consistent with the Behavior Treatment Program's overall goal of transferring instructional control to those within Student's natural environment.

63. The updated fade plan mirrored that originally proposed in January 2015, with a reduced amount of in-home services. It consisted of four phases, each phase two weeks in length, of decreasing individual and consultative behavior services at school and at home. Genesis recommended implementing Phase One at the start of the 2016-

2017 school years. Mother disagreed with starting the first week of school, so Ms. Honokaa proposed the fade plan begin the second week of school.¹⁵ In response to Mother's question about data collection, Lodi explained that it would have its specialist collect data alongside the Genesis provider the first two weeks of school. If the data showed that Student's behaviors had increased by 20 percent or more, then the fade plan would not begin until he was maintaining 80 percent presentation of acceptable behaviors without a drop in skills.

64. Lodi offered intensive individual behavior therapist hours at school as follows: six hours per day for the first two weeks of the 2016-2017 school year; five hours per day for Phase One (August 15 through 26, 2016); four hours a day for Phase Two (August 29 through September 9, 2016); one and one half hours per day for Phase Three (September 12 through 23, 2016); and no individual services at school for Phase Four (September 26 through October 7, 2016). In-home behavior therapist services for Phase One would be six hours per week; four hours per week for Phase Two; one and one half hours per week for Phase Three; and no individual in-home hours for Phase Four. Lodi offered behavior consultation services of up to 10 hours for Phase One; 8 hours for Phase Two; 6 hours for Phase Three; and 2 final hours for Phase Four.

65. The May 2016 IEP document specified the type, duration, and frequency of each of the offered behavior services, per each two-week phase, in separate related

¹⁵Ms. Honkala has worked for Lodi for over 30 years as a special education teacher, inclusion specialist, staff development trainer for TEACCH Autism Training, and most recently as a program specialist for the past 21 years. She holds an autism authorization certificate, resource specialist certificate, multiple subjects credential, educational specialist-severely handicapped credential, and elementary education credential. She has completed and provided numerous trainings in the field of autism.

services boxes on the “Offer of FAPE-Services” pages. All behavior services were to be provided by a contracted non-public agency. The IEP referenced an attached fade plan which detailed the specific duties of the aide and consultant during each phase, and the criteria for not advancing to the next phase, namely, a 20 percent increase in maladaptive behavior or a reported loss of skills.

66. With regards to Phase Three, there was a discrepancy between the attached behavior fade plan, the May 26, 2016 IEP team notes, and the services page of the IEP prepared for the original May 11, 2016 team meeting. Specifically, the attached fade plan called for 90 minutes per day, three days per week, of in-home behavior therapist services during Phase Three, while the IEP team notes and service pages offered a total of 90 minutes per week of in-home behavior services during Phase Three. Additionally, Genesis’ attached plan called for no behavior therapist services in the class beginning with Phase Three, while the IEP notes reflected 90 minutes per day of in-class behavior services for a frequency of three days per week during Phase Three. The May 2016 IEP service box offered a more generous 90 minutes per day of in-class behavior therapist services during the third phase. The IEP included one duplicative behavior service box. Neither this duplication nor the discrepancy between the attached behavior plan and the IEP rendered the IEP offer unclear. Mother, with the assistance of Student’s attorney, participated in four IEP team meetings from January 2015 through May 2016, during which Lodi and Genesis presented the proposed fade plan. Mother understood, but disagreed with, the plan to fade Student’s behavior services.

67. Lodi’s witnesses, all of whom were well-qualified and familiar with Student, supported the fade plan. The evidence showed that Student did not require intensive behavior services. Ms. Honkala persuasively testified that Student should be supported but not restricted, and deserved to be as independent as he had worked to be. Based on her expertise in the field of autism, extensive experience serving students with autism,

and her firsthand knowledge of Student for over five years in class and on the playground, her testimony was compelling and undisputed. Student displayed age-appropriate behaviors including time on task, social interactions, and work completion, though he needed to move to be able to attend and succeed. Student responded well to his general education teacher, who was his primary prompter. The intensive services were restricting rather than supporting Student, who was performing above his peers. Student was aware of and frustrated by the fact that an aide was following and monitoring him.

68. Ms. Snyder, who had worked with Student for two and a half years, described the behavior therapists as “hovering inappropriately.” Her testimony established that having a one-to-one aide was a detriment, and that Student manipulated their reward system which resulted in more behaviors. Similarly, Ms. Wickland observed Student to be agitated by the presence of his behavior therapist. Ms. Wickland’s testimony established that Student understood and followed her class management and behavior system, and redirection; and most telling, the behavior therapist intervened at times when Student was beginning to appropriately resolve something independently.

