

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016100887

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 13, 2016, naming Bellflower Unified School District. Student filed an amended complaint naming District on February 17, 2017. A continuance of the hearing was granted on March 10, 2017 to dates stipulated by the parties.

Administrative Law Judge Alexa J. Hohensee heard this matter in Bellflower, California on May 17, 18, 19 and 25, 2017.

Pamela K. Daves, Attorney at Law, represented Student. Mother attended and testified at the hearing on behalf of Student.

Eric Bathen, Attorney at Law, represented District. Tracy McSparren, Assistant Superintendent of District, attended the hearing on behalf of District.

Maria G. Meza, Doneida Marroquin and Lilly Lucas provided Spanish to English and English to Spanish interpretation throughout the hearing.

A continuance until June 12, 2017, was granted for the parties to file written closing arguments. Upon receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Did District deny Student a free appropriate public education between October 13, 2014 and December 1, 2016, by failing to assess Student in all areas of suspected disability, specifically, psycho education, including social emotional functioning, and language and speech?

2. Did District deny Student a FAPE, as to the individualized education programs of January 21, 2015 and January 15, 2016, by failing to:

- (a) Provide Parent with the procedural rights and safeguards in Spanish;
- (b) Provide Parent with copies of the IEP's translated into Spanish;
- (c) Develop additional goals, specifically in the areas of academics, language and speech and social emotional functioning;
- (d) Provide a clear written offer that identified a specific placement by stating how the weekly specialized academic instruction minutes would be allocated between group and individual instruction;
- (e) Offer appropriate placement in a special day class or additional individualized special academic instruction services; and
- (f) Offer appropriate related services, specifically school-based counseling and language and speech therapy?

3. Did District deny Student a FAPE by failing, during the June 16, 2016 IEP team meeting, to:

¹The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- (a) Provide Parent with a Spanish language interpreter and a Spanish language copy of the IEP;
- (b) Have all necessary IEP team members present, specifically, a general education teacher, and a special education teacher; and
- (c) Develop an IEP with a clear written offer that identified specific placement by stating which type/program of special day class District was offering, and which four periods per day Student would be in the special day class?

4. Did District deny Student a FAPE by failing to provide written prior notice of its refusal to conduct timely assessments, specifically language and speech and psycho educational assessments?

5. Did District deny Student a FAPE by failing to provide Student copies of all educational records at Parent request beginning August 8, 2016?

SUMMARY OF DECISION

District denied Student a FAPE by failing to assess Student in the areas of psycho education, including academics and social emotional functioning, and language and speech. For the period at issue, Student demonstrated communication abilities well below age level, increased distractibility, difficulty in completing class work or homework, and reluctance to participate in classroom activities, and was failing his academic classes and failing to meet annual goals. These circumstances warranted a language and speech assessment, and a psycho educational reassessment with academic and social emotional functioning components.

District denied Student a FAPE in the IEP's of January 21, 2015 and January 15, 2016 by failing to develop annual goals in all areas of need. In those IEP's, District also failed to clarify the delivery model of the specialized academic instruction offered, placed Student in general education despite Student's history of failing his classes and being unable to read or comprehend grade level materials, and failed to offer Student

language and speech or counseling. District significantly impeded Mother's opportunity to participate in the IEP development process by failing to provide her with the Spanish language translations of the January 21, 2015, January 15, 2016 and June 16, 2016 IEP documents. District also failed to provide Mother with an interpreter, or to have all necessary team members, at the IEP team meeting of June 16, 2016.

Student did not establish that District failed to provide Mother with Spanish language translations of parental rights and procedural safeguards, that the June 2016 IEP was required to specify the classes Student would be taking, that District was required to provide Mother with a separate prior written notice of its decision not to assess Student prior to the change of placement offered in the June 2016 IEP, or that District failed to provide Student with all copies of educational records upon request.

This Decision awards Student independent educational evaluations in the areas of psycho education, including academics and social emotional functioning, and language and speech. It also awards Student compensatory speech, specialized academic instruction and mental health services. It requires District to provide Mother with Spanish language translations of all of Student's IEP's and IEP amendments. Lastly, this Decision orders District to provide training to its staff to avoid future procedural violations such as occurred here.

FACTUAL FINDINGS

1. Student was a fourteen-year-old boy and in eighth grade at the time of the hearing. Student has resided with Mother within District's boundaries at all relevant times.

2. Mother enrolled Student in District in February 2013, during Student's fourth grade year. Mother needed assistance from the school receptionist to complete the enrollment forms, as she did not speak or read more than a few words of English.

Spanish is Mother's native and primary language, and is the language she speaks at home with her sons.

3. District designated Student as an early English language learner and placed him in a fourth grade general education class for the spring 2013 semester.

2013-2014 SCHOOL YEAR

4. During the 2013-2014 school years, Student was in fifth grade and placed in a general education classroom. Socially, Student was quiet, cooperative and well-liked. Academically, Student was below grade level standards in language arts, math, social science and science. He met grade level standards in physical education and some electives. Student's effort was consistently graded as unsatisfactory or needing improvement in academic classes. Student's teacher noted on achievement reports that Student struggled to understand fifth grade curriculum, could not keep pace with the lessons, and failed to complete many classroom and homework assignments.

5. Mother was worried about Student's inability to complete homework and his poor grades. She approached his teacher many times to ask for help for her son. Mother's ability to communicate with school staff was limited by her inability to speak English. District implemented a number of general education supports, including intensive reading intervention. As an English language learner, Student also received a lesson each day in English language development.

6. On October 11, 2013, Mother wrote a letter in Spanish requesting that her son be assessed for special education. District arranged for the letter to be translated into English, and maintained both letters in Student's file.

7. On October 25, 2013, District sent Mother an assessment plan in Spanish for assessments of Student's health, academics, cognitive functioning, gross motor skills, social emotional functioning and processing. Mother promptly signed and returned the assessment plan.

8. In December 2013 and January 2014, District conducted a psycho educational assessment of Student. The assessor found that Student had borderline to low average cognition, with verbal-expressive deficits in the areas of vocabulary, comprehension and word-association. Student was cooperative and worked hard during testing, but was easily confused by test directions and required prompting and repetition. In consultation with a District speech pathologist, the assessor determined that Student's comprehension and communication deficits were not due to language delays, so no separate language and speech assessment was conducted. The assessment did not include in-depth attentional or social emotional measures. Attention and concentration were measured by one subtest as low average in a one-on-one testing situation, without distraction or noise. Student's social/emotional/behavioral functioning was not assessed, and the examiner simply reported his observations of Student during the exam, and Mother's report that Student was respectful, polite, and sometimes displayed irritability and inattentive behaviors. Student needed additional time to complete tasks, which the assessor concluded was due to slow processing speed. Student's teacher reported that Student was not making academic progress, despite accommodations, heavily modified work, and targeted reading interventions. The assessor concluded that Student required special education support due to auditory processing deficits.

FEBRUARY 20, 2014 IEP TEAM MEETING

9. On February 20, 2014, District conducted Student's initial IEP team meeting. Mother attended, and an interpreter was provided. District's assessor told the team that Student had borderline to low average cognitive ability with significant processing deficits in conceptualization, association and expression. The team found Student eligible for special education under the category of specific learning disability in the areas of basic reading skills, reading comprehension and math calculation due to an

auditory processing deficit. The IEP team noted that Student was a beginning English language user, and that Spanish was the primary language in Student's home.

10. The IEP offered Student placement in general education, with 45 minutes per day of individual specialized academic instruction within the classroom. Annual goals were developed in the areas of reading comprehension (answer questions from fourth grade text), writing (compose multi-paragraph story without spelling, punctuation or grammar errors), reading fluency (read 100 words aloud with appropriate pacing, intonation and expression), math (multiplication of multiple-digit numbers), and science (identify main idea in fifth grade passage).²

11. Mother was not given a copy of the IEP in Spanish. Mother consented to the IEP because she understood that, if she signed the IEP, her son would get additional help with his education.

2014-2015 SCHOOL YEAR

12. For the 2014-2015 school year, Student was placed in Kellie Dickinson's general education sixth grade classroom. Ms. Dickinson was a credentialed general education teacher with additional certification to teach English language learners. As an English language learner, Student received 30 minutes per day of English language development with math support, in addition to the services in his IEP.

13. Student received 45 minutes of specialized academic instruction daily from resource specialist Meagan Robertson in the resource classroom. Ms. Robertson worked with Student on his goals of English language development and improved math skills.

² The IEP document was dated January 23, 2014. This Decision will refer to the document dated January 23, 2014 as the February 20, 2014 IEP because that is the date of the meeting during which the IEP was developed.

Although Student's February 20, 2014 IEP called for individualized instruction, Ms. Robertson provided services on an individual or small group basis as she determined was needed. Ms. Robertson provided support for Student to work on his goals by modifying Student's math work to his ability level, and having Student practice reading fluency and sight words so that slow and inaccurate reading would have less of an impact on his reading comprehension.

14. Student was reading at a third grade level. Ms. Dickinson tried to motivate Student to read. She had parties at the end of the month for students in her class who excelled at reading assignments, and she let Student attend a few parties as a reward for good effort. Ms. Dickinson found Student to be respectful and kind, and as the year progressed she thought he was participating more. With his then current level of support, Student was not meeting grade level standards in his core academic classes.

15. Mother was concerned that Student was developing low self-esteem as he realized that he could not keep up with his peers. Mother was also worried that Student would be going into middle school, and would be unable to understand the classes and overwhelmed by his inability to do the work. Ms. Dickinson regularly spoke with Mother about Student's lack of progress and homework. Ms. Dickinson did not speak Spanish, and Mother was unable to respond to Ms. Dickinson in more than a few words of English. The conversations were very short. Ms. Robertson similarly had a few short telephone conversations with Mother in English.

January 21, 2015 IEP Team Meeting

16. On January 21, 2015, District held an annual review IEP team meeting.³ Mother attended, and District provided a Spanish language interpreter. The meeting lasted approximately 40 minutes.

17. District gave Mother a copy of parental rights and procedural safeguards (procedural safeguards) at the meeting. The procedural safeguards were prepared by District in a packet of approximately 40 pages, with the cover and first half of the packet in English, and the last half of the packet in Spanish. The packet was revised from year to year to reflect changes in the law on parental rights under the IDEA, but the packet was always in the same English/Spanish format. District witnesses at hearing testified persuasively and convincingly that procedural safeguards were always presented to parents at the beginning of every IEP team meeting.

18. Mother informed the team of her worries, including Student's low self-esteem and her fear that Student would be unable to succeed in seventh grade.

19. The team reviewed Student's present levels of performance. Student was reading at a fourth grade level, and Ms. Robertson saw an increase in Student's confidence when he was able to comprehend what he read. In math, Student was still learning to multiply multi-digit numbers. In writing, Student needed less support, and enjoyed the pre-writing organization and brainstorming exercises. Student had made some progress in English language development (a measure of his proficiency in the English language), and scored in the early intermediate range. Socially, Student's behavior was good, he was well-liked by his peers, and he often appeared happy.

³ The IEP developed at this meeting was incorrectly dated January 23, 2014. This Decision will refer to the IEP developed at the January 21, 2015 meeting as the January 21, 2015 IEP.

20. Student met his annual goals in reading comprehension (fourth grade level), reading fluency and math (multiplication of two digit numbers). Student did not meet his writing goal, and did not meet his science goal because he could not read a fifth grade passage. The IEP team developed three new annual goals in English language development (write paragraphs with effective transitions), math (determine which operation to use to solve a word or mathematical problem), and reading comprehension (compare and contrast stories at his level with similar themes). The English language development goal was intended to address both Student's language development and writing needs. No reading fluency goal was proposed, as reading fluency was addressed in the specialized academic instruction curriculum. Each of the goals was measurable, and the IEP team adopted the proposed goals.

21. The IEP team determined that Student's placement would continue to be in general education, with resource specialist support. District offered the same level of specialized academic instruction, but changed the delivery method from individual instruction to a combination of individual and group instruction. The IEP offer did not indicate the proportion of group to individual services.

22. The IEP team noted that Ms. Dickinson had made a referral to the school guidance counselor to help Student expand his circle of friends. The guidance counselor assisted students with social emotional functioning, and if a student needed regular counseling sessions, the guidance counselor would request an IEP team meeting to discuss adding those services to the student's IEP.

23. The January 21, 2015 IEP document was 20 pages long. District did not provide Mother with a copy of the IEP in Spanish, and the interpreter did not go over the IEP document line by line. Mother signed the January 21, 2015 IEP consenting to implementation because she wanted help for her son.

24. In spring 2015, Student participated in Statewide testing in English language arts and math. Student scored mostly below grade level standards.

2015-2016 SCHOOL YEAR

25. During the 2015-2016 school year, Student was in seventh grade and transitioned to Bellflower High School, which had both middle school and high school programs. In middle school, Student navigated the campus to attend classes in different classrooms with different teachers. At Bellflower High, all specialized academic instruction services were provided in a student's classroom, referred to as a "push-in" (as opposed to "pull-out") model.

26. Resource specialist Lark-Ellen Adams met with Student every day in his math class, which she co-taught. Ms. Adams taught the entire class of approximately 30 students, but gave individual attention to the five to ten special education students on her caseload in the classroom. She also ran the Learning Center during fifth period, and assisted Student there by conferencing with him, going over missing assignments with him, providing him with extra time and a separate space for tests, and sometimes reading his test questions aloud as accommodations. Neither Ms. Adams nor any of Student's teachers assisted Student with his assignment planner.

JANUARY 15, 2016 IEP TEAM MEETING

27. On January 15, 2016, District conducted Student's annual review IEP team meeting. Mother attended, and District provided a Spanish language interpreter. The meeting lasted approximately 45 minutes.

28. Parent expressed concern about her son's worsening grades, and Student's increasing lack of self-esteem.

29. The team reviewed Student's present levels of performance. Student's English language development was still at the early intermediate level. Student was

reading at below grade level, and had difficulty with comprehension. He could write a multi-paragraph story, with errors in tense and run-on paragraphs. In math, he could add and subtract multi-digit numbers with regrouping, but had difficulty with multi-digit multiplication and division. Student was kind and respectful and well-liked by his peers and adults. Student's teachers reported that Student required prompting to get started and continue working in class, and was sometimes distracted and unable to focus. The team identified Student's areas of need as reading comprehension, writing, math, and work habits.

30. Student's general education Science teacher told the team that Student was getting low grades because Student didn't ask for help or participate in class and did not turn in his homework. Ms. Adams reported that all of Student's general education teachers had said the same thing, and that Student needed to self-advocate when he didn't understand something in class. The IEP team members agreed that Student needed to be better about using his student planner to stay on track with class work and homework.

31. The team considered annual goals. Student had not met any of the annual goals in the January 21, 2015 IEP, in English language development, math, or reading comprehension. Student was reading at a fourth grade level, and although he could decode fifth grade words, he did not comprehend fifth grade text. Student struggled when writing to identify where to end one paragraph and start another. Student had difficulty performing both multiplication and division, and was unable to solve word problems. Ms. Adams proposed new goals in the areas of reading comprehension, writing, math and work habits. Because Student would be going into eighth grade, the annual goals were written to eighth grade curriculum standards. For example, the reading goal was that Student would be able to "cite the textual evidence that most strongly supports an analysis of what the text says explicitly as well as references drawn

from the text as measured by oral or written work samples, teacher records, curriculum based assessments, etc.” The math goal was that Student would be able to “graph proportional relationships, interpreting the unit rate as the slope of the graph.” The work habits goal required Student to “independently maintain his/her academic calendar, prioritize tasks, complete assignments and seek staff support as needed by the designated due date.” Each goal included a means of measuring progress and was adopted by the team.

32. The IEP team considered Student’s placement, and determined that the least restrictive environment for Student was general education with resource specialist support and a resource class. The team offered placement in general education, with 45 minutes per day of specialized academic instruction, individual or group as needed, and an additional 58 minutes per day (one period) of group specialized academic instruction in the Learning Center.

33. At the end of the meeting, the notes were read and interpreted aloud. The January 15, 2016 IEP was 21 pages long, and the interpreter did not go over the IEP line by line. District did not provide Mother with a Spanish translation of the IEP. However, District did provide Mother with a Spanish language attendance and signature page for the IEP. Mother consented to the January 15, 2016 IEP.

34. For the remainder of the 2015-2016 school year, even with an additional period of specialized academic instruction, Student continued to receive failing grades. Mother asked several District employees at the school if District could provide tutoring or help for her son with his homework, but nothing happened. Mother looked into private tutoring, but could not afford it. In addition, Mother informed District that Student was acting distracted and depressed.

35. On May 9, 2016, armed with Student’s failing grades, Mother met with school psychologist Lauren Bliss to demand that Student receive a different program.

Ms. Bliss recommended that Student move to a continuation school, which Mother opposed.⁴ Ms. Bliss told Mother that Student needed to be reassessed by a school psychologist to see if he qualified for a special day class, but that so close to the end of the school year, nobody was available to conduct the assessment. Mother requested an IEP team meeting to discuss Student's placement and services. Ms. Bliss did not immediately respond to Mother's request, or schedule an IEP team meeting.

36. Near the end of the 2015-2016 school year, Mother spoke to a school staff member about having District conduct a mental health assessment. Mother was concerned that Student was unfocused, unable to complete his homework and failing his classes. Mother was told that the assessment would not be conducted over the summer, and that Student would get help faster if Mother went to an outside agency. Mother arranged for Student to be assessed at Pathways, a community mental health service provider.

37. On May 26, 2016, Student was assessed by Alex Garcia, a licensed family therapist at Pathways. Mr. Garcia determined that Student required mental health services, and prescribed weekly therapy sessions for Student at the Pathways clinic with mental health therapist Alejandra Alvarez. Ms. Alvarez possessed a bachelor's degree in psychology and a master's degree in counseling psychology, and was working on her mental health therapist license under the supervision of Mr. Garcia. Ms. Alvarez had been a therapist at Pathways for two years by the time of hearing, and was qualified to

⁴ Students may be removed to a continuation school through suspension, expulsion or involuntary transfer if they commit an offense related to school activities or attendance involving physical injury to another, profanity, disruption/defiance, theft, or possession of a controlled substance. (Ed. Code §§ 48432, 48900, et seq., 48912.5) Students may also voluntarily transfer to a continuation school. (Ed. Code. § 48432.5.)

make mental health diagnoses. She provided Student with one-on-one mental health counseling for one hour a week for one year, through April 2017. Her demeanor at hearing was professional, her responses to questions were clear and informative, and she displayed genuine concern for Student. Her opinions regarding Student's mental health status and his need for mental health services were accorded significant weight.

38. Ms. Alvarez found that Student was having a difficult time focusing, and was critical of himself and others, and she initially diagnosed him with depressive disorder. However, after gathering information on Student's history, interactions with family members, and information from his school records, her clinical judgment was that Student was suffering from depression. Student was cooperative and insightful during counseling sessions.

39. After six months of counseling, Student could verbalize his emotional needs to Ms. Alvarez and his mother, and his lack of focus, disorganization and inability to follow through seemed more prevalent. Ms. Alvarez referred Student to a psychiatrist who diagnosed Student with attention deficit disorder-primarily inattentive type(ADD) and prescribed medication to help Student focus. Ms. Alvarez worked with Student on increasing his communication skills, being more assertive about his needs, and tackling tasks and assignments through to completion. Ms. Alvarez was bilingual, and she always conversed with Mother in Spanish. In her opinion, Student had, and continues to have, social emotional needs, particularly low self-esteem impacted by communication deficits that makes it difficult for him to self-advocate in large settings. She recommended that Student continue to receive counseling services. Ms. Alvarez opined that Student did not need both a clinic and school counselor, although she freely admitted that she did not know what school-based counseling services were, or what needs school counselors addressed.

40. In June 2016, Student continued to struggle with reading comprehension. He was making little progress on his writing goal, minimal progress on his math goal and failing his math class. Student's teachers were reporting that Student was having problems with behavior and focus, was goofing around in class, and needed redirection.

41. On June 16, 2016, the last day of the 2015-2016 school year, Ms. Bliss called Mother to respond to Mother's concerns regarding Student's placement. No interpreter was made available for the call. School psychologist and counselor Sarah Biggs was in the room with Ms. Bliss. Ms. Biggs did not participate in the conversation and Mother was not informed that Ms. Biggs was present. Ms. Bliss told Mother that Student could be placed in a "special" class that would give him the supports he needed at the beginning of the next school year. Mother responded that she would like that. There was no discussion about waiving the presence of IEP team members.

42. On June 16, 2016, after the call was completed, Ms. Bliss typed up an amendment to the January 15, 2016 IEP in English, indicating that an IEP team meeting had been held. The amendment stated that Ms. Bliss and the school counselor had contacted Mother by telephone to address Mother's concerns, that an academic assessment was reviewed by the school psychologist, and that the team determined from Student's present levels of performance and standardized academic scores that a special day class would be the least restrictive environment for Student in light of his lack of progress in a general education setting. The proposed amendment offered four periods of special day classes, and physical education and an elective in general education. It did not specify the type of special day class offered. The proposed amendment did not indicate that if Student was placed in a special day class, the current services he was receiving under his IEP would be discontinued, although that is what Ms. Bliss intended. The proposed amendment stated that the "notes were reviewed with all IEP Team members including [Parent] and were agreed to."

43. Ms. Bliss arranged for Ms. Biggs and Ms. Adams to sign the amendment as members of a June 16, 2016 IEP team. Ms. Adams did not have any input into the IEP amendment decisions. Ms. Bliss sent the amendment to Mother. Mother signed the amendment consenting to the change of placement on June 22, 2016.

44. Ms. Bliss and Ms. Biggs gave conflicting testimony about the June 16, 2016 telephone call. Ms. Bliss testified that Ms. Biggs made decisions about how the IEP team would be configured for the call and typed up the amendment. Ms. Biggs recalled that Ms. Bliss handled everything. Ms. Biggs testified at hearing that there was a bilingual secretary in the room at the time of the June 16, 2016 call, and that Mother said no interpretation was needed, but neither Ms. Bliss nor Mother testified that a secretary was on the call, or that Mother was given an opportunity to have an interpreter. Ms. Biggs' statement was inconsistent with Ms. Bliss' testimony that only Ms. Biggs was in the room with her, and that she spoke to Mother in English and thought that Mother understood, and with Mother's testimony that she was not aware of anyone besides Ms. Bliss on the call. Ms. Biggs' responses were tentative, vague and often circular and non-responsive. Ms. Biggs had poor recall, seemed confused by the questions, and often appeared to be guessing or making up information. Ms. Biggs' testimony in general was not credible or persuasive.

45. Mother's recall of the telephone conversation was good, as it was important to her that a District staff member had responded to her repeated requests for a change in Student's educational program. Mother testified that she received a call from Ms. Bliss on the last day of school with no notice, and that Ms. Bliss offered her son a "special" small class with more support. She recalled no discussion of prior assessments, components of a special day class, or a change in services or Students schedule. Mother's testimony was more credible than that of Ms. Bliss or Ms. Biggs.

2016-2017 SCHOOL YEAR

46. Pursuant to the June 16, 2017 amendment to the January 15, 2016 IEP, Student was placed in an eighth grade special day class for the 2016-2017 school year. That program is not a subject of the current due process filing.

47. On August 31, 2016, Student, who was now represented by counsel, requested a copy of his educational records from District. District provided a copy to Student on September 7, 2016.

48. On October 14, 2016, Student filed the current due process hearing request. Soon after, District requested and received Mother's consent to assess Student in the areas of psycho educational functioning, language and speech, behavior and mental health.

49. In January 2017, District bilingual speech pathologist Paola Calle conducted a speech, language and communication evaluation of Student. Ms. Calle had been a licensed speech and language pathologist since 2006, and had worked for many years providing speech therapy in school environments. Ms. Calle had conducted hundreds of language and speech assessments of children with learning disabilities. Ms. Calle did not speak with Mother, and did not review Student's December 2013 psycho educational assessment report. Ms. Calle is bilingual, but she found that Student was more comfortable speaking to her in English than in Spanish. She administered a series of standardized instruments to Student over two days. She found that Student had severe delays in expressive vocabulary, pragmatic judgment, syntax and pragmatic skills, and moderate delays in receptive language, grammar and semantic language skills. Ms. Calle's assessment report found Student eligible for speech services and recommended that Student receive speech therapy.

50. Ms. Calle was very professional in demeanor, and gave detailed and informative responses concerning areas tested and how Student's deficits impacted

Student's interactions at school. She freely admitted weaknesses in her assessment, and the depth and clarity of Ms. Calle's responses made her a powerful and persuasive witness. Her opinions of Student's language skills and educational needs, and her recommendations for compensatory education, were given great weight.

51. Student was social, pleasant and cooperative during language testing. However, his severe delays in expressive vocabulary skills, and his difficulty eliciting meanings from context, impacted his ability to effectively understand and communicate and to interact with his same age peers. Student had particular difficulty with English idioms, for example, "it's raining cats and dogs," which was impacted by his status as an English language learner. Student's difficulties were not because he was an English language learner. It generally takes an English language learner only a couple years to learn a second language and acquire the necessary vocabulary, but Student's language scores were so low that Ms. Calle opined that his difficulties with the use of language would have shown up one or two years earlier if assessed. She also opined that speech therapy would have helped Student with reading comprehension and writing by exposing him to vocabulary at his reading level, which a speech therapist could have taught him to use and understand in context. She explained that students must be familiar with vocabulary and sentence structure to elicit the information necessary to respond to complex questions from text. Ms. Calle opined that Student was so far behind in language skills that he now required two to three hours per week of speech therapy to address those delays. She recommended pull-out speech therapy for Student of two hours per week in a small group and 30 minutes per week on a one-on-one basis. She also recommended compensatory speech therapy of one hour per week.

52. In February 2017, District psychologist Cynthia Johnson-Romain conducted a bilingual psycho educational assessment of Student. Student had average cognitive ability, but at age 14, his language proficiency was comparable to an eight-

year-old. In academics, Student's reading skills were at the third grade level, and his comprehension was at the second grade level. Math skills were in the fourth to fifth grade range. Student had poor attention, and below average planning skills. Teacher reports of Student's behavior indicated that he acted typically for his age, with the exception that he was quiet and reluctant to speak or join group activities in the classroom. Ms. Johnson-Romain concluded that Student qualified for special education as a student with a specific learning disability as a severe discrepancy existed between Student's overall level of cognitive ability and his level of achievement in the areas of reading skills, reading comprehension and math calculation.

53. On February 14, 2017, District held an IEP team meeting, attended by Mother, a Spanish language interpreter, and District team members, to review the assessments. District speech pathologist Kayla Solomon attended and presented Ms. Calle's report. Ms. Solomon told the team that Student had severe deficits in expressive vocabulary and pragmatic skills, and moderate delays in receptive language, grammatical skills and semantic language. She proposed goals in reading and retelling stories using visual clues and note taking strategies, forming opinions after reading articles on current events, and answering WH questions on reading a story passage. She recommended that Student receive 30 minutes per week of individualized speech services to address his speech goals, and that she consult with Student's teachers two times per month for a total of 60 minutes to address any issues they saw in the classroom.

54. Ms. Solomon received her certificate of clinical competency in in 2014, and had worked for District through a nonpublic agency since February 2017. Prior to the February 14, 2017 IEP team meeting, Ms. Solomon did not review any information regarding Student except Ms. Calle's report. Ms. Solomon provided some sessions of speech therapy to Student after February 2017, but generally supervised a speech

language pathologist assistant who worked with Student and did not seem particularly familiar with Student or his language needs. At hearing, Ms. Solomon explained that she did not recommend a pragmatics goal, or small group sessions, because Student didn't appear to need assistance in the area of pragmatics. This testimony was indirect contradiction with Ms. Calle's assessment that Student had significant pragmatic skills deficits, and with substantial evidence that Student had expressive language delays that manifested in a reluctance to join his peers in classroom activities. Ms. Solomon had significantly less experience than Ms. Calle, and her opinions were accorded less weight than those of Ms. Calle.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;⁶ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*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. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.*, __ U.S. __; 137 S.Ct. 988 (March 22, 2017) (*Endrew*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of

instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Andrew*, 137 S.Ct. at p. 1001.)

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

5. A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams v. State of*

Oregon (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).

ISSUE 1: ASSESSMENT IN ALL AREAS OF SUSPECTED DISABILITY

6. Student contends that no later than January 2015, District was on notice that Student had social emotional needs that required reassessment of social emotional functioning. Student further contends that by January 2016, District was aware that Student was not making meaningful academic progress and that a psycho educational reassessment should have included an academic component. Student contends that an assessment of Student's language and speech was warranted at all times. District contends that there was no reason to reassess Student prior to his triennial in January 2017.

7. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.)

8. The IDEA provides for reevaluations (referred to as reassessments in California law) to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

9. Without updated information from a reevaluation, it may be difficult to develop an educational program that would ensure a student's continued receipt of a FAPE. (*Cloverdale Unified School Dist.* (March 21, 2012) Cal. Off. Admin. Hrngs. Case No. 2012010507, 58 IDELR 295, 112 LRP 17304.) A substantial change in the student's academic performance or disabling condition is an example of conditions that warrant a reevaluation. (*Corona-Norco Unified School Dist.* (SEHO 1995) 22 IDELR 469, 22 LRP 3205.)

10. A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006), 464 F.3d 1025, 1031-1033 (*Park*)). In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

11. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on Parents' opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. (*Shapiro v. Paradise Valley Unified School Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078; see also *Amanda J. v. Clark County School Dist.*, (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*)). A procedural error results in the denial of educational opportunity where, absent the error, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." (*M.L. v. Federal Way School Dist.* (9th Cir. 2003) 394 F.3d 634, 657 (*M.L.*)). Thus, an IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error. (*Ibid.*)

12. The weight of the evidence established that teacher reports of Student's inability to focus and distractibility, Mother's reports of Student's decreasing self-esteem, and Ms. Dickinson's referral to the school counselor warranted a psycho educational reassessment of Student by January 21, 2015. A language and speech assessment of Student was warranted from the time of the December 2013 psycho educational assessment, when severe expressive language delays were indicted on standardized measures.

13. During the 2014-2015 school year, Ms. Dickinson and Ms. Robertson contacted Mother multiple times to discuss Student's lack of progress and inability to complete class work and homework. Although Student made some progress in reading comprehension and math calculation by his sixth grade IEP team meeting in January 2015, he remained several grade levels behind in reading comprehension, and failed to meet his annual goals in writing and science. Mother relayed concerns about Student's decreasing self-esteem, and although Student often appeared happy, Ms. Dickinson had made a referral to the school counselor to assist Student in socializing with his peers. On this information, District should have determined that Student's educational or related service needs, including improved academic achievement and social emotional functioning, warranted a psycho educational reassessment with academic and social emotional components.

14. District staff believed that Student could make educational progress in the general education curriculum, and if so, should have reassessed Student to determine why the services in place had not enabled Student to do so. Small successes such as Ms. Dickinson's ability to motivate Student to read did not make up for Student's complete failure to meet grade level standards. Student was exhibiting increasing distractibility, inability to follow through on work and low self-esteem, which warranted reassessment of Student's social emotional functioning, including his ability to maintain attention to

task, which is part of a comprehensive psycho educational assessment. Had District conducted a psycho educational reassessment with a social emotional functioning component, District staff might have been timely alerted to Student's attention deficit and low self-esteem, and put in place strategies to address both.

15. By the January 2016 IEP team meeting, Student had been failing grade level standards for two years, was three grade levels behind in reading, and could not comprehend seventh grade materials. Mother expressed concerns about Student's worsening grades, low self-esteem and depression, and Student's teachers reported that Student was distracted and did not participate in class or complete his class work or homework. Student's educational program was not meeting his needs, and information available to the January 2016 IEP team indicated that Student had suspected needs in the areas of social emotional functioning and attention. A psycho educational reassessment was warranted at that time, particularly as the District's psycho educational assessment was two years old, and lacked significant social emotional or attentional testing.

16. As to language and speech, Student should have been assessed in this area when the initial psycho educational assessment was completed in December 2013 and severe expressive vocabulary delay was indicated. Ms. Calle testified persuasively and convincingly that it was unprofessional and inappropriate for District's psychologist to decide that an assessment of Student's language abilities was not necessary, even in consultation with a speech pathologist. Student's language delay impacted academic areas such as reading comprehension and solving word problems. Language delay also impacted Student's social communication, and manifested as an inability to engage in social communication with his peers, and a reluctance to speak out loud in class or join in classroom activities, and an inability to self-advocate. By the time of the IEP team meeting on January 21, 2015, signs of Student's unaddressed language needs were

apparent in teacher comments and Ms. Dickinson's referral of Student to the school counselor, further warranting a language and speech assessment.

17. District's failure to assess Student in the area of language and speech, and to reassess Student in the area of psycho education, including social emotional functioning, constituted a procedural violation of the IDEA. The evidence established that Student had ADD and language delays that would likely have been discovered and addressed in his educational program had District conducted reassessments in all areas of suspected disability in the two years before Student filed his complaint. There is a strong likelihood that alternative educational possibilities for Student would have been better considered had appropriate assessments been completed. Without updated information from a reevaluation, District could not develop an educational program that was reasonably calculated to provide Student a FAPE. Accordingly, District's failure to assess Student in all areas of suspected disability impeded Student's right to a FAPE and caused deprivation of educational benefits.

18. Student met his burden of proving by a preponderance of the evidence that District denied him a FAPE by January 2015, by failing to reassess Student in the areas of psycho education, including academic and social emotional functioning components, and language and speech.

ISSUES 2(A), 2(B), AND 3(A): SPANISH LANGUAGE INTERPRETATION AND TRANSLATION

19. Student contends that he was denied a FAPE because District failed to provide Mother with Spanish translations of her procedural safeguards. Student also contends that he was denied a FAPE because District did not give Mother Spanish language translations of the IEP documents, and failed to have an interpreter during the June 2016 teleconference. District responds that it provided Mother with Spanish copies of the procedural safeguards, and that no harm would have occurred if it did not, as

Mother knew she could request assessments because she did so in October 2013. It also contends that Mother knew she could have asked for Spanish translations of the IEP documents, but failed to do so.

20. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J., supra*, 267 F.3d 877 at p. 882.)

21. A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

22. Local educational agencies "shall take any action necessary to ensure that the parent or guardian understands the proceedings at [an IEP team] meeting, including arranging for an interpreter for parents or guardians . . . whose native language is other than English." (Ed. Code, § 56341.5, subd. (i); see also 34 C.F.R. § 300.322(e).) This enables parents to understand their child's needs so that they can give informed consent for their child's IEP. "Consent," as defined in Section 300.9 subpart (a) of title 34 of the Code

of Federal Regulations, means the parent has been fully informed, in parent's native language, of all information relevant to the activity for which consent is sought.

23. “[T]he informed involvement of parents” is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994] (*Winkelman*)). Protection of parental participation is “[a]mong the most important procedural safeguards” in the IDEA. (*Amanda J., supra*, 267 F.3d at p. 882.)

24. The IDEA, and the Code of Federal Regulations interpreting the IDEA, do not require that a school district translate assessments, assessment plans, or IEP documents from English to a parent’s native language. Federal and state education law only require that school districts take any action necessary to ensure that the parent or guardian understands the IEP team meeting proceedings, including arranging for an interpreter if necessary. (34 C.F.R. §§ 300.9, 300.322(e); Ed. Code, § 56341.5, subd. (i).) The Office of Special Education Programs of the United States Department of Education has stated that the IDEA and corresponding Code of Regulations do not require translations of IEP documents, although providing such translations may help demonstrate in some circumstances that non-English speaking parents have been fully informed of the services the IEP offers. (*Letter to Boswell* (OSEP 2007) 49 IDELR 196; *City of Chicago School District 299* (Ill State Educational Agency 2010) 110 LRP 36565; *In re: Student with a Disability* (NM State Educational Agency 2011) 111 LRP 39015.)

25. Mother was given a copy of her procedural safeguards, which included Spanish translations, at the IEP team meetings of January 21, 2015 and January 15, 2016. Both contemporaneously prepared IEP documents state that Mother was handed a copy of the procedural safeguards, and District witnesses testified convincingly that parents were always given the procedural safeguards packet at the beginning of an IEP team meeting, which packet included a Spanish language translation. Mother testified that she did not recall receiving a Spanish language copy of her rights, but considering the

format of the packet, with English language in the front and Spanish language at the back, it is possible (if not likely) that she did not realize that she had been given a Spanish translation of the procedural safeguards.

26. District did not provide an interpreter for the June 16, 2016 IEP team meeting. Ms. Biggs' testimony that there was a Spanish interpreter available for the June 16, 2016 telephone call and that Mother waived an interpreter, was not credible. Such a waiver, if it occurred, should have been documented on the IEP, and it was not. Mother testified that she understood that her son was being offered a "special" class, but did not understand the specifics of the proposal or that any of the other procedural matters documented in the IEP had occurred. Without interpretation in her native language, Mother could not have been fully informed of all the information relevant to the proposed change in Student's placement. The lack of an interpreter at this IEP team meeting significantly impeded the Mother's opportunity to participate in the decision making process regarding the provision of a FAPE to Student.

27. It was undisputed that District did not provide Mother with Spanish language copies of the January 21, 2015, January 15, 2016 and June 16, 2016 IEP's. The interpreters at the January 2015 and January 2016 IEP meetings did not go over the IEP developed at those meetings line by line, and in light of the 40 minute meeting length, did not have sufficient time to do so. An IEP contains information that is critically important to parents and, if in the parent's primary language, gives them an understandable document that allows parents the opportunity to review and consider the IEP team recommendations. (*Victor Valley (CA) Union High School District* (W.D.Cal Office of Civil Rights, Oct. 31, 2007) at p. 5.) Without understandable IEP documents, Mother could not have been fully informed of all the information considered by the respective IEP teams in developing the educational program for her child.

28. It was District's obligation to take the action necessary to ensure that Mother understood the proceedings of the IEP team meetings, and it took a first step by providing a Spanish language interpreter at two of them. However, due to the very short length of the meetings, the interpreters did not, and could not, translate the entire IEP's for Mother. IEP's are filled with technical terms, and team members can be imprecise in describing or summarizing information such as present levels of performance, goals, placement options, accommodations, and the type, frequency, duration and delivery model of services. District was aware that Mother was a Spanish language speaker with very limited ability to understand or read English: Mother needed District staff to help her complete English language enrollment forms; Mother told District that she spoke Spanish in the home; Mother had difficulty communicating with District staff in English; Mother made the initial written request for evaluation in Spanish; and District used Spanish language documents to communicate with Mother regarding assessments and to schedule IEP team meetings and secure proof of her attendance. The provision of an interpreter at a brief meeting and an English language copy the IEP did not provide Mother with all of the information necessary to understand and fully participate in the development of her son's IEP's. On these facts, Mother's consent to the IEP's was not, and could not reasonably have been interpreted to have been, informed.

29. The United States Supreme Court in *Rowley* and *Winkelman*, and the Ninth Circuit in *Amanda J.*, have stressed the importance of informed participation of the parents in the IEP process.

30. Here, where it was known that Mother spoke and wrote in Spanish, and spoke little in English, District was required to provide Mother with Spanish language translations of the January 2015, January 2016 and June 2016 IEP's to ensure that Mother could understand her child's needs and give informed consent to the District's proposed educational programs. District's failure to provide her with those IEP's in

Spanish significantly impeded Mother's opportunity to participate in the decision making process regarding the provision of a FAPE to Student. Mother's uninformed consent to implementation of the IEP's does not absolve District of its obligation to obtain informed consent.

31. District argues that Mother knew she could ask for translations of the IEP's if she wanted them, but Mother credibly testified that she did not know she could request translated copies of those documents. District produced no evidence that Mother was ever made aware that District would honor such a request. The IEP documents used by District in 2015 and 2016 did not inform parents (in English or otherwise) that they could request and receive a translated copy of the IEP. The procedural safeguards packet used by District stated that a copy of the procedural safeguards could be obtained in the parent's primary or native language, but it did not indicate that a translated copy of an IEP could be obtained. More importantly, a requirement that translated IEP's will only be provided on parent request shifts the burden of ensuring informed understanding of the IEP offer to the parent, which is contrary to statute, and this Decision declines to impose such a requirement.

32. Student met his burden of proving by a preponderance of the evidence that he was denied a FAPE by District's failure to provide Mother with copies of the January 21, 2015, January 15, 2016 and June 16, 2016 IEP documents, or to provide Mother with an interpreter at the June 16, 2016 IEP team meeting. Student did not prove that District failed to give Mother a Spanish language translation of the procedural safeguards, however, the District failures that were proven significantly impeded Mother's opportunity to participate in the decision making process regarding the provision of a FAPE to Student.

ISSUES 2(C): GOALS

33. Student contends that District failed to develop appropriate annual goals for Student at the January 2015 and January 2016 IEP team meetings because Student needed additional goals in the areas of academics, language and speech and social emotional functioning. District contends that the goals written were appropriate.

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

35. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

36. In addition, the IEP must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the

annual goals are being achieved,” and a statement of how the student’s progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).) An examination of an IEP’s goals is central to the determination of whether a student has received a FAPE. In *Adams*, the court stated: “[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit.” (*Adams, supra*, 195 F.3d at p. 1149.)

37. The goals in the January 21, 2015 IEP were not designed to meet Student’s needs resulting from his disability, or his educational needs. As discussed at Issue 1, District failed prior to each IEP team meeting to reassess Student in all areas of suspected disability, depriving his IEP teams of the information necessary to identify all of Student’s educational needs and develop goals to address those needs.

38. By January 21, 2015, District was on notice from the December 2013 psycho educational assessment that Student had verbal-expressive deficits that impacted his vocabulary, comprehension and word association. Ms. Dickinson was aware that Student was several grade levels behind in reading fluency and reading comprehension, and she had made a referral to the guidance counselor to help Student expand his school-based friendships. Ms. Robertson was modifying Student’s work several grade levels and Student continued to get poor and failing grades. Student was unable to complete classroom assignments or homework. Yet the three proposed academic goals in English language development (writing paragraphs with effective transitions), math (determine correct operation to solve a problem) and reading comprehension (compare and contrast stories) did not target Student’s underlying expressive language delays, vocabulary deficits, poor reading fluency, difficulties with attention to task and work completion, or social emotional needs. Even if the IEP team could not have known that Student had language delays in reliance on the

psychologist's opinion in the December 2013 psycho educational assessment, goals to address Student's needs in vocabulary, fluency, social emotional functioning and attention/organization were necessary to address Student's educational needs in January 2015.

39. Ms. Robertson testified that no fluency goal was written in January 2015 because fluency was addressed as part of the resource support program. However, if such a concept was taken to its logical conclusion, school districts would not be required to draft any goals where the team believed that a placement or service satisfactorily addressed the needs of the student. That is not what the IDEA envisions. Rather, an IEP team is charged with identifying Student's needs and writing goals for the purposes of determining the special education and related services reasonably calculated to support Student to meet those goals and to measure Student's progress on those goals. Without adopting a reading fluency goal, District did not and could not measure if Student made progress in this area of need, or appropriately determine if additional services were needed for Student to achieve that goal.

40. By the January 2015, IEP District was also on notice of Student's declining self-esteem and Ms. Dickinson had referred Student to the school counselor due to socialization deficits. A goal in the area of social emotional functioning was necessary to address Student's increasing awareness that he could not keep up with his peers academically and resultant poor self-image, which impacted Student's ability to self-advocate, participate in classroom activities, and socialize outside the classroom.

41. District did not include annual goals in the January 15, 2016 IEP designed to meet all of Student's needs that resulted from his disability to enable him to be involved in and make progress in the general curriculum, or to meet his other educational needs. By the January 15, 2016 IEP team meeting, Student had scored below grade level standards on Statewide testing, was failing his classes for a second year, and

had not met any of the annual goals from his January 21, 2015 IEP. Student was distracted and unable to focus in class, and Student's middle school teachers were reporting that Student didn't participate in class, turn in homework, or advocate for himself when he needed help. Mother informed the IEP team that Student's self-esteem was adversely impacted by his increasing awareness that he could not keep up with his peers, and Student was depressed. Student's English language development had stalled. On this information, the IEP team should reasonably have determined that Student had needs in expressive language and social emotional functioning, and at a minimum added language, self-advocacy, and social emotional goals. Goals in reading comprehension, writing, math, and work habits did not address all of Student's needs. The academic goals written were also based on eighth grade standards, and it was not reasonable for the IEP team to expect Student to achieve those goals within a 12-month period or to make progress in the eighth grade curriculum when Student was reading at a fourth grade level and could not comprehend fifth grade materials. This lack of annual goals in all of Student's areas of need continued to be unaddressed by the IEP amendment of June 16, 2016.

42. As discussed at Issue 2(f), District's failure to write appropriate and sufficient goals to address Student's educational needs resulted in an incomplete and inappropriate offer of special education and services and caused a deprivation of educational benefit.

43. Student met his burden of proving by a preponderance of the evidence that Student was denied a FAPE by District's failure to develop additional appropriate academic, language and speech and social emotional functioning goals in the IEP's of January 21, 2015 and January 15, 2016.

ISSUES 2(D) AND 3(C): CLARITY OF WRITTEN OFFER

44. Student contends that the January 21, 2015 and January 15, 2016 IEP's denied him a FAPE because the offers were unclear, particularly as to how the weekly specialized academic instruction would be allocated between individualized and group instruction. He contends that the June 16, 2016 offer was unclear because it did not state the type of special day class that was offered, or specify which four periods per day Student would be in special education. District contends that its offers were clear.

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

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.

(*Union*, *supra*, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D. Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

46. A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the

IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (See *Union*, *supra*, 15 F.3d at p. 1526.)

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

48. The IEP offers of January 21, 2015 and January 15, 2016 were insufficiently clear and specific to permit Mother to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing.

49. The January 21, 2015 IEP offered Student placement in general education with 45 minutes per day of specialized academic instruction. However, the instructional service minutes were designated as *both* individual and group, without any indication of how the services would be allocated between delivery models. This ambiguity falls short

of the IDEA requirement that an IEP detail, among other things, the special education and related services to be provided to the student.

50. Identification of the delivery model for Student's specialized academic instruction services was particularly important, as Student was performing poorly and well below grade level with the ad hoc mix of individual and group services he received for the first half of the 2014-2015 school year. Although a clear offer will not prevent implementation errors such as that by Ms. Robertson, who provided specialized academic instruction in whatever setting she chose despite the February 20, 2014 IEP specification of individual services, it does allow such errors to be identified and corrected.

51. The January 15, 2016 IEP offer of specialized academic instruction failed to meet the specificity standards of the IDEA. Student was placed in general education with 45 minutes per day of specialized academic instruction to be delivered as *both* individual and group services, without specification of the amount offered for each type of service. Student was also offered an additional 58 minutes per day of group specialized academic instruction, but the lack of specificity would allow a resource specialist to deliver all 103 minutes of specialized academic instruction in a group setting, depriving Student of any individual instruction in support of his general education placement. With such ambiguity, Mother could not have known what services were being offered her son. In addition, Ms. Adams testified that she sometimes gave students on her caseload "individual" specialized academic instruction while simultaneously co-teaching a general education class of 30 students, with 5-10 special education students in that class and on her caseload. If District was counting co-teaching minutes as individual instruction minutes it becomes even more unclear if, or how many, minutes of individual specialized academic instruction were offered by the January 15, 2016 IEP.

52. The June 16, 2016 IEP specified that Student would take four of six class periods in special education, with a general education elective and physical education. It did not designate the type of special day class offered to Student, or the classes he would take each semester. School districts routinely provide multiple types of special day classes to support their students with disabilities, such as special day classes offering emotional support, or specifically assisting students on the autism spectrum, or non-categorical classes for students with mild to moderate or moderate to severe disabilities. Ms. Bliss testified that Bellflower High had only one type of special day class, for students with mild to moderate disabilities. However, per *Union*, the IDEA requires a clear record of what placement was offered, and what additional educational assistance was offered to supplement that placement. The June 16, 2016 IEP is not sufficiently clear to inform the reader of the type of special education class offered.

53. Student contends that, in addition to lack of specificity regarding the type of special day classroom offered, the June 16, 2016 IEP was unclear because it did not list the subject matter of the classes that Student would attend while in special education. However, the IEP specifies that Student would be placed in special day classes except for an elective and physical education, clearly indicating that special education placement was for the core curriculum.

54. District failed to make a clear offer of the services offered to support Student in a general education placement in the IEP's of January 21, 2015 and January 15, 2016. It also failed to make a clear offer of the type of special day class offered in the June 16, 2016 IEP amendment. These failures constituted procedural violations of the IDEA. Even if District had provided Mother with a Spanish language translation of the IEP, the lack of a clear, coherent offer that Mother reasonably could evaluate and decide whether to accept or dispute significantly impeded Mother's opportunity to participate

in the decision making process regarding a provision of FAPE to Student, resulting in a substantive denial of FAPE.

55. Student met his burden of proving by a preponderance of the evidence that District denied him a FAPE by failing to make a clear offer of services to support his placement in the January 21, 2015, January 15, 2016, and June 16, 2016 IEP's.

ISSUE 2(E) AND 2(F): APPROPRIATENESS OF PLACEMENT AND SERVICES

56. Student contends that the placement and services offered in the January 21, 2015 and January 15, 2016 IEP's were substantively inappropriate. Specifically, Student argues that he required placement in a special day class, or additional individual specialized academic instruction minutes in support of a general education placement. He also argues that he needed language and speech services at all times, and weekly counseling services by no later than January 2016. District contends that the services offered were appropriate.

57. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U. S.C. § 1401(9).)

58. Applying the *Rowley* standard, the weight of the evidence established that the January 21, 2015 and January 15, 2016 IEP's were not designed to meet Student's unique needs and were not reasonably calculated to provide Student with educational benefit.

59. In determining the educational placement of a child with a disability a school district must ensure a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the

general education curriculum. (34 C.F.R. § 300.116.) To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and that (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).)

60. In this case, given the nature and severity of Student's needs, Student was not, and could not have been satisfactorily educated in a general education environment by complying with the January 2015 or January 2016 IEP's. Student had severe verbal expressive delays, compounded by his status as an English language learner, and was multiple grades below grade level in all academic subjects. Student was making minimal progress on several goals by January 21, 2015, but did not meet other goals and was unable to keep up with his grade level peers. The 45 minutes per day of push-in individual resource specialist minutes had been inadequate for Student to access grade level curriculum, and the IEP team proposed to reduce individual instruction for a combination of individual and group services. With a reduction in intensity of services, Student could not reasonably be expected to receive educational benefit in general education classes taught at the sixth grade level when he was reading at the third or fourth grade level.

61. Student's situation was worse by the time of the January 15, 2016 IEP, when he was in middle school and falling further behind his peers, failing his classes, and not making meaningful progress on any of his goals. The change from individual specialized academic instruction to group instruction, which was how Ms. Robertson implemented the January 2015 IEP, had resulted in worse outcomes for Student, which in turn had increased Student's distracted behaviors and low self-esteem. The proposed

increase in group specialized academic instruction in the Learning Center did not address Student's severe language delays, increasing distractibility, reluctance to participate in group activities or low self-esteem. Per *Andrew*, the *Rowley* standard envisions that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. Neither the January 21, 2015, nor the January 15, 2016, IEP's were reasonably calculated to permit Student to advance through the general education curriculum.

62. Although Student could arguably have received non-academic benefit in a regular classroom from exposure to language modeling by typical peers, the evidence established that Student was suffering from low self-esteem, having difficulty staying on task, reluctant to participate in class activities, and had communication deficits that had not improved through casual modeling. Student exhibited increased distractibility as performance expectations rose above his academic skill levels, and by January 15, 2016, Student's teachers were reporting that Student was a distraction, which adversely impacted Student's teacher and classmates. Student's inability to focus was due in part to depression, diagnosed in May 2016 by Ms. Alvarez, and in part to ADD, diagnosed by a psychiatrist in January 2017. Student's depression also manifested as Student being critical of himself and others, making it unlikely that Student would have benefitted socially from placement in a general education setting with peers performing several grade levels above Student's abilities.

63. The level of support offered to Student in general education was clearly inadequate to enable him to advance through the general education curriculum. The January 21, 2015 IEP failed to increase the February 2014 IEP level of services despite Student's poor educational performance, and in fact lessened Student's support by changing the delivery model of the services from intensive individual services to a

combination of individual services and delivery in a group setting. Specialized academic instruction alone had been inadequate support for Student to access the general education curriculum under the January 2015 IEP, and the addition of further group minutes in the January 15, 2016 IEP could not be reasonably expected to, and did not, enable Student to make progress on his goals or access grade level curriculum. Unfortunately, Student's lack of progress was increasingly blamed upon Student's inability to focus, complete his homework or organize his planner, all manifestations of his unidentified disabilities, including ADD inattentive type and depression. Neither the January 21, 2015 nor the January 15, 2016 IEP was reasonably calculated to enable Student to make progress appropriate in light of his circumstances.

64. As discussed at Issue 2(c), Student had needs in the area of language and speech in January 2015 and January 2016. Student had verbal-expressive deficits that impacted not only his vocabulary and comprehension, but his ability to self-advocate in large settings like a general education classroom. Goals and services in language and speech were necessary to address Student's language deficits, and to enable him to ask for help and participate in group activities. Language and speech services were necessary to meet Student's unique needs and allow him to advance through the general education and receive educational benefit at the time of the January 21, 2015 and January 15, 2016 IEP's.

65. As also discussed at Issue 2(c), Student had needs in the area of social emotional functioning. In January 2015, Student was experiencing low self-esteem. Student was increasingly aware of his inability to keep up with his peers academically, was unable to self-advocate or participate in group activities, and Ms. Dickinson had referred him to the school counselor for help in socialization. By January 2016, Student was distracted and unable to focus in class. Student didn't ask for help when he needed it, didn't participate in class, and displayed distractibility and lack of focus that were

subsequently identified as symptoms of depression. School-based counseling would have addressed Student's ongoing social emotional needs, and given him the support needed to self-advocate and socialize with his same-aged peers in the classroom and in large settings. At the times of the January 21, 2015 and January 16, 2016 IEP team meetings, school-based counseling services were necessary to meet Student's unique needs and allow him to advance through the general education and receive educational benefit.

66. Student met his burden of proving by a preponderance of the evidence that District denied him a FAPE in the January 21, 2015 and January 15, 2016 IEP's by failing to offer him appropriate an placement, and by failing to offer him appropriate services, including language and speech services and school-based counseling.

ISSUE 3(B): NECESSARY IEP TEAM MEMBERS

67. Student contends that District did not ensure that all necessary members of the IEP team were present at the IEP team meeting of June 16, 2016. District contends that the change in Student's placement was made on June 16, 2016 without an IEP team meeting by agreement of Mother and District.

68. Each meeting to develop, review or revise the IEP of an individual with exceptional needs must be conducted by an IEP team. (Ed. Code, § 56341, subd. (a).) The IEP team must include: one or both of the parents or a representative chosen by the parents; not less than one regular education teacher if the pupil is, or may be, participating in the regular education environment; not less than one special education teacher, or where appropriate, one special education provider to the student; a representative of the school district who is (a) qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of the student, (b) knowledgeable about the general education curriculum, and (c) knowledgeable about the availability of school district resources; an individual who can interpret the

instructional implications of assessment results; at the discretion of the parent, guardian or school district, other individuals with knowledge or special expertise regarding the student; and, if appropriate, the student. (20 U.S.C., § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

69. The Ninth Circuit has held that “the plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that at least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary.” (*M.L.*, *supra*, 394 F.3d at p. 643.) The failure to include a regular education teacher on the IEP team deprives the team of “important expertise regarding the general curriculum and the general education environment.” (*M.L.*, *supra*, 394 F.3d at p. 646; *see also*, *W.G. v. Bd. of Trustees of Target School Dist. No. 2* (9th Cir. 1992) 960 F.2d 1479, 1485.) Without a general education teacher, a reviewing court has no means to determine whether an IEP team would have developed a different program after considering the views of a regular education teacher, and a failure to include at least one general education teacher is a structural defect in the constitution of the IEP team. (*M.L.*, *supra*, 394 F.3d at p. 646.)

70. A member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parents and school district agree that the attendance of such a member is not necessary because the member’s area of the curriculum or related services is not being modified or discussed in the meeting. (20 U.S.C. § 1414(d)(1)(C)(i).) A member of the IEP team may be excused from attending an IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member’s area of the curriculum or related service if (i) the parent and the school district consent to the excusal, (ii) the member submits written input to the team prior to the meeting for development of the IEP, and (iii) the consent is in writing. (20 U.S.C. § 1414(d)(1)(C)(ii) and (iii).) These procedures are slightly different. An “agreement” to

excuse a team member refers to an understanding between the parent and the district. (71 Fed. Reg. 46,673 (Aug. 14, 2006).) The requirements for “consent” are more stringent, requiring the school district to fully inform the parent of all information relevant to the team member’s excusal, in the parent’s native language or other mode of communication, and to ensure that the parent’s understanding that the granting of consent to the team member’s absence is voluntary and can be revoked at any time. (71 Fed. Reg. 46,674 (Aug. 14, 2006).)

71. After a student’s annual IEP development has taken place, the parent of a student with a disability and the school district may agree to make changes to the student’s IEP without holding an IEP team meeting. (34 C.F.R. § 300.324(a)(4)(i).) Changes to an IEP may be made either by the entire IEP team at an IEP team meeting, or as by an agreement between a parent and the school district, by amending the IEP rather than redrafting the entire IEP. (34 C.F.R. § 300.324 (a)(6).)

72. The June 16, 2016 IEP document purported to document an IEP team meeting, telephonic or otherwise. It stated that the “purpose of the meeting” was a change in placement, that the team reviewed a recent assessment, and that the team determined that the least restrictive environment for Student was a special day class. It stated that the “IEP team” reviewed and agreed to the notes of the meeting. Ms. Bliss arranged for Ms. Biggs to be present on the telephone call with Mother, and had Ms. Adams, sign as a participant in the meeting. District developed an IEP amendment with the indicia of an IEP team meeting and with IEP team members present, and cannot subsequently contend that the June 16, 2016 amendment IEP was not an IEP team meeting as described for purposes of avoiding compliance with IEP team meeting requirements.

73. The June 16, 2016 IEP amendment did not document an agreement reached between Parent and District, because Parent only spoke and understood

Spanish, and Ms. Bliss conducted the telephone conversation with Parent in English without an interpreter. District could not have obtained Mother's informed consent to the IEP amendment because, as discussed at Issue 2(b), Mother could not read English and District did not provide Mother with a Spanish language translation of the IEP amendment document. Mother testified convincingly at hearing that she did not understand everything Ms. Bliss said, and that Ms. Bliss did not go over the information documented in the IEP amendment, which was interpreted for Mother at the hearing.

74. If the June 16, 2016 IEP amendment does not document an agreement between Mother and District, then it must comply with the requirements of an IEP team meeting, as those are the only procedures in the regulations implementing the IDEA for changing a disabled child's program. District did not have all necessary members of an IEP team present on the June 16, 2016 telephone call. A general education teacher is a mandatory member of every IEP team meeting in which a Student may be participating in general education, and the June 16, 2016 meeting was both (i) about whether Student was properly placed in general education and (ii) proposed placement in general education for two periods of Student's school day. However, neither Ms. Bliss nor Ms. Biggs was a general education teacher. District's failure to include a general education teacher on the IEP team deprived the team of important expertise regarding the general curriculum and the general education environment, and whether Student could succeed in general education with additional services.

75. The meeting also lacked a special education teacher, although a special education teacher was a required member of the team because a change of placement into special education was the purpose of the meeting. Ms. Bliss was a school counselor, and Ms. Biggs was a school psychologist, and neither was a credentialed special education teacher. Ms. Bliss and Ms. Biggs did not testify convincingly that they were familiar with the proposed special day class program or could have answered Mother's

questions regarding the program, even had an interpreter been available. Ms. Adams was a special education teacher, but she did not participate in the call.

76. Mother did not agree or consent to the absence of a general education and special education teacher. Neither Ms. Bliss nor Ms. Biggs spoke Spanish and could have obtained Mother's agreement to excuse these important team members. They could not have fully informed Mother of all information relevant to the team members' excusal in Spanish to ensure that Mother understood that the granting of consent to the team member's absence was voluntary and could be revoked at any time.

77. The absence of either the regular education teacher or the special education teacher at an IEP team meeting, particularly one with the purpose of discussing a change in placement, is a significant procedural violation. Without the presence of both of these critical IEP team members and their valuable input regarding Student's performance in the classroom, Student's academic and functional levels, whether Student could continue in general education with additional supports, and information about the special education classrooms, Mother could not meaningfully participate in the IEP development process. Accordingly, District's failure to ensure that a general education teacher and a special education teacher were present during the telephonic meeting on June 16, 2016 significantly impeded Mother's opportunity to participate in the decision making process regarding the provision of a FAPE to Student.

78. Student met his burden of proving by a preponderance of the evidence that District denied him a FAPE by failing to ensure that a general education teacher and a special education teacher were present at the June 16, 2016 IEP team meeting.

ISSUE 4: PRIOR WRITTEN NOTICE

79. Student contends that District denied him a FAPE by failing to provide him with prior written notice explaining why it was not conducting an assessment prior to proposing to change his placement on June 16, 2016. District contends that it was not

required to assess Student until it was time to prepare for Student's triennial review IEP in January 2017, and that no prior written notice was required regarding the lack of reassessment prior to that time.

80. The IDEA requires an educational agency provide "prior written notice" whenever the agency proposes or refuses to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." (20 U.S.C. § 1415(b)(3); see also 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action proposed or refused by the agency, (2) an explanation for the action, and (3) a description of the assessment procedure or report which is the basis of the action. (34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long as the IEP contains the required content of a prior written notice. (*Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed.Reg. 46540, 46691 (Aug. 14, 2006)(Comments to 2006 Regulations).)

81. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopin School Dist.* (3d Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge of or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

82. The proposed June 16, 2016 IEP amendment adequately served as prior written notice of the proposed change of placement without an assessment because it contained the information that would have been contained in a prior written notice. The amendment: (i) described the proposal to change Student's placement to four periods of special day class with a general education elective and physical education; (ii)

explained that the action was taken because Student had not made sufficient academic progress in the general education setting; and (iii) described that the basis of the action was the most recent standardized academic assessment (December 2013 psycho educational assessment), standardized academic scores and present levels of performance. District committed other procedural violations that interfered with Mother's opportunity to participate in the IEP development process, including failure to provide an interpreter during the telephonic meeting, failure to provide the IEP document to Mother in Spanish, and failure to properly conduct the meeting. However, the June 16, 2016 IEP amendment document, in Spanish, would have provided Mother with adequate notice of the decision to change Student's placement without further formal assessment. The lack of written notice of the proposed action and its basis earlier than the date of the IEP document itself had no separate impact on Mother's knowledge or participation in educational decisions.

83. Student did not meet his burden of proving by a preponderance of the evidence that he was denied a FAPE by lack of prior written notice regarding a change of placement without formal reassessment prior to Student's proposed change of placement.

ISSUE 5: PRODUCTION OF EDUCATIONAL RECORDS

84. Student contends that he was denied a FAPE by District's failure to respond completely to Student's request for educational records, in particular, its failure to provide Mother with the protocols from the December 2013 psycho educational assessment and periodic testing conducted by Ms. Adams. Student contends that these documents were relied upon in developing the January 2016 IEP and recommending a change of placement in June 2016, and that Mother could not evaluate this information to participate in the IEP process. District contends that it responded fully to Student's records request.

85. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) A district must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the district.(34 C.F.R. §300.613(a).)

86. The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).)In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3; Ed. Code, § 49061, subd. (b) [similarly defines pupil record].) The United States Supreme Court, after conducting an analysis of FERPA provisions related to education records, defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." (*Owasso Independent School Dist.No.I-011 v. Falvo*(2002) 534 U.S. 426, 434 [122 S. Ct. 934, 151 L.Ed.2d 896].)

87. Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Education*(C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children's test protocols constitutes a permissible "fair use" pursuant to federal copyright law]; *Letter to Price* (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student's personally identifiable information are educational records and if copyright law conflicts with IDEA's requirement to provide educational records, districts should

seek ways to facilitate inspection including contacting the copyright holder].) Parents have the right to inspect instructional materials and assessments including teacher's manuals. (Ed. Code, § 49091.10, subd. (a).)

88. The failure to provide a parent information related to the assessment of his or her child may significantly impede the parent's opportunity to participate in the decision-making process and result in liability. In *Amanda J.*, the Ninth Circuit held that a failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents' right to participate in the IEP development process, resulting in compensatory education award. (*Amanda J.*, *supra*, 267 F. 3d at pp. 892-895.) In a later case, it again found that a district's failure to provide parents assessment data showing their child's lack of progress in district's response to intervention program left the parents "struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the [individualized services plan], and thus unable to properly advocate for changes to his IEP." (*M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 855-856.) There, the Ninth Circuit concluded that the failure to provide assessment data prevented the parents from meaningfully participating in the IEP process and denied their child a FAPE.

89. The only witness on this issue, special education director Tracy McSparren, testified that District complied fully with Student's records request. Although Student is entitled to any protocols from the December 2013 psycho educational assessment, Student did not present evidence that the protocols were maintained by District, a prerequisite to producing those documents in response to a records request.

90. As to Ms. Adam's periodic testing results, Student failed to present evidence that these were educational records ordinarily maintained in the centralized cumulative file of Student by a central registrar. Student did not present evidence that Ms. Adam's testing scores were used and accessible to anyone besides herself and her

functional aides. Accordingly, these were not educational records required to be produced by District in response to a generic request for Student's educational records.

91. Student failed to meet his burden of providing by a preponderance of the evidence that he was denied a FAPE because District failed to produce his educational records to Mother on request, and that the withholding of those records significantly impeded the Mother's opportunity to participate in the IEP decision making process.

REMEDY

92. Student requests several remedies, including: independent educational evaluations, compensatory education, an increase in the frequency and duration of speech services currently provided in Student's IEP; Spanish language translations of Student's IEP's, and District staff training. District contends that compensatory education should not be awarded because Student's expert, Ms. Calle, was not credible, Student's language needs are being met in his current program, and Student's education would be adversely impacted if he was pulled out of class for additional speech therapy.

93. As discussed above, Student met his burden of demonstrating that he was denied a FAPE by District's failure to assess him in all areas of suspected disability, to provide Mother with the interpretation and translation needed to make informed decisions on Student's educational program, to identify Student's needs and write goals on those needs, and to make clear written offers of placement. Accordingly, as an equitable remedy, Student is entitled to the relief sought.

94. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an ALJ who

hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

95. In general, when a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington, supra*, 471 U.S. at p. 374.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).

96. School districts may be ordered to provide compensatory education or additional services to students who have been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.)

97. Student languished in general education programs without language, attention or social emotional support because District did not assess Student for attention deficits, social emotional functioning or language delays despite consistent teacher reports of Student's inability to focus in the classroom, inability to complete work, reluctance to participate in classroom activities, decreasing self-esteem, and failing grades. District did not reassess Student in the area of psycho education, including academics, despite Student's consistent failure to meet his goals and lack of meaningful

progress after supports were put in place. The recently completed District psycho educational assessment contained dramatically different cognitive ability results from the December 2013 assessment, resulting in conflicting information on Student's abilities. Accordingly, an equitable remedy for District's failure to assess or reassess is an award of independent educational evaluations in the areas of: psycho education, including academics, attention and social emotional functioning; and language and speech. The assessments will be by assessors of Mother's choice, pursuant to the guidelines of District's special education local plan area for independent assessments.

98. Student will be awarded compensatory language and speech services, calculated at the rate of one hour per week as recommended by Ms. Calle for compensatory services, for the weeks school was in session from two years prior to the filing of Student's complaint through the implementation of speech services in the February 14, 2017 IEP.⁷ Accordingly, Student is awarded: 32 hours for the 2014-2015 school year from October 13, 2014 through June 18, 2015; 38 hours for the 2015-2016 school year; and 17 hours from the beginning of the 2016-2017 school year through February 17, 2017; for a total of 87 hours.

99. Student did not put on evidence of the amount of compensatory specialized academic instruction necessary to make up for the time lost in a general education program years above his academic skills, and the lack of individual specialized academic instruction at a time when it was sorely needed. However, per *Puyallup*, one-on-one compensatory instruction is intensive, and an hour-by-hour award is not required for appropriate relief. It is equitable that Student is awarded a block of

⁷ Whether the February 17, 2017 IEP offered Student a FAPE is not an issue in this hearing, and this Decision offers no opinion on whether the level of speech therapy offered in that IEP was appropriate.

specialized academic instruction, calculated as one hour per week for the weeks school was in session from October 13, 2014 through August 29, 2016, when Student began instruction in special education special day classes. Accordingly, Student is awarded 32 hours for the 2014-2015 school year from October 13, 2014 through June 18, 2015 and 38 hours for the 2015-2016 school year, for a total of 70 hours of compensatory specialized academic instruction.

100. Student did not put on evidence of the amount of compensatory mental health counseling necessary to make up for the time Student's mental health needs were unaddressed by District. As discussed at Issue 2(c), by the IEP of January 21, 2015, Student required goals in social emotional functioning, but his social emotional needs were unaddressed by the IEP's of January 2015, January 2016 and June 2016. Student benefitted from weekly mental health sessions obtained from an outside mental health provider by Mother from May 2016 through April 2017, as Ms. Alvarez persuasively testified that Student demonstrated improved communication and self-advocacy from his counseling sessions. Accordingly, Student is awarded mental health services, calculated at the rate at which Student previously received benefit, at one hour per week for the weeks school was in session from January 21, 2015 through the filing of Student's complaint. That period encompasses 21 weeks in the 2014-2015 school year, and 7 weeks in the 2015-2016 school year, for a total of 28 hours of mental health services.

101. The compensatory services awarded above are not intended to interfere with Student's current educational program, and will be provided after the end of the school day or when school is not in session. Compensatory services will be provided by non-public agencies, unless Mother chooses to have appropriately credentialed individuals or licensed District staff provide those services. Compensatory services may be provided in the home or at a setting mutually agreeable to Mother and the service

provider. Mother will be reimbursed at the federal mileage rate for transportation to and from compensatory services.

102. Mother has been unable to fully participate in the IEP process, or to give informed consent to proposed FAPE offers, because she was not provided with a translated copy of the IEP documents. As this issue arose during implementation of the February 20, 2014 IEP, and continues to date, District will be ordered to provide Mother with translated copies of all of Student's IEP's and IEP amendments developed since and including the initial IEP of February 20, 2014.

103. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training may be an appropriate remedy. (*Park, supra*, 464 F.3d at p. 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.*, See also, e.g., *Student v. Reed Union School Dist.*, Cal.Ofc.Admin.Hrngs. Case No. 2008080580 (Jan. 23, 2009) [52 IDELR 240; 109 LRP 22923] [requiring training on predetermination and parental participation in IEP team meetings]; *Student v. San Diego Unified School Dist.* (Dec. 13, 2004) Special Education Administrative Hearing Decisions SN 2739-04 [42 IDELR 249; 105 LRP 5069][requiring training regarding pupil's medical condition and unique needs].)

104. Here, District's staff committed multiple clear procedural violations including: failing to conduct assessments of Student in all areas of need when warranted; failing to reassess when circumstances warranted; failing to ensure Mother's participation in the assessment and IEP development process as a non-native speaker of English with the primary language of Spanish; failing to develop appropriate goals in all

areas of need; failing to clearly document the offered placement and services; failing to properly conduct the June 16, 2016 IEP team meeting with all necessary team members present; intentionally mischaracterizing the June 2016 IEP team meeting in the written IEP document; failing to give Mother notice of the absence of necessary team members at the June 16, 2016 IEP team meeting; and failing to obtain Mother's fully informed consent to the absence or excusal of absent team members, or to the IEP's. Accordingly, District training on these important topics will be ordered.

ORDER

1. District shall fund independent educational evaluations in the areas of (i) language and speech, and (ii) psychoeducation, to include without limitation cognitive ability and processing, academic skills, attention and social emotional functioning. The assessments will be performed by assessors chosen by Mother, consistent with District criteria, at District's expense. The assessors shall be paid a usual and customary rate for assessors in their respective fields practicing in Los Angeles County.
 - a. The assessments shall include recommendations as to the frequency, duration and delivery model of services Student requires. The assessments shall be conducted in the school environment at Student's school placement for the 2017-2018 school year, and shall begin within three weeks after Student begins attending that placement.
 - b. Within five days of District's receipt of this Decision, District shall provide Student with agency criteria for conducting the assessment, including agency criteria, if any, concerning the reasonable cost for conducting the assessment.
 - c. District shall pay each assessor for the independent educational evaluations within 30 calendar days of that assessor's written demand for payment.

- d. District shall convene an IEP team meeting to discuss the independent educational evaluations within 30 calendar days of District's receipt of both assessor's reports, not counting days between Student's regular school sessions, or days of school vacation in excess of five school days.
 - e. The assessors shall be invited to attend the IEP team meetings held with respect to their respective assessments. District shall fund up to four hours at the evaluator's usual hourly rate to prepare for and attend the IEP meeting.
2. District shall fund compensatory education as follows:
- a. District shall fund 87 hours of language and speech therapy, to be provided by a licensed speech pathologist, or non-public agency certified to provide language and speech services, to be chosen by Mother.
 - b. District shall fund 70 hours of specialized academic instruction by a credentialed special education teacher, or a non-public agency certified to provide specialized academic instruction to students with special needs, to be chosen by Mother.
 - c. District shall fund 28 hours of mental health services, to be provided by a licensed mental health therapist, or through a non-public agency certified to provide mental health services, to be chosen by Mother.
 - d. District shall promptly contract directly with each compensatory service provider of Mother's choice, either directly or through the non-public agency, as applicable, upon notice of Mother's designation of provider.
 - e. The compensatory hours awarded may be used by Student at any time within three years of the date of this Decision, regardless of whether school is in session. Student will forfeit compensatory hours unused by that time.
 - f. Upon reasonable proof of Student's attendance at compensatory service sessions not provided in-home, District shall promptly reimburse Mother for

travel expenses for one round-trip to the service location, not to exceed 30 miles per round-trip, at the then current federal mileage reimbursement rate.

3. Within 60 calendar days of this Decision, at District's expense, District shall provide Mother with Spanish language translations of all IEP's and any IEP amendments developed for, and offered to, Student from February 20, 2014 through the date of this Decision. The translations shall include complete copies of all IEP's and amendments, including signature pages and any and all attachments.

4. Within 90 days of this decision, District shall provide six hours of training to any and all of its administrative personnel and teaching staff who are or may be involved with the administration of special education programs, including the preparation of assessment plans, conduct of assessments, arrangement of IEP team meetings and conduct of IEP team meetings, in the following topics: when assessments must be conducted; when reassessments are warranted; development of appropriate goals in all areas of educational need; clear documentation of the offer of placement and services in an IEP; properly documenting an IEP team meeting; ensuring participation of parents whose primary language is not English in the IEP development process; determination of the proper composition of the IEP team; proper procedures for providing parents with as much notice as possible of district team member absences; and obtaining fully informed parent consent to excusal of absent team members. Proof of completion of the training ordered in this Decision shall be provided to Mother within 10 days of completion of such training.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues 1, 2(b), 2(c), 2(d), 2(e), 2(f), 3(a), 3(b) and 3(c). District prevailed on Issues 2(a), 4 and 5.

RIGHT TO APPEAL THIS DECISION

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: July24, 2017

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings