

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. 2017020312

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings on February 7, 2017, naming Bellflower Unified School District. On March 24, 2017, OAH granted a continuance for good cause. Administrative Law Judge Sabrina Kong heard this matter in Bellflower, California, on May 24, 2017.¹

Attorney Hamlet Yarijanian represented Student. Mother attended the hearing. Maria Meza, Spanish translator, translated for Mother at hearing. Attorneys Eric Bathen and Marcia Brady represented District. District's Assistant Superintendent, Tracy McSparren, attended the hearing.

A continuance was granted for the parties to file written closing arguments and the record remained open until June 14, 2017. The parties timely filed written closing

¹District filed its response to Student's complaint on March 9, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir., May 30, 2017, No. 14-56344) __ F.3d __ [2017 WL 2330615, ** 6-7].)

arguments. The record was closed on June 14, 2017, and the matter was submitted for decision.²

ISSUES³

1. Did District deny Student a free appropriate public education at the March 9, 2015 individualized education program team meeting by: (a) failing to include sufficient and challenging reading goals to ensure meaningful educational benefit; (b) failing to include sufficient writing goals; and (c) failing to include sufficient math goals?

² District filed a motion to disregard Student's closing briefs because on its face the brief was 31 pages, and exceeded the 25-page limit. Student opposed. District's motion is denied, because Student's motion complied with the 25-page limit; the table of contents did not count toward the page limit.

³The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student withdrew the following issues at the May 24, 2017 hearing: (1) Did District deny Student a FAPE by failing to provide accommodations and support services to address Student's auditory processing deficits at the March 9, 2015, December 10, 2015, and December 8, 2016 IEPs? (2) Did District deny Student a FAPE by failing to conduct a comprehensive psycho-educational assessment on December 10, 2014? Student also withdrew duplicative reading goal issues set forth as Issues 2(a)(i), 2(b)(i), and 2(c)(i) in the May 12, 2017 Order Following Pre-Hearing Conference. Student agreed that Issues 1(a), 2(a) and 3(a) would be the only reading goals addressed at hearing.

2. Did District deny Student a FAPE at the December 10, 2015 IEP team meeting by: (a) failing to include sufficient and challenging reading goals to ensure meaningful educational benefit; (b) failing to include sufficient writing goals; and (c) failing to include sufficient math goals?

3. Did District deny Student a FAPE at the December 8, 2016 IEP team meeting by: (a) failing to include sufficient and challenging reading goals to ensure meaningful educational benefit; (b) failing to include sufficient writing goals; and (c) failing to include sufficient math goals?

4. Did District deny Student a FAPE by failing to offer sufficient Resource Specialist Program services at the: (a) March 9, 2015 IEP team meeting; (b) December 10, 2015 IEP team meeting; and (c) December 8, 2016 IEP team meeting?

5. Did District deny Student a FAPE by failing to offer extended school year services at the: (a) March 9, 2015 IEP team meeting; (b) December 10, 2015 IEP team meeting; and (c) December 8, 2016 IEP team meeting?

6. Did District deny Student a FAPE by failing to offer designated instructional counseling services at the December 8, 2016 IEP team meeting?

SUMMARY OF DECISION

Student proved in Issues 1(a),(b), and (c) that District denied Student a FAPE by not revising his initial IEP goals and offering him immeasurable reading, writing (spelling/phonics), and math goals at the March 9, 2015 IEP team meeting. Student also proved in Issues 2(a) and (b) that District denied Student a FAPE by not offering appropriate reading fluency and writing goals at the December 10, 2015 IEP team meeting. Student further proved in Issues 3(a) and (b) that District denied Student a FAPE by not offering appropriate reading comprehension and writing goals at the December 8, 2016 IEP team meeting.

Student did not prove in Issues 2(c) and 3(c) that District failed to provide an appropriate math goal at the December 10, 2015, or December 8, 2016 IEP team meetings. Student did not prove that District denied him a FAPE in Issues 4(a), (b), and (c) by not offering sufficient Resource Specialist Program services at the March 9, 2015, December 10, 2015, or the December 8, 2016 IEP team meetings. Student did not prove that District denied him a FAPE in Issues 5(a),(b), and (c) by not offering extended school year services at the March 9, 2015, December 10, 2015, and the December 8, 2016 IEP team meetings. Student also did not prove that District denied him a FAPE by not offering designated instructional counseling services at the December 8, 2016 IEP team meeting, as alleged in Issue 6.

As a remedy for District's failure to offer and provide: appropriate reading, writing (spelling/phonics), and math goals at the March 9, 2015 IEP team meeting; appropriate reading fluency and writing goals at the December 10, 2015 IEP team meeting; and appropriate reading comprehension and writing goals at the December 8, 2016 IEP team meeting, Student is awarded a total of 55 hours of compensatory one-to-one academic education from a non-public agency.

FACTUAL FINDINGS

1. Student was 11 years old, and attended sixth grade at a District school at the time of the hearing. He resided with Mother, within District's boundaries, at all relevant periods.

DECEMBER 16, 2014 IEP TEAM MEETING: FOURTH GRADE

2. District found Student eligible for special education under the category of specific learning disability at the December 16, 2014 IEP team meeting, when Student was in the fourth-grade. District used Student's scores in the Kaufman Test of Academic

Achievement, Second Edition, as his baseline to set annual IEP goals in reading comprehension, spelling/phonics, and math at the initial IEP team meeting. Student's Kaufman baseline for reading comprehension, spelling/phonics, and math were 73, 68, and 76, respectively. District offered Student a general education placement and a general education social science and science curriculum. District also offered Student 60 minutes of Resource Specialist Program services, with an additional 30 minutes on Tuesdays and Fridays, starting January 28, 2015. Mother wanted Student to receive additional Resource Specialist Program services, but the District IEP team was concerned that additional Resource Specialist Program services would cause Student to miss too much of the general education curriculum, and did not offer additional Resource Specialist Program services. Summer school was not discussed at the initial IEP team meeting, but the IEP document showed that the "No" box for extended school year was checked, and the rationale stated next to the box was a generic statement of, "Program and services will be provided according to when student is in attendance and consistent with the district of service calendar and scheduled services, excluding holidays, vacation, and non-instructional days unless otherwise specified." District did not formally assess Student's social emotional functioning as a part of his comprehensive initial assessment, but based upon his teachers' and the school psychologist's observations and discussions about Student, the District IEP team concluded that Student did not need designated instructional counseling services.

3. Student's reading comprehension goal stated that he would answer, in writing or orally, literal questions such as who, what, where, and when with an average of 90 percent accuracy by December 2015 when given a reading passage at his instructional level, over a period of four weeks, as measured by work samples, or teacher recorded data. Student's first short-term reading comprehension objective stated that he would answer, in writing or orally, literal questions such as who, what, where, and

when with an average of 40 percent accuracy by March 2015 when given a reading passage at his instructional level, over a period of four weeks, as measured by work samples or teacher recorded data. Student's second short-term reading comprehension objective stated by that he would answer, in writing or orally, literal questions such as who, what, where, and when with an average of 60 percent accuracy by June 2015 when given a reading passage at his instructional level, over a period of four weeks, as measured by work samples or teacher recorded data.

4. Student's spelling/phonics goal stated that he would spell target words with 80 percent accuracy by December 2015 when given spelling words of basic short-vowels, long vowels, r-controlled vowels, and consonant blend patterns in three out of four trials, as measured by teachers' tests. Student's first short-term spelling/phonics objective stated that he would spell target words with 50 percent accuracy by March 2015 when given spelling words of basic short-vowels, long vowels, r-controlled vowels, and consonant blend patterns in three out of four trials, as measured by teachers' tests. Student's second short-term spelling/phonics objective stated that he would spell target words with 65 percent accuracy by June 2015 when given spelling words of basic short-vowels, long vowels, r-controlled vowels, and consonant blend patterns in three out of four trials, as measured by teachers' tests.

5. Student's math goal stated that he would multiply up to four digits without decimals with 80 percent accuracy by December 2015 when given 10 problems, as measured by work samples. Student's first short-term math objective stated that he would multiply up to two digits without decimals with 80 percent accuracy by March 2015 when given 10 problems, as measured by work samples. Student's second short-term math objective stated that he would multiply up to three digits without decimals with 80 percent accuracy by June 2015 when given 10 problems, as measured by work samples.

6. The December 16, 2014 IEP did not conclude and was continued to January 27, 2015 where District made the same FAPE offer as it did in December 2014. Mother wanted time to consider District's January 27, 2015 offer of FAPE; she did not accept District's January 27, 2015 offer. The IEP team agreed to reconvene another IEP team meeting on March 9, 2015.

MARCH 9, 2015 AMENDMENT IEP TEAM MEETING

7. The IEP team reconvened on March 9, 2015. Student's Resource Specialist Program teacher reported that Student met the first short-term objectives on all his goals, and was making appropriate progress towards meeting his goals. Specifically, she reported that Student passed all of the weekly spelling tests; made progress on his reading fluency; and passed three out of seven multiplication facts tests. She helped Student with his general education science and social studies assignments during the Resource Specialist Program time, and stated that the general education teacher shared with the Resource Specialist Program teacher that Student exhibited more confidence since Resource Specialist Program services began. Mother was concerned with Student's class work, sharing that Student did not understand his homework. The District IEP team members informed Mother that they would consult with Student's general education teacher to modify the homework to fit Student's academic level. The IEP team reviewed Student's placement and services, and made Student the same FAPE offer it did at the prior two IEP team meetings: 60 minutes of Resource Specialist Program services, with an additional 30 minutes on Tuesdays and Fridays. District also re-offered the same goals without any revisions. Despite using Kaufman scores as the baselines, District did not revise the goals to include Kaufman scores with which to compare Student's performance against the baseline Kaufman scores on March 9, 2015. Mother consented to District's March 9, 2015 FAPE offer on April 3, 2015.

8. District's data on Student's short term objective progress on March 9, 2015 was: (a) good on his reading goal because his average was 50 percent; (b) good on his spelling/phonics goal because he received 100 percent on his weekly spelling tests; his overall average was 54 percent; and he met 100 percent of his short vowels objective; had not met any of his long vowels objective; met 50 percent of his r-controlled vowels objective; and met 67 percent of his consonant blends objective; (c) that he met his math goal because he completed two digit multiplication problems independently. District administered the Feature Guide for Elementary Spelling Inventory 2, typically used from kindergarten to the third grade, to obtain Student's spelling/phonics percentages.

JUNE 5, 2015 AMENDMENT IEP TEAM MEETING

9. Mother requested the June 5, 2015 IEP team meeting to discuss her concerns about Student's progress and summer school⁴ for Student. District IEP team members informed Mother that summer school was not available to students placed in general education. Student's general education and Resource Specialist Program teachers reported that Student's grades improved. They reported that Student could multiply multi-digit numbers independently and was working on division, and had improved on his sentence structures by following writing conventions.

10. District's data on Student's short term objective progress on June 18, 2015 was: (a) great on his reading goal because his average was 87 percent; (b) some progress on his spelling/phonics goal because he received 100 percent on his weekly

⁴Summer school was the lay term used to describe extended school year services, which was the term used by federal and California statutes. This Decision treats the terms summer school and extended school year as the same.

spelling tests; his overall average was 49 percent; he met 100 percent of his short vowels objective; met 20 percent on his long vowels objective; had not met his r-controlled vowels objective; and met 75 percent of his consonant blends objective; (c) good as to his math goal because he met his objective.

11. The third and last reporting period of Student's 2014-2015 fourth grade report card showed that: (a) he was approaching standards in the main categories⁵of reading informational text, reading foundational skills, writing, language, and math; and (b) met standards in the main categories of reading literature, speaking and listening, science, social studies, and technology. Student's fourth grade general education teacher reconciled why Student "met standards" in the main category of reading literature, but was only "approaching standards" in the main categories of reading informational text and reading foundational skills. She shared that the main category of reading literature involved structured group reading activities, where Student received lots of support; but this was not the case with the main categories of reading informational text and reading foundational skills which was why Student did not meet standards in the main categories where he received fewer supports. She also shared that Student improved from the beginning of the school year and exhibited a desire to focus and learn.

12. However, Student's fourth grade report card showed Student's grades changed from not meeting standards in the main category of reading foundational skills from the first trimester to approaching standards by the third trimester; and changed

⁵Student's also received grades under each subcategories of the main category subjects in his report cards. Because Student's performance in each subcategory contributed to the main category grade, each specific subcategory was not summarized separately.

from approaching standards in the main categories of speaking and listening, and reading literature from the first trimester to meets standards by the third trimester. Student did not meet the fourth-grade standards in all areas of English language arts/literacy and math on the California Assessment of Student Performance and Progress, which is a standardized test given to all students. The state standardized testing had four levels: (i) Level 1 equated to not meeting standards; (ii) Level 2 equated to nearly meeting standards; (iii) Level 3 equated to meeting standards; and (iv) Level 4 equated to exceeding standards. Student scored in Level 1, a 2321 in English language arts, and a 2363 in math.

DECEMBER 10, 2015 ANNUAL IEP TEAM MEETING: FIFTH GRADE

13. The District IEP team reported that Student met all of his annual IEP goals in reading comprehension, spelling/phonics, and math at the December 10, 2015 IEP team meeting. Student's decoding, reading fluency, spelling, sight word recognition and comprehension had improved from the last year. District administered the Feature Guide for Elementary Spelling Inventory 1, typically used from first grade through the elementary grades, to obtain Student's spelling/phonics percentages. Student could spell one to two syllable words with short and long vowels, consonant blends and r-controlled vowels; read 50 words per minute at the fifth-grade level and 61 words per minute at a second grade and six-month level on cold reads. His accuracy was excellent but natural reading speed was slow. While his daily math work improved, he had difficulty demonstrating math skills on tests. He could multiply up to four digits using generic rectangles or the standard algorithm, recall multiplication facts when needed, and was progressing toward mastery of division. Mother expressed concerns about Student not always understanding his homework. The District IEP team reminded Mother that Student could request homework help before school. Student worked hard and paid attention. Mother asked whether Student required counseling, and the District

IEP team concluded that Student did not need designated instructional counseling services, but that the school psychologist would be available on an as needed basis. The IEP team concluded that Student would participate in state standardized testing with accommodations, specifically the California Modified Assessment for science and the Smarter Balanced Assessment System Testing.

14. Student's math goal stated that when given a set of problems he would use the standard algorithm to solve division problems with one or two digit divisors with an average of 80 percent accuracy by December 2016 over a period of two or more weeks, as measured by work samples and/or teacher observations. Student's first short-term math objective stated that when given a set of problems he would use pictorial strategies or standard algorithm to solve division problems with one or two digit divisors with an average of 50 percent accuracy by March 2016 over a period of two or more weeks, as measured by work samples and/or teacher observations. Student's second short-term math objective stated that when given a set of problems he would use pictorial strategies or standard algorithm to solve division problems with one or two digit divisors with an average of 60 percent accuracy by June 2016 over a period of two or more weeks, as measured by work samples and/or teacher observations. Student's baseline was that he progressed with multiplying multi-digit numbers, and had not mastered division.

15. Student's writing goal stated that he would write or edit sentences with correct grammar with 80 percent accuracy by December 2016, as measured by work samples and teacher observations. Student's first short-term writing objective stated that he would write or edit sentences with correct grammar with 50 percent accuracy by March 2016, as measured by work samples and teacher observations. Student's second short-term objective stated that he would write or edit sentences with correct grammar with 60 percent accuracy by June 2016, as measured by work samples and teacher

observations. Student's baseline was that he worked hard on teacher led pre-writing activities, planners and composing writing assignments; his sentences often had incorrect grammar, but he was able to correct some mistakes when the sentences were read aloud.

16. Student's reading fluency goal stated that he would read with fluency at an average of 90 correct words per minute by December 2016 when given a reading passage at his instructional level, over a period of four or more weeks, as measured by work samples or teacher recorded data. Student's first short-term reading fluency objective stated that he would read with fluency at an average of 70 correct words per minute by March 2016 when given a reading passage at his instructional level, over a period of four or more weeks, as measured by work samples or teacher recorded data. Student's second short-term reading fluency objective stated that he would read with fluency at an average of 80 correct words per minute by June 2016 when given a reading passage at his instructional level, over a period of four or more weeks, as measured by work samples or teacher recorded data. Student's baseline was that he had good reading accuracy, but low fluency.

17. District offered Student a general education placement with 60 minutes of Resource Specialist Program services five days per week, with an additional 30 minutes two days per week. Mother consented to the IEP on December 10, 2015. Summer school was not discussed at the December 10, 2015 IEP team meeting, but the IEP document showed that the "No" box for extended school year was checked, and the rationale stated next to the box was a generic statement of, "Program and services will be provided according to when student is in attendance and consistent with the district of service calendar and scheduled services, excluding holidays, vacation, and non-instructional days unless otherwise specified."

18. District's data on Student's short term objective progress on March 18, 2016, was: (a) good progress on math and writing because he met both of those goals; (b) he met his reading fluency goal by reading an average of 80 correct words per minute. District's data on Student's short term objective progress on June 16, 2016 was: (a) good progress on math and writing because he met both of those goals; (b) he met his reading fluency goal because he read an average of 82 correct words per minute.

19. The third and final reporting period of Student's 2015-2016 fifth grade report card showed that: (a) he was approaching standards in the main categories of reading literature, reading informational text, reading foundational skills, writing, speaking and listening, math (specifically in the subcategories of operations and algebraic thinking, measurement and data, and geometry), physical science, and social studies; and (b) Student met standards in the main categories of language, and technology.

20. Student's general education teacher shared at hearing that Student had struggled to ask for help at the beginning of the school year when he started fifth grade, but by mid-year his confidence improved and he participated in class. Thirty-five percent of the students in her class were below grade level. She described Student as having improved in all areas by the end of the school year. Student also participated in independent reading (during classroom free time and at home).

DECEMBER 8, 2016 IEP TEAM MEETING: SIXTH GRADE

21. District reported that Student met his math and reading fluency goals, but did not meet his writing goal because his accuracy was at approximately 65 to 70 percent by December 2016, and not 80 percent. Student earned scores of three on a four-point scale on fifth grade level math assignments, but had difficulty with math processes that required multiple steps. He read at a third grade and five months to a fourth-grade level and could write three to four sentences summarizing his reading.

Student struggled without the support of structured text and paragraph frames in longer, text-based writing assignments; had difficulty conceptualizing higher level texts analysis without concrete illustrations; and while his sentence structure and grammar progressed, he still needed support to identify grammatical and sentence structure errors. Student worked hard, was respectful, and well-liked. He completed and timely submitted assignments. He used strategies and tools provided by his teachers who rated his skills as age appropriate. Student's general education teacher and case carrier shared that Student was reading and writing below the fifth-grade level, but made some academic progress in the past year. Mother expressed concerns about Student reading and writing below the fifth-grade level and that he was not making enough progress. Student worked hard and paid attention. Mother asked whether Student needed counseling at the IEP team meeting. The District team members did not feel that Student demonstrated a need for counseling. District IEP team concluded that Student did not need designated instructional counseling services, but that the school psychologist would be available on an as needed basis. Student did not present any testimony or documentary evidence at hearing that he required counseling as a related service in order to access his education. The IEP team concluded that Student would participate in state standardized testing with accommodations, specifically the Smarter Balanced Assessment System Testing.

22. Student's math goal stated that when given a grade level assignment he would independently solve math problems that required four or more steps with an average of 80 percent accuracy by December 2017 over a period of two or more weeks, as measured by work samples. Student's baseline was that he progressed with grade level math concepts, generally earning grades of three on a four-point scale, and had more difficulty with processes that required multiple steps.

23. Student's comprehension/writing goal stated that when following teacher-led pre-writing activities and given paragraph/text frames, he would respond to literature text-based prompts with five or more paragraphs and earn a score of three for content 75 percent of the time by December 2017, as measured by work samples. Student's baseline was that he read between a third grade and five month to a fourth grade level and could summarize reading in three to four simple sentences; and required structured paragraph frames to compose appropriate responses to higher level analysis tasks, particularly with literary texts.

24. District offered Student a general education placement with 70 minutes of push-in (providing assistance in the general education classroom) or pull-out (providing assistance outside of the general education classroom) Resource Specialist Program services, five days per week for the remainder of the 2016-2017 school year, with an additional two class periods of push-in English and math for the 2017-2018 school year. Summer school was not discussed at the December 8, 2016 IEP team meeting, but the IEP document showed that the "No" box for extended school year was checked, and the rationale stated next to the box was that Student was able to recoup skills lost at the same rate as his general education peers. Mother wanted Student to be provided with more services, including summer school, and did not consent to the December 8, 2016 IEP offer.

25. Student's sixth-grade report card showed that Student's grades remained the same between the first and second reporting period in the ten main categories. The second reporting period of Student's 2016-2017 sixth grade report card up until March 10, 2017 showed that: (a) he had not met the standards in the main categories of reading literature, reading informational text, and language; (b) was approaching standards in the main categories of language, science, and social studies; and (c) met standards in the main categories of math and technology. Teacher reported on March

10, 2017, that Student improved in reading and writing, specifically with his basic summarization skills and use of transitions. Student did not meet the fifth-grade standards in all areas of English language arts/literacy and math on the state standardized testing. He scored in Level 1, a 2326 in English language arts, and a 2300 in math. His fifth-grade English language arts/literacy score was five points higher than his fourth-grade score; and his fifth-grade math score was 63 points lower than his fourth-grade score.

TESTIMONY OF DR. JERRY DAVID MILLER

26. Dr. Jerry David Miller was the school psychologist who conducted a December 10, 2014 psycho-educational assessment of Student. He held a master's and a doctorate degree in school psychology, a master's multiple subjects teaching credential, and had provided 3,000 hours of clinical therapy. Although Student tested low, a 73, in verbal comprehension, on Dr. Miller's assessment, his perceptual reasoning was average, a 98. Dr. Miller concluded that the 25-point difference along with Student's average scores in working memory and processing showed that Student's visual-nonverbal reasoning abilities were considerably more developed than his verbal reasoning abilities and that his true cognitive ability was in the average range. He identified Student's areas of need as being in math, reading comprehension and spelling, and opined that the goals set forth in the initial IEP addressed all of Student's needs. The initial IEP goals were drafted after Dr. Miller consulted with the Resource Specialist teacher, but he did not recall whether it was he or the Resource Specialist teacher who drafted the goals. He did not believe that Student needed writing, letter recognition, or math problem solving goal in December 2014. He opined that although a social emotional assessment was not conducted, informal observations and input from Student's teachers, led the IEP team to properly conclude in December 2014 that Student did not need counseling. Student's Resource Specialist teacher from the middle of his fourth-grade year to his sixth grade

also opined that Student did not need counseling, that he was hard working, had friends, and was well adjusted. At hearing, this Resource Specialist teacher also confirmed District's policy on extended school year services and shared that "extended school year was not offered for [sic] general education students...."

TESTIMONY OF STUDENT'S EXPERT DR. MARLEN BARBEE

27. Dr. Marlen Barbee was Student's expert who conducted an academic achievement assessment of Student in May 2017. She was a licensed educational psychologist, and held a bachelor's degree in psychology; a master's degree in education and counseling; a doctorate in educational psychology; a multiple subjects teaching credential, and a school psychology credential. She worked as a school psychologist for 14 years, and in that capacity conducted 2,000 assessments of students. Most recently, she worked for Long Beach Unified School District, part-time, as a school psychologist. She also taught at elementary schools for seven and a half years. As an educational psychologist and licensed psychologist, Dr. Barbee was qualified to conduct academic achievement assessments. She had also attended over 1,000 IEPs throughout her career as a psychologist. She reviewed all of Student's IEPs, report cards and District's December 2014 psycho-educational assessment of Student when assessing Student in May 2017, and in preparation as Student's expert. She met Student once in May 2017 and spent two hours in her home office administering the Wechsler Individual Achievement Test, Third Edition, to Student. She did not talk to any of District's employees about Student. She agreed with Dr. Miller that Student's true ability was in the average range.

Dr. Barbee's Opinion Regarding goals for the 2014-2015 school year

28. Dr. Barbee opined that Student's 2014-2015 school year IEP goals were inappropriate because they did not include aspirational Kaufman standards to monitor

Student's progress as compared to Student's baseline Kaufman scores. District did not revise Student's reading, spelling/phonics, and math goals to make them measurable at the March 9, 2015 IEP team meeting. Because District had chosen to use the Kaufman as baselines, each of Student's goals should have been revised to include an aspirational Kaufman standard score, higher than the one stated in the baseline, to properly monitor progress.

29. Dr. Barbee also opined that Student's reading goal was inappropriate because it did not specify Student's baseline instructional level. She defined instructional level as the level of teacher support, or instruction, a student needed to perform a task, such as reading. She opined that the reading and spelling/phonics goals were not rigorous enough, and on March 9, 2015, District should have revised both goals to ones which were more reflective of Student's abilities of a general education, fifth grader, with average cognition. For example, the reading goal should have been revised to require Student to answer inferential questions by December 2015.

30. Dr. Barbee concluded that the IEP team could not accurately measure Student's reading progress in December 2015, because District did not provide concrete information on the level of teacher support, or instruction Student needed. The progress reports for the reading, spelling/phonics, and math goals were vague because the District IEP team used subjective adjectives, such as "good" or "great" in describing the Student's goal progress without concrete definitions and information. Specifically, using "good" or "great" to describe reading progress without information on the extent of assistance Student required to read a passage and answer the simple literal questions of "who, what, where and when" was unhelpful in understanding Student's reading abilities, or the level of support/intervention he required. She opined that District's description of Student's spelling/phonics progress as "good" in March 2015 did not match with Student's inability to spell words with long vowels. She also opined that

District's report that Student met his spelling goal in December 2015 without reporting any success percentages, or providing information on whether Student was capable of spelling all of the words (short, long and r-controlled vowels, and consonant blends) was unhelpful in understanding Student's progress and suspect because in June 2015 District reported that Student did not meet his long vowels, or r-controlled vowels spelling objectives. Finally, Dr. Barbee concluded that checkmarks indicating Student met his goals by December 10, 2015, were vague and inappropriate monitor of progress for each goal because it did not provide specific information as to what extent the goals were met.

Dr. Barbee's Opinion Regarding the December 10, 2015 IEP Goals

31. Dr. Barbee opined that math reasoning, reading comprehension, basic reading/word recognition, written expression, and paragraph structure were all areas of need for Student in December 2015 and District should have provided goals in those areas in addition to the math, writing, and fluency goals District provided to Student. The math goal targeting division was inappropriate in that it did not also address math reasoning. The writing goal was inappropriate because it did not specify the writing level Student would be writing and editing sentences, with correct grammar, and with 80 percent accuracy. As a general education, sixth grader (by December 2016), Student should have been writing approximately five paragraph essays, including producing a pre-writing product, a first draft, editing the first draft, and producing a final draft. The goal was unclear whether Student would be expected to meet the goal by writing at a sixth-grade level, with multiple paragraphs, or somewhere below a sixth-grade level, by writing a few sentences. Dr. Barbee provided an example of the vagueness of the goal by explaining that Student could meet the writing goal by writing and editing two sentences 80 percent of the time at any grade level.

32. Dr. Barbee opined that Student's December 10, 2015 reading fluency goal was inappropriate because it did not specify Student's instructional level or grade level in the goal. District could not accurately measure Student's reading progress without concrete information on the level of teacher support, or instruction, and the grade level of the passages Student was aiming to achieve by December 2016. The fluency goal was also inappropriate because the baseline was imprecise in stating that Student's accuracy was good, but fluency was low. Dr. Barbee characterized the baseline as a contradiction because if Student's accuracy was good, and his fluency low, the problem causing the low fluency would be the reading rate, which should have been stated in the baseline to accurately reflect Student's abilities. An appropriate fluency baseline should have set forth the number of correct words Student read and the grade level at which Student was reading, which District did not do.

Dr. Barbee's Opinion Regarding the December 8, 2016 IEP Goals

33. Dr. Barbee opined that basic reading/word recognition and decoding were all areas of need for Student on December 8, 2016 and District should have provided goals in those areas in addition to the general math, and the comprehension/writing goals District provided to Student. Further, District did not follow the best practices procedures for monitoring goal progress because it did not include short term progress objectives for the math, or the comprehension/writing goal. Dr. Barbee opined that the general math goal of giving Student "grade level" assignment and solving math problems "independently" was an appropriate instructional level to measure Student's progress in math. However, she opined that the comprehension/writing goal was inappropriate because: it should not have been a combined goal because they were two separate areas of need; and it did not specify the grade level of text Student would be required to read to achieve the goal. She provided an example of the vagueness of the goal by explaining that Student would meet the comprehension/writing goal if he read

at the same District stated baseline level a year later, in December 2017. Without grade level text specificity, District would be unable to accurately monitor Student's progress. Also, Dr. Barbee disagreed with District's stated baseline of Student's comprehension/writing level as that of a third grade and five month to fourth grade level in December 2016, because when she tested Student in May 2017, approximately five months later, she found Student read at a second grade and one month level.

34. Dr. Barbee opined that extended school year was intended for students with a disabling condition who were not making adequate progress and required instruction over the summer so they would not lose academic skills. A student's needs, and not the placement, should determine whether extended school year should be offered. She disagreed with District's decision not to offer extended school year to Student at the December 8, 2016 IEP. Dr. Barbee did not believe that Student was recouping skills at the same rate as his general education peers as District contended when it declined to offer Student summer school. She opined that Student needed summer school because his IEP goals dealt with second grade level skills such as long, short, r-consonant vowels and blended consonants. Further, his sixth-grade report card in the first trimester showed that he was not making adequate progress. Dr. Barbee believed that since Student was not meeting standards in reading literature, reading informational text, writing, and languages; and approaching standards in speaking and listening, earth and space and social studies, District should have offered him a summer school placement.

LEGAL AUTHORITY AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

1. This due process hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)⁷; Ed. Code, § 56000, et seq.; and Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are:(1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); 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 as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures

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

⁷All subsequent references to the Code of Federal Regulations are to the 2006 edition.

with the participation of parents and school personnel, and which sets forth 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); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "'meaningful' educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision

in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'..." (*Endrew F. v. Douglas School Dist. RE-1* (March 22, 2017, No. 15-827) 580 U.S. ___ [___ S.Ct. ___, ___ L.Ed.2d ___], 2017 WL 1066260 (*Endrew F.*)) The Supreme Court in *Endrew F.* stated that school districts must "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (Id. at p. 1002.)

4. The IDEA affords parents or 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) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, 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, sub. (l).)

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

ISSUES 1(A), (B), (C); 2(A), (B), (C) AND 3(A), (B), (C): APPROPRIATE GOALS

6. Student contends that the reading, writing⁸, and math goals were insufficient, immeasurable, and did not provide Student with meaningful educational benefit. District contends that all of Student's goals were appropriate and Student made appropriate progress in the areas of reading, writing and math.

7. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) In appropriate goals are procedural violations of the IDEA. (*Park v. Anaheim Union High School Dist.*, , (9th Cir. 2006) 464 F.3d 1025, 1031). The IEP team shall review the pupil's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the pupil are being achieved, and revise the IEP, as appropriate, to address, among other matters, information about the pupil provided to, or by, the parents; the pupil's anticipated needs; or any other relevant matter. (Ed. Code, § 56341.1, subd. (d)(3), (4), and (5).) An IEP is a "snapshot" and must be evaluated

⁸ Although Student's issue contentions referred to a writing goal, the March 9, 2015 IEP did not have a writing goal. Student did not present any evidence regarding a writing goal, but instead presented evidence on a spelling/phonics goal. This Decision treated the spelling/phonics goal as the writing goal in the discussion of the March 9, 2015 IEP because the substance was spelling as a function of writing.

in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

8. A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, *superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.)

9. The statute of limitations for due process complaints in California precludes claims that accrued more than two years prior to the date of filing the request for a due process hearing.(Cal. Edu. Code § 56505(l)) A due process hearing "shall 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))

March 9, 2015 IEP Goals

10. While the December 16, 2014 IEP goals were outside of the two years statute of limitations period, the March 9, 2015 IEP team meeting was a separate offer of FAPE which was within the two years statute of limitations period. District offered Student the same reading, writing (spelling/phonics) and math goals at the March 9, 2015 IEP team meeting as the ones which they offered to Student at the December 16, 2014, and January 28, 2015 IEP team meetings. District should have revised Student's goals at the time they made the offer of FAPE at the March 9, 2015 IEP team meeting because the goals were immeasurable. Instead of revising Student's goals to include aspirational Kaufman scores by which to measure Student's progress against the

baseline Kaufman scores, the IEP team adopted the same immeasurable IEP goals as part of its March 9, 2015 offer of FAPE to Student.

11. Dr. Barbee's opinion that District's reading and spelling/phonics goals for the 2014-2015 school year were not rigorous enough was not persuasive. Because District personnel assessed Student in December 2015, District IEP team was more persuasive on the appropriate reading standards for Student in March 2015, than Dr. Barbee who assessed Student in May 2017. Dr. Barbee's opinion that Student's reading goal requiring Student to answer only literal questions was not rigorous enough because as a fifth grader in 2016 Student should also answer inferential questions was not persuasive because Student did not present any evidence supporting that District had information that Student could read at, or near, a fifth-grade level, or that answering inferential questions was an appropriate goal for Student given his learning disability. Likewise, Dr. Barbee's opinion that the spelling/phonics was not rigorous enough because learning various vowels and consonant blends were the standards for a second grader, not the fourth grader that Student was at the time the goal was drafted, was also unpersuasive because Student did not present evidence that District had information that Student was capable of fourth grade level work in spelling/phonics in light of his learning disability.

12. However, Dr. Barbee's opinion that the March 9, 2015 IEP goals were immeasurable because they did not specify Student's instructional level of teacher support, or instruction, for Student either in the baseline, or in the goals, was uncontradicted and persuasive. These goals also did not set forth Kaufman aspirational scores to monitor progress as compared to the Kaufman baselines. Without data allowing for comparisons between Kaufman baseline scores to future Kaufman scores, District IEP team's measure of Student's progress on the reading, writing (spelling/phonics), and math goals were compromised and meaningless because they

were unable to compare Kaufman score to Kaufman score, or “apples to apples”.

Student met his burden of persuasion by showing that District committed a procedural violation by not providing accurate, measurable reading, writing (spelling/phonics), and math goals to Student when it made its FAPE offer to Student at the March 9, 2015 IEP team meeting.

13. District’s procedural violation of not providing measurable goals at the March 9, 2015 IEP team meeting significantly impeded the parent’s opportunity to participate in the decision-making process, caused a deprivation of educational benefits and impeded Student’s access to a FAPE because it prevented the IEP team from accurately monitoring Student’s progress; interfered with parental participation with the IEP team in creating effective strategies to target Student’s needs; and providing Student with meaningful academic progress. Even though District’s IEP team members reported at the December 10, 2015 IEP team meeting that Student’s decoding, reading fluency spelling, sight word recognition and comprehension increased from last year; could read 50 words per minute at a fifth-grade level, and 61 words per minute at a second grade and six-month level on cold reads; this was not persuasive evidence that Student had progressed because the data measuring this “progress” was flawed.

14. The baselines for reading, writing (spelling/phonics), and math as stated in March 9, 2015 were the Kaufman scores of 73, 68, and 76, respectively. District did not provide a definition of what the 73 Kaufman score in reading translated to in terms of words per minute or grade level in March 2015, or what level of teacher support, or instruction Student required throughout the year to meet the reading goal in December 2015, as reported by District. Although at the December 2015 IEP team meeting, District IEP team reported that Student read at a fifth-grade level, the statement was unpersuasive because District later stated, in the December 8, 2016 IEP team meeting, that Student’s reading comprehension baseline was at a third to fourth grade level. The

inconsistent data from the District IEP team showed that District's reading goal monitoring was compromised, or wrong: in December 2015; in December 2016; or in both December 2015 and December 2016. The inconsistent data also showed that Student regressed from December 2015 to December 2016.

15. District had more data from the spelling inventories it conducted while Student was in the fourth and fifth grades for the spelling/phonics goal. However, the goal was still vague in that District did not provide a definition of what the 68 Kaufman score in writing (spelling/phonics) translated to in terms of the ability to spell short, long, and r-consonant vowels and consonant blends in March 2015, or what grade level words Student was given throughout the year to meet the spelling/phonics goal in December 2015, as reported by District.

16. Likewise, District had more details for the math goal stating Student could multiply two, then three, then four digits. Yet, the math goal was still vague in that District did not provide a definition of what the 76 Kaufman score in math translated to in terms of the grade level of math functions Student was capable of performing, or the level of teacher support Student was given in March 2015 to meet to the goal, as reported by District. Therefore, when District reported that Student could perform two-digit multiplication problems "independently," that was not persuasive evidence of progress because there had been no information of the level of teacher support, or instruction, Student had to begin with in March 2015. District's inconsistent use of Kaufman baselines when drafting Student's goals in March 2015, then switching to other descriptors in December 2015 to conclude Student made progress rendered District's conclusion inaccurate, suspect, and meaningless because District was not comparing apples to apples.

17. While his teachers concluded that Student improved in all areas from his fourth grade to fifth grade, that improvement was minimal at best as shown by his

report cards and the state standardized testing results. His fourth-grade report card showed that Student's grades improved minimally in only three of the ten main categories and he scored below average in all areas of English language arts/literacy and math in his fourth-grade state standardized testing. Student made minimal academic progress because District did not provide him with measurable goals from which to create effective strategies for targeting his special needs.

18. Student met his burden of persuasion that District's procedural violation in not revising/providing measurable goals in reading, writing (spelling/phonics) and math in the March 9, 2015 IEP team meeting resulted in a substantive FAPE denial. Remedies awarded to Student for these violations are discussed below.

December 10, 2015 IEP Goals

19. Dr. Barbee's opinion that the December 10, 2015 IEP reading fluency and writing goals were immeasurable because they did not specify Student's grade level or instructional level of teacher support, or instruction, for Student in the baseline and in the goals, was uncontradicted and persuasive. Student met his burden of persuasion by showing that District committed a procedural violation by not providing measurable writing and reading fluency goals to Student at the December 10, 2015 IEP team meeting.

20. District's procedural violation of not providing measurable writing and reading fluency goals at the December 10, 2015 IEP team meeting significantly impeded the parent's opportunity to participate in the decision-making process, caused a deprivation of educational benefits and impeded Student's access to a FAPE because it prevented the IEP team from accurately monitoring Student's progress; and interfered with parental participation with the IEP team in creating effective strategies to target Student's needs in those two areas. Although at the December 2016 IEP, teachers reported that Student had progressed and met his reading fluency goal, reading at

approximately a third to fourth grade level, this was not persuasive evidence that Student had progressed because the IEP team did not include the grade level Student was reading, and or how much help Student received from his teachers when the reading fluency goal was provided at the December 10, 2015 IEP team meeting. District's conclusion that Student progressed in his writing goal was also unpersuasive for the same reason the reading fluency goal was unpersuasive. Specifically, the writing goal progress was measured by a certain percentage by December 2016, but District did not provide a baseline percentage at the December 10, 2015 IEP team meeting with which to compare Student's performance a year later. Therefore, District's conclusion that Student's 65 to 70 percent accuracy was an improvement, could not be supported by any factual basis because District did not have a percentage baseline upon which to measure Student's progress.

21. Further, Student's improvement was minimal at best as shown by his report cards and the state standardized testing results. "Language" was the only main category where Student improved. Student's grades remained the same from the first to the third trimester in all nine main categories, in all three trimesters. Further, Student's fifth grade English language arts/literacy state standardized testing score was five points higher than his fourth-grade score—evidencing minimal improvement; and his fifth-grade math score was 63 points lower than his fourth-grade score—evidencing regression. Student made minimal academic progress because District did not provide him with measurable goals from which to create effective strategies for targeting his special needs.

22. Student met his burden of persuasion that District's procedural violation of not providing sufficient goals in reading fluency and writing resulted in a substantive FAPE denial. Remedies awarded to Student for these violations are discussed below.

23. Dr. Barbee's opinion that District should have provided goals for math reasoning, reading comprehension, basic reading/word recognition, written expression and paragraph structure at the December 10, 2015 IEP team meeting because they were also Student's areas of need was less persuasive because she did not provide any details supporting her opinion. Her opinion that the math goal was inappropriate because it did not address math reasoning was also unpersuasive for the same reason. Therefore, Student did not meet his burden of persuasion that District committed a procedural violation by not providing goals for math reasoning, reading comprehension, basic reading/word recognition, written expression and paragraph structure, and for not providing sufficient math goals to Student at the December 10, 2015 IEP team meeting.

December 8, 2016 IEP Goals

24. Dr. Barbee opined that the general math and comprehension/writing goals were inappropriate because they did not include short term objectives. District's failure to provide short term objectives for monitoring the two goals did not conform to the best practice procedures, but did not amount to a FAPE procedural violation because there was no statutory requirement that a goal contain short term objectives. Dr. Barbee did not opine that the math goal was inappropriate other than District's failure to include short term objectives. Therefore, Student did not meet his burden by showing that District committed a procedural violation by not providing a sufficient math goal to Student at the December 8, 2016 IEP team meeting.

25. Dr. Barbee opined that based on the level Student exhibited when she tested him in May 2017, Student's baseline for the reading comprehension should have been at a lower level, instead of a third grade and five month to fourth grade level that District ascribed to Student in December 2016. Her opinion was irrelevant as it pertained to District's FAPE offer because District did not have this information at the December 8, 2016 IEP team meeting. Further, Dr. Barbee's opinion that District should have provided

goals for basic reading/word recognition and decoding at the December 8, 2016 IEP team meeting because they were also Student's areas of need was unpersuasive because she did not provide any details supporting her opinion.

26. Dr. Barbee's opinions that the comprehension/writing goal was inappropriate because it encompassed two separate areas of need and should be separated; and that it was immeasurable as it did not specify the grade level of text Student would be required to read to achieve the goal; was uncontradicted and persuasive. By combining the reading comprehension and writing areas of need, each goal was vague. The writing goal did not have its own baseline and accurate measures of progress. Further, the combined goal inappropriately failed to specify a grade level at which Student was aspiring to read and write. Without this grade level specificity and separation of the reading comprehension and the writing areas of need, District would be unable to accurately monitor Student's progress in either area. Student met his burden by showing that District committed a procedural violation by not providing a measurable reading comprehension and writing goal to Student at the December 8, 2016 IEP team meeting.

27. District's procedural violation of not providing appropriate reading comprehension and writing goals at the December 8, 2016 IEP team meeting caused a deprivation of educational benefits and impeded Student's access to a FAPE because it prevented the IEP team from accurately monitoring Student's progress; and interfered with parental participation with the IEP team in creating effective strategies to target Student's needs in those two areas. Although teachers reported that Student improved in reading and writing, such improvement was minimal at best as shown by his sixth-grade report card and the state standardized testing results. Student did not improve academically in any of the ten main categories between the first and second reporting period of his sixth grade. Student made minimal academic progress because District did

not provide him with measurable goals from which to create effective strategies for targeting his special needs. Student met his burden of persuasion that District's procedural violation in not providing appropriate reading comprehension and writing goals at the December 8, 2016 IEP team meeting resulted in a substantive FAPE denial. Remedies awarded to Student for these violations are discussed below.

ISSUES 4(A), (B), AND (C): RESOURCE SPECIALIST PROGRAM SERVICES

28. Student contends that District should have offered two hours per day of Resource Specialist Program services at the March 9, 2015, December 10, 2015 and December 8, 2016 IEP team meetings to address Student's below grade level academic performance. District contends it offered the appropriate amount of Resource Specialist Program services at all times.

29. Other than Mother's expressed desire for Student to have additional Resource Specialist Program services, Student did not provide any evidence supporting his contention that District should have offered two hours per day of Resource Specialist Program services at any of the IEPs at issue, or that additional services were required for Student to receive a FAPE. The IEP team considered additional Resource Specialist Program services and concluded that additional time in Resource would reduce Student's ability to participate in general education. District offered the amount of Resource Specialist Program services at each of the three IEP team meetings because that was FAPE for Student. Although Student was not meeting standards in certain academic main categories and did not meet grade level standards in his fourth and fifth grade state standardized tests, he did not present any evidence showing that more Resource Specialist Program Services was the answer to improve academic performance, or that it was necessary in order for him to receive a FAPE. Student's expert, Dr. Barbee, did not opine on this issue. Therefore, Student did not meet his burden of persuasion by the preponderance of evidence on this issue.

ISSUES 5(A), (B), AND (C): EXTENDED SCHOOL YEAR

30. Student contends that District should have offered extended school year at the March 9, 2015, December 10, 2015, and December 8, 2016 IEP team meetings because Student was performing below grade level academically. District contends that extended school year was inappropriate for Student because he was performing at the same level as other general education students and extended school year was not available for students in general education.

31. In addition to special education instruction and services during the regular school year, extended school year services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE.(34 C.F.R.§ 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, Title 5, section 3043, provides that extended school year services shall be provided for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. (Cal. Code Regs., tit. 5 § 3043.) Students to whom extended school year services must be offered under section 3043 "...shall have disabilities which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition. The lack of clear evidence of such factors may not be used to deny an individual an extended school year program if the IEP team determines the need for such a program and includes extended school year in the IEP pursuant to subdivision (e). " *Id.* (See also *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1209-1210.)

32. District did not discuss, or consider, whether Student required extended school year services at the March 8, 2015 IEP team meeting. When Mother requested

summer school for Student at the June 5, 2015 amendment IEP team meeting, District IEP team informed her that it was not available to students in general education. District also did not discuss, or consider, whether Student required extended school year services at either the December 16, 2015, or the December 8, 2016 IEP team meetings. Despite District's change in stated rationale for not offering extended school year at the December 8, 2016 IEP was because Student was able to recoup skills lost at the same rate as his general education peers, this was unpersuasive because, at hearing, the Resource Specialist teacher confirmed that the District had a policy of not offering extended school year to general education students. District's failure to offer extended school year to Student at the March 9, 2015, December 10, 2015, and December 8, 2016 IEP team meetings were all procedural violations because District did not consider Student's individualized needs, but simply enforced District's policy of not offering extended school year to general education students.

33. However, Student did not prove these procedural violations significantly impeded the Parent's opportunity to participate in the decision-making process, caused a deprivation of educational benefits, or impeded the child's right to a FAPE, because Student did not show that Student required extended school year to prevent regression over the summer, or that he had limited capacity for recoupment of academic skills after returning from summer break. Although, Student's expert concluded that that Student was not recouping skills at the same rate as his general education peers as District had contended, she did not provide supporting details other than Student was operating below, or not meeting grade level standards, which was insufficient. Under *Andrew F.*, FAPE should be considered in light of a child's circumstances. Student did not present any evidence that Student was capable of operation at grade level given his specific learning disorder even if he did have average cognition. Student also did not present any evidence supporting that without extended school it would be impossible or

unlikely that the Student would attain the level of self-sufficiency and independence that would otherwise be expected in view of his specific learning disorder. Therefore, Student did not meet his burden by showing that District denied him a FAPE by failing to offer extended school services at each of these three IEP team meetings.

ISSUES 6: COUNSELING

34. Student contends that District should have offered designated instructional counseling services at the December 8, 2016 IEP team meeting. District contends that Student did not need counseling services.

35. Other than Mother's expressed desire for Student to receive designated instructional counseling services at the December 8, 2016 IEP team meeting, Student did not provide any evidence supporting his contention that he required counseling services as of the December 8, 2016 IEP team meeting in order to receive a FAPE. District's IEP team members, including his Resource Specialist Program service teacher for over two years, opined that Student did not need any counseling services because he was hard working and well-adjusted. Further, the school psychologist was available to see Student on an as needed basis. Student's expert, Dr. Barbee, did not opine on this issue. Therefore, Student did not meet his burden of proof by the preponderance of evidence on this issue.

REMEDIES

1. Student requests 240 hours of compensatory education from a non-public agency and an amendment to the December 8, 2016 IEP to include counseling and extended school year services. District contends no remedies are appropriate because Student did not meet his burden of persuasion on any issue.

2. Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington v. Department of Education* (1985) 471 U.S.

359, 374 [105 S.Ct. 1996, 85 L.Ed. 2d 385].) In addition to reimbursement, school districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p.1496.)

3. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) 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.*)

4. It is equitable, based upon Student's loss of FAPE, to award him an hour a week of one-to-one compensatory education.(a) District denied Student a FAPE from March 9, 2015 to December 10, 2015, by not providing any measurable goals for approximately 27 school weeks, and is awarded one hour per week of compensatory academic education for the equivalent of 27 school weeks.(b) District also denied Student a FAPE from December 10, 2015, to December 8, 2016, by not providing two out of three measurable goals, and is awarded one hour per week of compensatory academic education for the equivalent of 24 school weeks: calculated from approximately 36 weeks in a regular school year, divided by three, for the three goals equals 12 hours per goal; for a total of 24 hours for the two goals that resulted in FAPE denials.(c) District also denied Student a FAPE from December 8, 2016 to February 7, 2017, by not providing two out of three appropriate goals, and is awarded one hour per week of compensatory academic education for the equivalent of six school weeks (excluding winter break): calculated from approximately six school weeks, divided by

three, for the three goals; equals two hours per goal, for a total of four hours for the two goals that resulted in FAPE denials. The total remedy for Student is therefore 55 hours of compensatory specialized academic instruction, for all of District's FAPE denials, to be provided by a non-public agency at District's expense.

ORDER

1. Student is awarded a total of 55 hours of one-to-one specialized academic instruction from a non-public agency. Within five days of the date of this decision, District shall provide Student with a list of non-public agencies that provide academic instruction with which District contracts. Within 10 days of the date of this decision, Student shall communicate to District the name of the non-public agency Student chose from the list provided by District. Within 20 days of the date of this decision, District shall contact and fund the non-public agency which Student has selected to provide 55 hours of one-to-one academic instruction. District is not required to provide Student with transportation to and/or from the non-public agency.

2. Any compensatory service time awarded by this Decision must be used by December 31, 2018, or Student will forfeit the unused hours.

3. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party as to Issues 1(a),(b),(c); 2(a),(b); 3(a) and (b); and District was the prevailing party as to Issues 2(c), 3(c); 4(a),(b),(c); 5(a), (b), (c); and 6.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: July 14, 2017

/s/

SABRINA KONG

Administrative Law Judge

Office of Administrative Hearings