69. With regards to placement, Student’s IEP team agreed that Student’s goals, accommodations, and services could be implemented within the general education class environment. It was undisputed that Student could be fully included with the provision of support services. Specifically, Lodi offered Student placement in a general education classroom in a public day school at Woodbridge for second grade. His May 2016 IEP specified that Student would spend 98 percent of his school day in the general education setting and 2 percent of his time outside of this setting, to participate in speech and language services. The May 2016 IEP noted that Student would continue to participate in district-wide assessments with his peers.

70. The IEP team discussed whether Student was eligible for extended school year services. Ms. Snyder did not recommend speech and language services based on her experience that Student's language skills did not regress following breaks in programming over the summer, winter, and spring, and he did not display limited recoupment capacity. Student did not require specialized academic instruction, and he was not likely to suffer academic regression which could not be recouped within a reasonable period of time. Genesis reported that Student was not likely to regress socially over the summer. Student did have some behavior issues when transitioning back to school, but Genesis' data collection showed he only required one and a half weeks of recoupment. Lodi did not offer any extended school year services. The evidence showed that Student was not likely to suffer regression with limited recoupment capacity.

71. Student's attorney requested six weeks of extended programming with a non-public agency for 20 hours per week, to address speech and language and social skills. During Lodi's discussion of extended school year services, Student's attorney requested Lodi's offer in writing and abruptly ended her telephonic appearance. After Student's attorney left the team meeting, Ms. Honkala verbally shared with Mother Lodi's offer of FAPE. Lodi subsequently provided Parents with the May 2016 IEP via regular mail, certified mail, and email. Lodi's counsel also sent a copy of the May 2016 IEP to Student's attorney via email.

72. Parent input was not only considered during the course of the May 2016 IEP team meetings, but Lodi actively solicited and responded to Mother's concerns and suggestions. Mother and Student were represented by counsel. Mother and Student's attorney actively participated in both meetings by asking questions, sharing information, expressing disagreement, and requesting changes and additions to the identified present levels, goals, and services.

73. Mother signed her attendance only at both of the May 2016 IEP team meetings, and did not provide her consent to IEP at the time of the meetings. She disagreed with the IEP, as she felt it did not capture all of Student's areas of needs and lacked behavior goals addressing his inattention and aggression, and a goal to increase his working memory skills. She objected to the fade plan and believed Student required one-to-one behavior assistance at school and at home by a non-public agency, and disagreed with Lodi's determination that Student did not require extended school year services.

JUNE AND AUGUST 2016 PRIOR WRITTEN NOTICES

74. In a June 20, 2016 prior written notice, Ms. Honkala informed Parents that Lodi was declining Student's request for an aggression goal because Genesis' behavior data did not show an increase in aggression. Also, Genesis was reporting conduct to be aggressive that Lodi did not consider aggressive in nature. Additionally, Student had not been suspended during his first grade year. Lodi also declined the request for an inattention goal as the IEP accommodations addressed his inattention, and he responded to the teacher's redirection. Finally, Lodi declined Student's request for 20 hours per week of non-public agency services for six weeks during the summer because of its determination that Student would not suffer regression or experience limited recoupment in the areas of behavior, social skills, or speech and language. Lodi offered to further discuss this request in light of Student's attorney having ended the May 26, 2016 IEP team meeting during the team discussion. Ms. Honkala enclosed a copy of the May 2016 IEP and a copy of procedural safeguards with the prior written notice.

75. On August 17, 2016, Ms. Honkala sent Parents a follow-up letter to the prior written notice summarizing the May 2016 IEP offer. This letter informed Parents of the typographical error in the May 2016 IEP, which originally included a duplicative related services box, listing one behavior service twice. Ms. Honkala attached a corrected

copy of the May 2016 IEP and a notice of procedural safeguards. The letter informed Parents that Lodi would file for due process if Parents did not reply, and requested a response by September 2, 2016. Ms. Honkala expressed her willingness to convene a further IEP team meeting to discuss questions or concerns. Neither Parent nor Student's attorney responded or requested a further IEP team meeting. On October 21, 2016, Lodi filed for a due process hearing because Parents had not consented to the May 2016 IEP.

STUDENT'S 2016-2017 SECOND GRADE SCHOOL YEAR

76. Student made a smooth transition to second grade at the start of the 2016-2017 school year. Ms. Snyder continued to work with him on age-appropriate skill building related to his 2014 language goals. Student made progress in the area of speech and language, but his language challenges remained. Ms. Snyder's testimony established that the goals she proposed at the time of the May 2016 IEP remained appropriate for Student.

77. As of September 5, 2016, Lodi discontinued its contract with Genesis to provide non-public agency services. Point Quest Education, another non-public agency, provided Student's behavior services beginning September 2016. Ryan Dixon, a board certified behavior analyst and the director of clinical services for Point Quest, agreed with the fade plan proposed by Genesis. Mr. Dixon has completed hundreds of behavior and developmental assessments. He observed Student responding appropriately to his second grade teacher. At the time of hearing, Student's teacher and Ms. Snyder were successfully implementing Student's educational program, while the behavior aides played a passive role.

78. On November 28, 2016, Mother signed consent to the May 2016 IEP, with exception to the plan to fade Student's non-public agency intensive behavior services. Lodi received this partial consent just after four o'clock in the afternoon, the day prior to hearing. At the time of hearing, Student's behavior, work completion, and independence

was age appropriate. The evidence showed that fading Student's intensive behavior services would provide him a more typical and less restrictive environment.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK¹⁶

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);¹⁷ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: 1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to 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 student at no charge to the parent, meet state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are

¹⁶Unless otherwise stated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

¹⁷All subsequent references to the Code of Federal Regulations are to the 2006 edition.

required to assist the student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [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(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; 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. (e).) 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 due process hearings is preponderance of the evidence].) In this matter, Lodi had the burden of proof on the sole issue presented.

APPROPRIATENESS OF LODI'S MAY 2016 IEP OFFER

5. Lodi contends that the May 2016 IEP, including the proposal to fade Student's intensive non-public agency behavior services, offered Student a FAPE in the least restrictive environment. Lodi seeks an Order that it may implement this IEP without Parents' consent. Student objects to the fade plan and contends that he continues to require intensive behavior interventions at home and in class by a non-public agency.

6. When a school district seeks to demonstrate that it offered a FAPE, the legal analysis consists of two parts. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide 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 benefits. (*Ibid.*)

7. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*) superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.) A procedural violation of the IDEA denies a student a FAPE only if the violation: (1) impedes the student's right to a FAPE; (2) significantly impedes parents' opportunity to participate in the decision-making process regarding the provision of a

FAPE; or (3) causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d 1479, 1484.)

VALIDITY OF AN IEP: PROCEDURAL REQUIREMENTS¹⁸

Required IEP Team Members

8. An IEP is developed by an IEP team. The IEP team must include: (1) one or both of a student's parents; (2) no less than one general education teacher; (3) no less than one special education teacher or, if appropriate, a special education provider of the student; (4) a representative of the district who is qualified to provide or supervise specially designed instruction, and is knowledgeable about the general education curriculum and the availability of district resources; (5) an individual who can interpret the instructional implication of assessment results; (6) at the discretion of the parent(s) or district, any other individual who has knowledge or special expertise regarding the student, including related services personnel, as appropriate; and (7) whenever appropriate, the student with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.C.R. § 300.321(a); Ed. Code, § 56341, subd. (b).) A team member shall not be required to attend an IEP meeting if the parent, in writing, and school district agree that the excused member's area of service is not being modified or discussed at the meeting. (20 U.S.C. § 1414(d)(1)(C)(i); 34 C.F.R. § 300.321(e)(1); Ed. Code § 56341, subd. (f).) A team member whose area of service is subject to discussion may be excused if the parent, in writing, and the district consent to the excusal and the excused member provides written input

¹⁸The legal citations in this section are also incorporated into the subsequent substantive analysis section below.

to the IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C)(ii); 34 C.F.R. § 300.321(e)(2); Ed. Code, § 56341, subd. (g).)

Timelines

9. Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (20 U.S.C. §§ 1401 (14), 1414 (d)(4)(A); 34 C.F.R. § 300.323 (c); Ed. Code, §§ 56340, 56341, subd. (a); *Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686].) A school district must conduct an IEP team meeting for a special education student at least annually to review the IEP to determine whether the annual goals are being achieved, to make any necessary revisions to address any lack of expected progress, and to consider new information about the student. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1); Ed. Code, §§ 56343, subd. (d), 56380, subd. (a)(1); *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055-56.) An IEP required as a result of an assessment of a student shall be developed at an IEP team meeting held within a total time not to exceed 60 calendar days, not counting days between the student's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's written consent for assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (f)(1) & 56344, subd. (a).)

Procedural Safeguards

10. State and federal law require districts to provide the parent of a child eligible for special education with a copy of a notice of procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. §300.504(a); Ed. Code, § 56321, subd. (a).) The notice must include a full explanation of all procedural safeguards and be

written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent. (20 U.S.C. §1415(d)(2); 34 C.F.R. §§ 300.503(b),(c), 300.504(c), (d).) Furthermore, at each IEP team meeting, the district must inform a parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd.(b).)

11. All required participants attended Student's annual 2016 IEP team meeting, which Lodi opened on May 11, 2016, and concluded on May 26, 2016. Mother attended both meetings as did Student's attorney, who appeared telephonically for part two of the IEP team meeting. Student's teacher Ms. Wickland participated as did special education teacher and academic assessor, Ms. Grossman. Ms. Honkala attended as Lodi's qualified representative. The team reviewed Student's triennial assessments. The various assessors, specifically Ms. Siu, Ms. Snyder, and Ms. Banks also attended and personally presented their findings and recommendations. Student's behavior service providers from Genesis attended and explained the proposal to fade Student's behavior services. Lodi provided Mother a copy of the procedural safeguards and a brief explanation of those safeguards.

12. Since this meeting was a review of Student's triennial assessments, it was required to be held within 60 days of obtaining parental consent to the February 1, 2016 evaluation plan. Mother signed but did not date the February 2016 evaluation plan, and there was no evidence as to when Lodi received Mother's consent to assess Student. However, based on Student's April 13, 2015 annual IEP, Student's 2016 IEP was due by April 12, 2016. Lodi failed to establish that it timely convened Student's 2016 annual IEP. Even so, there was no evidence that convening Student's IEP team meeting one month late impeded Student's right to a FAPE, deprived him of educational benefit, or significantly impeded Parents' opportunity to participate in the decision making process. As such this procedural violation did not invalidate the May 2016 IEP.

Parental Participation

13. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a); *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043 (*Doug C.*) [“Parental participation ... is critical to the organization of the IDEA.”].) Parental participation in the IEP process is considered “[A]mong the most important procedural safeguards.” (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

14. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrmann v. East Hanover Board of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*).) The IEP team shall consider the concerns of the parent for enhancing the student’s education and information on the student’s needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s needs, attends the IEP team meeting, expresses disagreement with the IEP team’s conclusions, and requests revisions to the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and suggest changes, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d 1031, 1036.)

Prohibition Against Predetermination

15. Predetermination of an IEP offer violates the above requirement. For IEP team meetings, predetermination occurs when an educational agency has decided on its

offer prior to the meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858 (*Deal*); *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56486, p.2) (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by statute; *Target Range, supra*, 960 F.2d 1479, 1484.)

16. Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations, before the IEP is finalized. (*Assistance to States for the Education of Children with Disabilities*, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).) School officials may permissibly form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11- CV-398) 2013 WL 209478, p.7.)

17. Although Lodi presented the IEP team with a draft copy of Student's IEP including his present levels of performance at the May 2016 IEP meeting, Lodi also solicited, considered, and incorporated input from Mother and Student's attorney. For instance, Lodi amended Student's present levels in the area of social-emotional functioning to include their concerns about Student's frustration level. Following the May 11, 2016 IEP team meeting, Ms. Siu prepared an addendum to her multidisciplinary assessment report to incorporate the results of Mother's three rating scales, which Mother did not provide in time for the initial assessment report. Ms. Siu presented this

addendum to the IEP team on May 26, 2016. Mother and Student's attorney actively participated in the May 2016 IEP team meetings. They each shared their perspectives on Student's needs, asked questions, proposed changes, and disagreed with various elements of the IEP including the goals, Student's behavioral functioning, and the proposal to fade his behavior services. Lodi openly considered and incorporated Mother's input into its IEP offer. For example, Lodi developed an additional goal in response to her concern with Student's self-regulation. Lodi ensured meaningful Parent participation in developing Student's May 2016 IEP.

18. The fact that Genesis had proposed fading its behavior services since January 2015, and that Lodi had incorporated this change into Student's IEP since April 2015, did not establish that Lodi predetermined its offer. Rather, Lodi team members permissibly formed an opinion prior to the May 2016 IEP team meetings that Student no longer required intensive behavior interventions. Even so, Lodi engaged in an open discussion with Genesis, other services providers, Student's teacher, Mother, and Student's attorney during the May 2016 IEP team meetings about Student's behaviors and needs. Lodi considered the results of Ms. Siu's social-emotional testing and behavior scales. Lodi and Genesis analyzed Student's most current behavior data between the two meetings and openly considered Mother's concerns and her attorney's suggestions. Ms. Honkala further proposed to delay the start of the proposed fade plan in response to Mother's concerns. Lodi's actions and proposals show that it did not predetermine the May 2016 IEP offer.

Necessary Considerations

19. In developing the IEP, the IEP team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any

lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A)(ii); 34 C.F.R. § 300.324(a), (b)(1)(ii); Ed. Code, § 56341.1, subds. (a), (d).) When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, supports, and strategies to address that behavior. (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).)

20. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the instructional and service needs of special education students. (34 C.F.R. § 300.115(a); Ed. Code, § 56360.) This continuum of program options must include, but is not limited to, regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication in the home, hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.) In determining placement, a school district must consider a continuum of alternative placements. (34 C.F.R. § 300.116; Ed. Code, § 56342, subd. (b).) A school district is only required to consider those placements in the continuum that may be appropriate for a particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. (*L.S. v. Newark Unified School Dist.*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

21. Lodi considered all necessary information during the May 2016 IEP team meetings, including Parents' input in the form of rating scales and interviews during the assessment process; the concerns and proposals of Mother and Student's attorney during the IEP team meetings; Student's strengths, needs, and behaviors; the results of his recent triennial assessments; and his benchmark assessments and report card.

Student was fully included and accessing his curriculum in the general education environment with the provision of related services. As such, there was no need for the IEP team to discuss more restrictive program options. Student's behavior was not impeding his education or that of others. Therefore, Lodi appropriately considered how to best transition Student from his intensive behavior services provided by a one-to-one behavior therapist, to a less restrictive setting where Student could independently function and directly respond to the natural classroom management system of his general education teacher along with his typical peers.

Required IEP Contents

22. Federal and State law specify in detail what an IEP must contain. Among other things, it must include a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general education curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP team develops measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (*Letter to Butler* (OSERS Mar. 25, 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12406, 12471 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his

goals. (20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the offered educational services. (Cal. Code Regs., tit. 5, § 3040, subd.(b).)

23. An IEP must also include a statement of the special education and related services and supplementary aids, based on peer-reviewed research to the extent practicable, which will be provided to the student, as well as a statement of program modifications or supports, with a projected start date as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) &(VII); 34 C.F.R. § 300.320(a)(4) and (7); Ed. Code, § 56345, subd. (a)(4)& (7).) Additionally, the IEP must explain the extent to which the student will not participate with non-disabled children in a regular class or other activities; a statement of required services, program modifications or supports that will be provided to the student to allow him to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities; and a statement of individual accommodations necessary to measure the student's performance on State and district-wide assessments. (20 U.S.C. § 1414(d)(1)(A)(i)(IV)-(VI); 34 C.F.R. § 300.320(a)(4)(5)&(6); Ed. Code, § 56345, subds. (a)(4)-(6).)

RELATED SERVICES

24. Related services include speech and language services, occupational therapy services, and other services as may be required to assist a student with a disability to benefit from special education. (20 U.S.C. §1401(26)(A); 34 C.F.R. § 300.34(a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527, cert. den., 513 U.S. 965 (*Union*).) State law adopts this definition of related services. (Ed. Code, §

56363, subd.(a) & (b).)An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities and achieve the goals of his IEP. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

25. The May 2016 IEP document included all of the statutorily required items. For instance, it included: Student's present levels of academic achievement and functional performance; an analysis of how Student's disability affected his involvement and progress in the general education curriculum; a statement of three measurable, annual goals designed to meet Student's unique needs and allow him to make educational progress; a statement of how Student's goal performance would be measured and reported to Parents; a description of related services along with projected start dates and duration, frequency, and location of services, supports, and accommodations; and the percentage of time Student would not be participating in the general education setting with typical peers.

Clear Written Offer

26. One of the procedural prerequisites is that a school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union, supra*, 15 F.3d 1519, 1526.) An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decision based on it. (*Ibid.*) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*)The IEP is to be read as a whole. There is no requirement that necessary information be included in a particular section of the IEP if that information is contained elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2); Ed. Code, § 56345, subd. (h).)

27. The May 2016 IEP provided a clear written offer of placement and services. Mother and Student's attorney objected to any fading of Student's behavior services but they had no questions as to the details of the four-phase transition plan. As to Phase Three and the provision for behavior therapist services, there was a slight discrepancy between the attached fade plan and the IEP offer of services. The IEP clearly specified a more generous offer of one-to-one behavior services in class at the rate of 90 minutes per day as opposed to the IEP notes, which delineated 90 minutes for only three days per week, and the attached plan which called for no classroom behavior aide services during Phase Three. There was also a slight discrepancy in terms of the one-to-one in-home support for Phase Three with the plan calling for 90 minutes per day for three days each week, while the IEP notes and services offer specified only 90 minutes per week. Even so, these discrepancies did not render the IEP offer of behavior services unclear. The controlling offer of services is that within the IEP document itself. The IEP clearly described the offer of one-to-one behavior services during Phase Three, namely 90 minutes per day in class and 90 minutes per week at home. The May 2016 IEP provided Parents sufficiently clear details as to the proposed placement and services such that they could reasonably be expected to understand it and decide whether to accept the offer. Mother eventually decided to accept the IEP offer with the exception of the behavior fade plan.

28. Lodi complied with the procedures set forth in the IDEA in developing Student's annual May 2016 IEP. Lodi provided Mother all of the procedural protections to which she was entitled, and involved her in the process of developing Student's program. The proposed IEP included all the content required by law, and the IEP team members took into account necessary considerations. Any procedural violation in failing to timely convene Student's annual IEP team meeting was harmless. Because Parents did not consent to the May 2016 IEP offer, Lodi filed a request for a due process hearing to

defend its offer of FAPE and to obtain an Order authorizing it to implement the entire IEP, including the fade plan.¹⁹In summary, the May 2016 IEP was procedurally valid.

SUBSTANTIVE VALIDITY OF IEP OFFER

Unique Needs

29. A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer v. Weast, supra*, 546 U.S. 49, 56-58.) In addition, educational needs include functional performance. (20 U.S.C. § 1414 (d)(1)(A)(i)(I); Ed. Code § 56345, subd. (a)(1).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*San Diego*).)

30. The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) A school district is required to provide educational instruction, specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley,*

¹⁹This Decision does not address whether Lodi unreasonably delayed in filing to defend its May 2016 IEP offer. (*I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1169.) Such a finding is not required to determine whether the IEP offered Student a FAPE. Nothing in this Decision prevents Student from filing his own request for due process and raising this as an issue.

supra, 458 U.S. 176, 188-189; *San Diego, supra*, 93 F.3d 1458, 1468.) 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; *San Diego, supra*, 93 F.3d 1458, 1467-1468.)

Evaluating the IEP Offer

31. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) An IEP is "a snapshot, not a retrospective." (*Ibid.*) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.* citing *Fuhrmann, supra*, 993 F.2d 1031, 1041.) However, "after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1004 [citing *Adams, supra*, 195 F.3d at 1149].)

32. 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, not that preferred by the parent. (*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 child. (*Ibid.*) For a school district's offer of special education services to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the his IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Id.* at 1314-1315; *Rowley, supra*, 458 U.S. 176, 203.)

33. An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education designed according to the parent's desires."].) A

school district has the right to select the service provider so long as the provider is able to meet the student's needs. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*Slama v. Independent School Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885 [refusal to assign service providers of parent's choice does not result in a denial of a FAPE.]; *N.R. v. San Ramon Valley Unified School Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323 at p.7[parents are not entitled to their preferred provider.].) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.)

34. To be found appropriate under the IDEA, an IEP must not only be procedurally compliant but also substantively appropriate, meaning it was reasonably calculated, at the time it was developed, to enable the student to receive educational benefit. Lodi developed Student's May 2016 IEP based upon current assessments and Parental input regarding Student's cognitive abilities, academics, social-emotional and behavior functioning, speech and language deficits, and occupational therapy and sensory needs. Lodi considered all of Student's suspected areas of need stemming from his disability and related to his education in developing the May 2016 IEP.

35. Ms. Siu and Ms. Snyder conducted an exhaustive multidisciplinary assessment of Student, administering 18 different testing measures including an academic assessment. When one subtest on the Wechsler Intelligence Scale pointed to a possible deficit in Student's auditory short term memory, Ms. Siu pursued this further by administering the Test of Auditory Processing Skills and the Child and Adolescent Memory Profile. Based on Student's scores on these additional measures, Ms. Siu reasonably concluded that Student did not have a memory deficit, but rather benefitted from repetition given his attention difficulties. Similarly, Ms. Siu administered an

additional test instrument to further understand the significance of Student's poor performance on the visual-motor integration index. Her comprehensive assessment results highlighted the impact of Student's attentional issues. Student did not have a visual-motor disorder but rather attention deficits which negatively impacted his ability to complete visual-motor tasks, such as copying designs.

36. Data from Student's triennial assessments formed the basis for his present levels of performance. Lodi accurately identified and extensively detailed Student's present levels in the May 2016 IEP. Based on his performance levels, Lodi appropriately determined Student's areas of need to be language processing and reasoning, expressive language, and self-regulation, developed goals targeting these three areas of need.

37. In light of the assessment results, Student's attorney requested a goal to address Student's attention difficulties. However, Lodi proved that the offered accommodations of visual schedules and models, fidgets, and movement breaks readily addressed Student's attention difficulties. Student was excelling academically, easily redirected by the teacher, and followed along even when it appeared he was not attending. Although Mother was concerned with Student's aggression, Ms. Wickland and Ms. Snyder established that Student was not aggressive at school. Even though Ms. Snyder believed accommodations in the form of sensory strategies met Student's self-regulation needs, Lodi agreed with Mother that Student required a self-regulation goal to address his needs.

38. All three of the IEP goals comported with Student's identified educational needs. Independent examination of the goals shows that they met all legal requirements as detailed in the Factual Findings. The IEP extensively described Student's present levels of academic achievement and functional performance in general, and Lodi used those levels to establish baselines for the three proposed goals. The goals extrapolated from

these baselines and described advances that Student, in light of his deficits, could reasonably expect to reach within a year. Each goal described how Student's progress would be measured and those individuals responsible for supporting the goal. The combined testimony of Ms. Snyder, Ms. Siu, and Ms. Honkala established in detail how the goals were appropriate for Student. These witnesses were credible and persuasive given their extensive expertise and personal knowledge of Student. Lodi established that the goals were appropriate to Student's needs, measurable, and capable of being attained within the year.

39. In terms of related services, Lodi's offer of 30 annual, small group speech and language sessions, each 25 minutes long, was appropriate to support Student's two language goals and address his language needs. This frequency and duration of speech and language services would address Student's language needs without unduly restricting his access to the academic curriculum. The small group model would specifically target Student's pragmatic deficits stemming from his autism diagnosis and allow him to use his language skills with peers and develop his social reasoning and communication abilities.

40. Student no longer required direct occupational therapy services as he did not have educational needs in the area of motor skills, and his sensory needs were reasonably addressed by the offered accommodations. Lodi's offer of occupational therapy consultation services was reasonably calculated to meet Student's sensory needs as this service would ensure Student's access to his sensory strategies and consistent implementation; provide staff training; and allow the occupational therapist to monitor any additional needs and to support Student's self-regulation goal. This model of delivery was appropriate for Student's needs. Further, Lodi's plan to offer additional consultation minutes at the start of the year with a slight tapering for the remaining quarters was structured to ensure upfront additional training for staff new to

Student and to support Student's transition to a new class. Lodi's offer of 90 minutes of consultation for the first quarter and 60 minutes for each of the three remaining quarters was reasonably calculated to meet Student's sensory and self-regulation needs. The May 2016 IEP appropriately offered an increase in occupational therapist consultation time to support the new self-regulation goal.

41. Lodi's offer of autism specialist consultation services at the rate of 60 minutes for the first month and 30 minutes per month thereafter was appropriate to ensure Student's access to his visual supports and behavior reinforcement systems, and staff training on effective implementation. This supplementary service was designed to bridge the gap once Student's non-public agency behavior interventions ceased by providing training to staff on Student's autism-related needs and evidence-based practices to support him in class.

42. Lodi showed that the goals, accommodations, supports, and related services in the May 2016 IEP, which Mother did not challenge, adequately addressed Student's needs. Lodi also demonstrated that the plan to fade Student's intensive behavior services was reasonably calculated to provide Student a FAPE. Student's Early Intensive Behavior Treatment Program had successfully run its course. This program was intended for students between three and five years of age. Continuing this level of intervention beyond its course served to restrict rather than support Student. The non-public agency provider, itself, recommended that its services end and had originally proposed fading Student's behavior interventions beginning in January 2015. This proposal to fade behavior services was based on the collection of behavior data showing that Student did not require intensive behavior services. Lodi first discussed this proposal with Mother and Student's attorney at an addendum IEP team meeting on January 15, 2015. Mother was not amenable to a reduction in services. Therefore, Lodi

suggested small steps at first such as fading Student's reinforcement system to encourage more intrinsic reinforcement.

43. At the time of Student's annual IEP team meeting in April 2015, Lodi officially proposed a systematic reduction in behavior services in accord with Genesis' proposed fade plan. Mother and Student's attorney continued to resist this proposal. Lodi agreed to Mother's request to meet as an IEP team six weeks after the start of Student's first grade year to see how he had adjusted to a full day of school. Despite Student's successful transition to first grade, Mother still did not agree to reduce Student's behavior services. By May of 2016, Student had progressed to such an extent that Lodi additionally recommended reducing its prior April 2015 offer of autism specialist consultation hours, from 120 minutes the first and last months of the school year and 60 minutes for the remaining months, to 60 minutes the first month and 30 minutes thereafter. The testimony of Lodi team members who supported fading Student's behavior intervention services was rendered all the more persuasive by their extensive expertise in their respective fields as well as their personal experience and familiarity with Student.

44. Student was capable of independently functioning in the general education classroom. Student was responding successfully to his teacher, her prompts, and her class management and reinforcement systems along with his peers. Providing Student a one-to-one behavior therapist was detrimental in that the aides prematurely and inappropriately redirected Student, thereby preventing him from acting independently. This level of intervention was particularly inappropriate for Student because he was academically far above his peers, was aware he was being singled out, and had learned to manipulate his behavior reward system.

45. Student continued to progress in his educational programming even with his behavior aides taking a more passive role during the current school year. Mr. Dixon

became familiar with Student starting in September 2016, when Lodi contracted with Point Quest to provide behavior services. Mr. Dixon observed Student multiple times during his second grade year until the time of hearing, and supervised Student's behavior aides. From his first observation, Mr. Dixon determined that Student did not require intensive support, as he was responding appropriately to his teacher's directions. Student's general education teacher and speech and language provider were successfully implementing his programming and the behavior aides played a passive role. These more recent observations by the replacement non-public agency provider shed light on the objective reasonableness of Student's May 2016 fade plan originally proposed by Genesis.

46. Mother is not entitled to her preferred program of intensive, non-public agency behavior services. While it is understandable that Mother may have a difficult time letting go of services that have assisted her child for over six years, Lodi proved that Student did not need the intensive behavior intervention services at the time of the May 2016 IEP team meetings and up through the date of the hearing. Further, the plan to fade these interventions was data driven, systematic, and provided for training and monitoring of Student's teacher and providers to ensure their consistent implementation of, and Student's access to, effective sensory strategies.

Placement In The Least Restrictive Environment

47. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, § 56040.1, subd. (b).) The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are

not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, §§ 56040.1, subd. (a), 56342, subd. (b); *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.)

48. It was undisputed that Student was receiving, and could continue to receive, educational benefit in the general education setting. The IEP offer was reasonably calculated to constitute the least restrictive environment for Student by having him in a general education setting for 98 percent of the school day. The supports, services, and accommodations, with the exception of speech and language services, were all designed to take place in the general education second grade classroom with a minimum negative impact to Student's access to the general education curriculum.

Extended School Year Services

49. California Code of Regulations, title 5, section 3043, provides that extended services shall be provided for each individual with exceptional needs who requires special education and related services in excess of the regular academic year. Students to whom extended programming must be offered under section 3043: . . . shall have disabilities which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition.

50. The federal regulations do not specify any factors that must be considered in determining eligibility for extended programming. The IDEA simply provides that extended school year services shall be provided to a student if the IEP team determines that such services are necessary to provide a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); *N.B. v. Hellgate Elementary School Dist.*, (9th Cir. 2008) 541 F.3d.

1202,1210-1212 [no error in applying a regression/recoupment standard; extended services must be provided if necessary to ensure FAPE].) The purpose of special education during the extended school year is to “prevent serious regression over the summer months.” (*Hoelt v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; *Letter to Myers* (OSEP Dec. 18, 1989)16 IDELR 290.) The mere fact of likely regression is not enough to require an extended school year placement, because all students “may regress to some extent during lengthy breaks from school.” (*MM v. School Dist. of Greenville County* (4th Cir 2002) 303 F.3d 523, 538.)

51. Student did not meet the eligibility requirements for extended school year services. Ms. Snyder had provided Student with speech and language services for over two and a half years at the time of hearing. During this time, Student did not regress in his language abilities following breaks in programming. Genesis had served Student since he was just over two years of age. Based on updates from Genesis and data it collected on Student’s functioning, there was no indication that Student would regress in his social skills. With regards to his behavior, Student generally required one and a half weeks to settle back into a structured school setting following a program break. This amount of time to adjust, and to conduct himself in accordance with classroom expectations, was well within the norm. Interruption of his educational programming would not cause Student to regress. Further, Student did not have a limited recoupment ability which would render it impossible or unlikely that he would re-attain appropriate levels of independence and self-sufficiency in relation to his speech and language abilities, social skills, and behavioral functioning.

52. Student’s IEP goals, accommodations, and supports, and systematic fading of his behavior services could easily be implemented in the regular education classroom. Lodi met its burden of proving that the May 2016 IEP substantively offered Student a FAPE in the least restrictive environment. In summary, Lodi established that it complied

with all necessary procedural and substantive requirements in developing the May 2016 IEP, including the fade plan, such that it may implement this IEP in its entirety without Parent consent.

ORDER

1. The May 2016 IEP offered Student a FAPE in the least restrictive environment.
2. Lodi may implement the May 2016 IEP without Parents' consent. In implementing this IEP, Lodi shall adjust the dates for the four phases of the fade plan to correspond with the implementation date. Similarly, the autism consultation services shall be provided in the amount of 60 minutes for the first month of implementation and 30 minutes per month thereafter. The occupational therapy consultation shall be provided in the amount of 90 minutes for the first quarter of implementation and 60 minutes per quarter thereafter.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Lodi prevailed as to the sole issue presented.

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 26, 2017

/s/

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings