

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OXNARD UNION HIGH SCHOOL
DISTRICT.

OAH Case No. 2017020382

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on February 6, 2017, naming Oxnard Union High School District. The matter was continued for good cause on March 22, 2017.

Administrative Law Judge Adrienne L. Krikorian heard this matter in Oxnard, California, on May 9, 11, 22-25, 2017.

Attorneys Lindsay Gallagher and Andréa Marcus represented Student. Ms. Marcus was not present on May 11, 2017. Student attended the hearing on all days, and testified. Student's mother attended all days of hearing and testified. Student's father attended on May 11, 2017, and for a short portion of May 24, 2017.

Attorney Lee Ride out represented District. Attorney Yonit Kovatur attended all but the first day of hearing. Interim Special Education Director Mary Schillinger and Special Education Coordinator Judy Greyhound attended on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until June 19, 2017. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

1. Did District deny Student a free appropriate public education by failing to properly assess Student in any area of suspected need from August 2015 to January 2017?
2. Did District deny Student a FAPE by conducting an inappropriate language and speech evaluation of Student in January 2017?
3. Did District deny Student a FAPE from August 2015 to January 2017 by failing to offer and or deliver to Student appropriate supports and services in the following areas to address his known disability of cerebral palsy, including but not limited to¹:
 - (a) Occupational therapy services;
 - (b) Language and speech services; and

1 Student's complaint alleged District failed to "provide" supports and services without specifically identifying what services and supports were at issue, or whether Student was alleging failure to implement or failure to offer the areas of service at issue. At the prehearing conference, the parties agreed to specify the three service areas listed in Issue 3, adding the words "including but not limited to." The statement of Issue 3 has been rephrased to clarify the issues by replacing the word "provide" with "offer and or deliver to Student" based on the evidence presented by the parties. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443; see, also, *M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, fn. 2.)

(c) A paraeducator physically capable of lifting Student, pushing Student in his wheelchair, or a male paraeducator for Student when he used the restroom?²

4. Did District deprive Parents of their right to meaningfully participate in the development of Student's individualized education program by failing to consent to, deny, or otherwise respond to Parents' request that District assess Student in additional areas, made by Parents in writing on District's assessment plan on November 9, 2016?

SUMMARY OF DECISION

Student proved in Issues 1 and 2 that District denied him a FAPE and deprived Parents of the opportunity to participate in a meaningful way at his IEP team meetings regarding his communication needs because it did not appropriately or timely assess Student in language and speech. District changed his speech services in November 2015 from direct services to a consultation/collaborative model without assessing him or relying on current assessment data. Additionally, District's January 2017 language and speech assessment was not sufficiently comprehensive. Student did not prove that District denied him a FAPE by failing to assess in any other area before November 9, 2016. The time period after November 9, 2016 was addressed under Issue 4.

² Issue 3(c) as stated in the PHC order did not include "failure to provide" a male paraeducator when Student used the restroom. However, Student alleged facts related to the need for a male paraeducator in the complaint and sought a male paraeducator as a proposed resolution to the issues. Student and District witnesses testified concerning the need for a male paraeducator, and District raised no objections. Therefore, the ALJ redefined Issue 3(c) in accordance with the evidence at hearing. (See, *J.W. supra*, 626 F.3d at pp. 442-443; *M.C. supra*, 858 F.3d at fn. 2.)

In Issue 3(a), Student did not prove he required occupational therapy services to access his educational program or acquire educational benefit. Therefore, District did not deny him a FAPE by failing to offer occupational therapy services during the statutory period. Student proved in Issue 3(b) District denied him a FAPE by failing to offer appropriate language and speech services for one year from January 2016 because it changed his speech services to a consultation/collaborative model without first assessing his current needs. Student did not prove, however, that District did not implement the speech services as outlined in his February 2015, November 2015, and February 2016 IEPs. In Issue 3(c) Student proved District denied him a FAPE by failing to offer a male paraeducator as part of his paraeducator team for the purpose of using the restroom, and by failing to assign a male paraeducator when he visited the restroom. He did not prove District denied him a FAPE by failing to offer or assign to him paraeducators who were capable of lifting him or pushing him in his wheelchair. Student did not prove in Issue 3, in the context of the term "including but not limited to," that District denied him a FAPE by failing to offer any other specific support or related service.

In Issue 4, Student proved that District deprived Parents of the opportunity to participate meaningfully in the development of his January 2017 IEP because it failed to send prior written notice or otherwise notify Parents that it declined to assess Student in occupational therapy or alternative augmentative communication, areas in which Mother requested assessments. Student proved that District staff knew about the interrelationship between his physical/musculature disabilities and his communication needs, and assessing in those areas may have provided information useful to Parents and the IEP team when developing his 2017 annual IEP. Student did not prove that District denied parental participation because they failed to assess Student's social

emotional needs, as requested by Mother. District assessed in the area of social emotional needs as part of the 2016-2017 triennial psycho educational assessment.

Student's remedies are discussed below.

FACTUAL FINDINGS

1. Student was 16 years old and a sophomore at Adolfo Camarillo High School, at the time of hearing. He resided with Mother in the District at all relevant times. Mother was an experienced educational paraeducator. She was employed at a neighboring school district.

2. Student was eligible for special education as orthopedically impaired and secondarily as speech or language impaired. He was a personable and intelligent young man. He was diagnosed at age two with spastic quadriplegia cerebral palsy, which affected his mobility and movement-based activities, toileting, communication skills including intelligibility associated diaphragmatic inhalation, and writing skills. His body was stocky. He ambulated using a walker, crutches, and occasionally a wheelchair, with adult assistance when needed. He occasionally wore a super malleolar brace to stabilize his feet when using crutches. If he fell, he became "dead muscle weight," and his hands would go in the air instead of extending behind his head to avoid injury. He was not characterized as medically fragile, requiring a feeding tube, toileting assistance, or as severely handicapped. He required adult assistance to help him maintain his balance, and to lift him to a standing or sitting position if he fell. He did not have good breath support; his diaphragm and intercostal muscles did not function efficiently, which resulted in less oxygen intake, decreased mobility and impacted clarity in communication.

ENROLLMENT AT ADOLFO CAMARILLO HIGH SCHOOL

3. Student enrolled in the 10th grade at Camarillo High in August 2015. District implemented his February 23, 2015 transitional IEP from his prior district. That IEP provided for 100 minutes a month of direct speech therapy in a special education classroom; note-taking assistance; designated seating; additional time for testing; five-minute allowance to leave class early for transition to classes; and adult assistance for physical needs. The IEP provided for a full-time one-to-one paraeducator for all four years of high school, which would be evaluated annually to determine which services could be reduced. Student was not eligible for extended school year.

4. The Camarillo High campus was located on a hill with some slight elevations and grassy areas that Student could not easily maneuver without assistance. He required an adult paraeducator who was trained to lift him if he fell, and to help him maneuver the common campus areas. Student could usually enter and use the restroom facilities by himself. However, he required an adult paraeducator to be outside the restroom in case he fell, or if he had difficulty accessing bathroom fixtures because of obstacles. Student had access to handicap restrooms on campus, but also was obliged to use non-handicap restrooms at certain times of the school day.

5. In September 2015, a security breach on campus resulted in a lockdown at school during lunch. Police came to the school and students were evacuated to a safe area. Student reported to Mother by text message that he was left alone outside the cafeteria, without his paraeducator. He reported to Mother that he was confused and fearful. Mother came to the campus during the emergency but did not observe that Student was alone at the time she arrived. Student also reported to Mother that, in October 2015, a fellow student, rather than Student's paraeducator, pushed Student several hundred yards to a designated safe area during an earthquake drill. Student was embarrassed that a classmate had to assist him. Mother did not observe the incident

and no one from District corroborated that the incident occurred. Mother reported to District staff by email in October 2015 that Student was increasingly anxious about school.

6. Student's IEP team met on November 2, 2015. All required District staff, Student, Mother and Father attended and actively participated. The IEP team reviewed Student's present levels of performance; he was performing average or above in his classes.

7. Mother, Father and Student expressed various concerns about Student's education program at the meeting, including: the frequency of communication by staff with Student; the level of academic assistance provided by his paraeducator; Student's anxiety about safety issues on campus; paraeducator support at lunch and in public areas; Student's need for extra time for transitions between classes; and his private occupational therapy and physical therapy services. District staff corroborated that Student often felt anxious at school. Parents felt District was not fully implementing the IEP, based on Student's anecdotal reports to Parents. The IEP team discussed Student's concerns about his current paraeducator including what Student described as over involvement in his classroom activities. Student and Parents did not like when the paraeducator answered questions for him or corrected his work instead of having the teacher correct his work.

8. The IEP team considered Parents' and Student's concern that District's delivery of speech therapy services interfered with academic time. Student had worked well at his previous school with push-in speech therapy services. Although his February 2015 IEP required services to be provided in the classroom, Student reported he was pulled out of class for direct services at Camarillo High. He did not want to be pulled out of class because he did not want to lose instructional time. Other than Student's anecdotal report, no one offered evidence of the actual method of delivery of speech

services during the first months of the 2015-2016 school year. However, in response to Student's concerns about missing instruction, the speech therapist suggested changing speech therapy services to a collaborative model.

9. No one proposed to assess Student before changing the model of delivery of speech services. The new proposed service consisted of 60 minutes per month of collaborative services. The speech therapists would collaborate with teaching staff on Student's communication goal, involving breathing techniques while speaking in class, and would consult directly with Student during the school day when he was outside of the classroom. Consultations would be noted in logs maintained by the therapists. Mother credibly testified at hearing that she was less concerned at that time about Student's speech therapy services and wanted to focus her priority on safety issues. She did not ask for a language and speech assessment before agreeing to change the model of delivery of speech services. She did not express concern at the meeting that Student was not receiving direct speech therapy services, and Parents agreed to the change of services.

10. Although Mother voiced concern that Student's assistive technology/assistive communication needs should not be addressed until the IEP was fully implemented, Parents consented to an assistive technology assessment proposed by District, and signed and consented to the November 2, 2015 IEP, including the new model of delivery of speech services.

11. The IEP team met on January 14, 2016, to discuss the assistive technology assessment report and recommendations for a trial period using an iPad. Student accessed his educational program and made academic progress during the first semester of the 2015-2016 school year. He received straight A's on his first semester report card. The IEP team did not make any changes to the November 2, 2015 IEP.

2016 Annual IEP

12. On January 26, 2016, District administered age-appropriate transition assessments to Student. The assessments included a Transition to Adult Life Assessment which evaluated career interest, skills and aptitude to Student's related transition goals, and included a student interview. Student's resulting goals included attending a four-year college within one year of exiting school; and employment in broadcast media/video production with five years after exiting school.

13. On February 17, 2016, the IEP team convened an annual IEP team meeting. All required District staff, Parents and Student attended and participated. A District occupational therapist and Student's private physical therapist, Galen Okazaki, also attended. Student reported "everything was going well." Parents requested that District provide Student with the use of an iPad. Student's present levels of performance were good, he was doing well in his classes, and he received straight A's in his first semester. In vocational/prevocational access, Student was attentive in class, completed and returned homework, prepared for class, followed directions, managed time efficiently, and was well organized. He was a good classroom helper. In self-care/independent living, Student needed occasional adult assistance for swallowing, using the restroom, and ambulating with his walker.

14. The IEP team developed two goals in adult transition based upon the transition assessments, and one goal in communication. Student was on track to graduate in 12th grade, and did not demonstrate the need for post-graduate service by an adult agency.

15. The IEP team developed a communication goal focused on Student's airflow during conversation. Student was to pause as needed for at least 10 syllables with 90 percent accuracy for five consecutive trials. The IEP team also discussed the collaborative/consultation model of speech therapy services, noting that observation

and collaboration would allow the therapist to cue Student for good posture in order to insure appropriate breath support for volume and speech clarity.

16. The IEP team considered Parents' and Student's concerns for safety at school, and the qualifications of his assigned paraeducators. The IEP team agreed to hold another meeting to review a proposed Emergency Health and Safety Plan.

17. The IEP team reconvened on April 16, 2016. In addition to required District staff, a District adaptive physical education teacher, school nurse, associate principal, orthopedic consultant LaVada White, Mr. Okazaki, Parents, Student and Student's attorney Ms. Gallagher attended the meeting. Ms. White had a certificate in Mobility Opportunities via Education, which enabled her to make recommendations for children with mobility issues. She was not a licensed physical therapist or occupational therapist. She had never formally observed Student, interviewed him or had any communication with his treating therapists or physicians about his needs.

18. Parents expressed numerous concerns. Parents and Student remained concerned that the paraeducators assigned to Student did not have the physical ability to address Student's needs, and that they were not fulfilling all of their IEP duties to Student. Parents based their concerns on continued reports from Student that his paraeducators, including his then current paraeducator Christine Freedman, did not always follow his IEP. Parents, through attorney Ms. Gallagher, requested that one paraeducator should be assigned to Student. District IEP team members recommended a team of two assigned paraeducators with a substitute. Ms. White presented a Health/Emergency Care Plan. Parents and Mr. Okazaki recommended some changes, which the team agreed to incorporate into the final plan. The IEP team agreed to hold another meeting.

19. Student regularly received private physical therapy from Mr. Okazaki, a licensed pediatric physical therapist, beginning in 2011. Mr. Okazaki testified at hearing.

He had training and experience in evaluating, planning and caring for children with gross motor needs in order to optimize their abilities. His private practice caseload included 20-30 children a week. He demonstrated familiarity with Student's disability and unique mobility needs, and with Student in general. He attended Student's IEP team meetings during middle school. He observed Student during his private sessions. He observed, after Student began high school, Student was more afraid and prone to anxiety. Mr. Okazaki's testimony was credible and he was qualified to offer expert opinions regarding Student's postural and mobility needs at school.

20. Mr. Okazaki opined that the optimum classroom position for Student was a chair with a full back, feet flat, back upright, and supported by a lumbar roll or seat wedge orienting his spine slightly forward toward his table or desk. This postural environment stabilized Student's head and neck for looking at a computer screen or a book. Muscle control and balance was a challenge for Student and took his attention away from what was going on in the classroom. At school, Student had difficulty on wet pavement and he fatigued on hot days. These difficulties impacted his mobility and balance.

21. Mr. Okazaki concluded that the restroom was one of the most dangerous rooms for Student. Although he was capable of self-toileting, Student was unable to free his hands from his walker to move obstacles away from his path. This created a dangerous situation. If Student fell in the restroom before pulling up his pants, his paraeducator was required to immediately come into the restroom to lift him up and assist him. As a teenage boy, Student's need to maintain his self-esteem and dignity were important reasons to assign a male for restroom needs. In Mr. Okazaki's opinion, the IEP team should set as a high priority the assignment of an appropriate paraeducator for emergencies, including a male for the restroom.

22. Mr. Okazaki participated in the development of and recommended an emergency safety plan for Student's 2016 IEP, collaborating with Ms. White. In his opinion, the proposed safety plan presented at the April 2016 meeting, with his proposed changes, was appropriate. Ms. White also testified at hearing. She concurred with Mr. Okazaki that the proposed safety plan was appropriate. Both Mr. Okazaki and Ms. White agreed that Student required a paraeducator who had the training and ability to lift him if he fell and drag him in an emergency.

23. Ms. White concurred at hearing that Student should have a male paraeducator when he used the restroom. She also opined that Student did not need an occupational therapy assessment because Student had a note taker at school and he could dictate his notes. He accessed the curriculum successfully without occupational therapy services.

24. The IEP team reconvened on May 16, 2016. All required District staff, Parents and Student attended and participated. The IEP team reviewed Parents' continued concerns about the safety plan and qualifications of the paraeducators assigned to Student. Parents described again in detail their concerns about the duties of the paraeducators. The team also discussed whether a male or female paraeducator could assist Student if he fell in the restroom.

25. The IEP team considered two classifications of paraeducators for Student. District's Level I paraeducator was an instructional aide who worked under direct supervision of a classroom or program resource teacher. The Level I typical duties focused on educational and classroom support from an adult with a high school diploma or equivalent, an associate degree and or successful completion of a "Parapro" test. Physical characteristics included the ability to bend, stoop, reach, lift and stand for prolonged periods. District's Level IV Paraeducator for Physically/Severely Handicapped had similar duties in the areas of instructional assistance. However, the duties included

providing attendant services to physically handicapped students, including toileting assistance, transferring, lifting, positioning, feeding, and transporting. The Level IV paraeducator was required to assist with other needs of physically/severely handicapped students. Like the Level I paraeducator, physical characteristics for the Level IV paraeducator included the ability to bend, stoop, reach, lift and stand for prolonged periods. Level IV also required valid cardiopulmonary resuscitation and first aid certificates. At the May 2016 IEP team meeting, the team noted that a Level IV paraeducator was required if Student fell in the restroom.

26. Program specialist Susan McDonald agreed to document Parents' concerns, collaborate with Mother, and share the concerns with the assistant principal supervising the paraeducators. Parents repeated their concerns that one of Student's teachers was penalizing him for absences, requesting an accommodation that he would not be penalized. The IEP team agreed to their request, noting Student would still be responsible for assignments. The IEP team agreed to hold another meeting to finalize the IEP.

27. Assistant vice principal Karen Chadwick testified at hearing. Her duties included supervision of paraeducators, correction of actions if needed regarding campus safety, review of Student's IEPs and discussion of safety issues with his paraeducators. She helped write the job descriptions for Level I paraeducators. She was unaware of any incidents where any paraeducator assigned to Student was unable to lift him. Both Ms. McDonald and Ms. Chadwick credibly testified that District had contracted with an outside agency, Sunrise Therapy, to train all paraeducators on proper lifting techniques to address Student's unique needs. District would not have assigned any paraeducator to Student who could not lift him in an emergency. Mother declined a Level IV paraeducator for Student, as long as his assigned paraeducator could lift him or push him in his wheelchair.

28. The IEP team met again on June 6, 2016. All required District staff, Parents and Student attended and participated. The IEP team documented the specific duties of paraeducators assigned to Student. The paraeducators were to provide only physical assistance to Student, and not to communicate for him. The paraeducators were required to be physically able to push Student in his wheelchair, assist him on uneven surfaces and up and down slopes. They were required to be trained and physically able to lift him if he fell. They were required to be within eyesight of Student at all times, close enough at lunch time to assist Student if he fell, provide note-taking in class, assure that Student's wheelchair was outside of the classroom in case of an emergency, and provide constant supervision including during change of paraeducators. Student's IEP Health/Safety Plan should accompany the paraeducator at all times. District staff explained to Parents that Level IV paraeducators were trained in cardiopulmonary resuscitation. Parents confirmed they did not feel Student required a Level IV paraeducator, as long as the assigned paraeducator was physically able to assist Student in an emergency. Parents consented to the IEP as modified in June 2016, which District implemented.

Fall 2016

STUDENT'S CONCERNS FOR SAFETY

29. In the fall semester of the 2016-2017 school year, Student continued to experience increasing anxiety from his fear that he might fall. He was concerned that Ms. Freedman could not lift him. To that date, he had not fallen in the school environment. However, he reported to Mother that, in October 2016, he overheard Ms. Freedman complain that his backpack was "too heavy," which led Student to fear that if he fell, Ms. Freedman could not lift him. Ms. Freedman typically carried his backpack, or placed it in his wheelchair, while Student ambulated around campus with his walker. Student observed that Ms. Freedman appeared "sweaty" and out of breath when

pushing the wheelchair with the backpack on it. Student also reported to Mother that he observed Ms. Freedman breathing heavily when she pushed him in his wheelchair, including up inclines on campus. Student had eight paraeducators assigned to him while at Camarillo High. He felt only two of the eight were capable of lifting him in an emergency. His perception led to increased anxiety about school.

30. Student also reported to Mother that another student lifted him onto the platform of an outdoor stage during a video class exercise. He did not explain during hearing where his paraeducator was at the time. His video class teacher, Michael Tore Smith, did not recall seeing Student sitting on the stage, which is immediately outside of his classroom. Students were not required to climb up on the stage during his class. Use of the stage was not common in the class. Stage access included stairs and a ramp. Student had paraeducator support in his class, and the paraeducator had eyes on him whenever he left the classroom. Mr. Smith was unaware of any situation where Student needed to be lifted during his class.

31. Student did well in Mr. Smith's class. Student participated in small groups in class and had a particular interest in film editing. He often worked in the back of the classroom. Student engaged with the other students, and others understood his speech about 65 percent of the time. Mr. Smith did not observe anything out of the ordinary with Student during his class.

32. Student reported to Mother that, during a series of fire drills, his paraeducator pushed him on campus "sideways" up an incline. Student was afraid because he felt unsteady, had no seatbelt, and knew that pushing him from side to side was not a safe way to push him. Student participated in a fire drill while in Mr. Smith's class. The students in his class knew the escape route. Student's wheelchair was outside of the classroom door. Student walked to the door, where his paraeducator assisted him

into his wheelchair. They moved together to the basketball court using an included walkway that led to a flat area. Mr. Smith's testimony about this incident was credible.

33. Student also reported that he was afraid Ms. Freedman could not push him through puddles of water in a rainstorm. Student frequently sent text messages to his Mother when he was afraid for his safety. He reported that his paraeducator asked another student to push him while he was in his wheelchair. Mother continued to see an increase in Student's daily level of anxiety. Mother never independently observed any of the incidents reported to her by Student, although she had no reason to believe Student was not telling the truth.

34. In October 2016, Student's attorney Ms. Gallagher notified District that Parents were concerned about the inability of Student's paraeducators to lift Student if he fell, or push him in his wheelchair in an emergency. Ms. Gallagher also notified District that Parents were concerned that Student should have a male paraeducator assigned to him when he used the restroom.

SPEECH THERAPY SERVICES

35. From February 2016 until February 2017, four speech therapists provided services to Student on a collaborative basis pursuant to his IEP: Susan Crespi, Mary Serobian, Allison Marz, and Summer Chirdon. Ms. Marz and Ms. Chirdon testified at hearing.

36. Ms. Chirdon was a licensed speech therapist with a master's degree in communicative disorders. She had been employed for several school districts as a speech pathologist and language and speech specialist since 2005 and a clinician from 2001 to 2005. She had experience in administering assessments and writing assessment reports, providing treatment for students from pre-school through high school, collaborating with teaching staff, providing language and speech therapy treatment to students, attending IEPs, and developing IEP goals. Her testimony was credible and she

was qualified to offer opinions regarding Student's needs at school in language and speech.

37. Ms. Chirdon reviewed speech logs prepared by all of the speech therapists, credibly identified their handwriting/notes, and generally interpreted the notes. In her opinion, speech pathologists do not work to strengthen facial muscles. They consider the academic impact of the student's problem in order to determine the need for services. Ms. Chirdon collaborated with Student's teachers to determine whether articulation errors impacted his ability to socially navigate the school environment. Student readily participated in class; no teacher reported that Student was having trouble socially navigating language. Ms. Marz, Mr. Smith and Student's case manager all reported to Ms. Chirdon that Student's communication skills were successful. Student reached his IEP communication goal. The data on the speech therapy logs did not clearly reflect that Student's goal was measured consistently in the classroom during classroom participation. However, in Ms. Chirdon's opinion, if the IEP team had felt that Student needed to master the skills of his goals in the classroom, as opposed to in social settings outside of the classroom, the IEP team would have provided for services to work toward the goal in the classroom.

2016-2017 Triennial Assessments

38. District sent Parents an assessment plan in November 2016, in preparation for Student's triennial IEP in February 2017. Student was last assessed in 2011, when Student was in fourth grade. The November 2016 plan proposed to assess Student in the areas of pre-academic/academic achievement, self-help/adaptive skills, language/speech communication development, functional behavior, intellectual development, and the need for a special circumstances paraeducator. Mother added the following assessments to the proposed plan: social/emotional, motor skills development for occupational therapy; vocational/prevocational, and augmentative alternative

communication. She wanted a comprehensive assessment because Student's teen transition had been difficult and she wanted the team to have enough information to develop appropriate goals for Student. Mother signed the assessment plan as she amended it on November 9, 2016. District did not communicate to Mother verbally or in writing that it declined to add the areas of assessment she requested until the January 12, 2017 IEP team meeting.

39. District school psychologist Dr. Jorge Sacchetto conducted portions of the triennial assessment and coordinated the preparation of the multi-disciplinary report. The appropriateness and validity of all areas of assessments except language and speech were not at issue. At the time of this assessment, Student had an average cumulative grade average of 4.0 and he was on track to receive a diploma. The assessment included a records review, Student and classroom observations, interviews with Student's paraeducator and teachers, Parent and teacher interviews, and several standardized tests in the areas of intelligence, academic achievement, visual motor, behavior based on Student, Parent and teacher evaluations, and adaptive behavior. Student had difficulty with visual and fine motor integration. He required assistance with note taking, using copies of another student's notes, teacher's notes, or assistance from his paraeducator.

40. Dr. Sacchetto assessed Student in the area of social emotional functioning. He administered the Behavior Assessment System for Children Third Edition, administering rating scales to Mother, Student and Mr. Smith. Based upon their scores, Student's social emotional behaviors, including in the area of anxiety, were within normal limits on all three rating scales, with no notable areas of clinical concern. Dr. Sacchetto observed Student three times, during his video production class, his physical education class, and in directed studies class. Student's paraeducator was always within eyesight or pushing his wheelchair while Student walked. Student generally kept to

himself, was not overly sociable, and often did not engage in self-initiated conversation with his peers.

41. Ms. Marz and Ms. Chirdon conducted the speech/language assessment. Ms. Marz reviewed and summarized Student's 2011 speech assessment report. She was a licensed speech therapist with a master's degree in communication sciences and disorders. She had a certificate in clinical competence and had worked as a clinician and licensed pathologist since fall 2010. Her work experience included providing speech therapy, creating written evaluations of speech therapy needs, goals and expected outcomes, attending IEP team meetings, and treating children with varying areas of need in articulation, language comprehension, alternative augmentative communication, fluency, pragmatics and speech/language. She served as Student's case manager, informally worked with him on his speech on campus, and was qualified to administer the test instruments that she gave to Student.

42. Ms. Marz prepared the written assessment report which was incorporated into the multi-disciplinary report. She assessed Student in his native language of English. Ms. Marz took language samples during one-on-one conversation with Student. She reported no grammatical errors, at or above-age level content/vocabulary, average range of stuttering, hypernasal voice quality, and dental/lateral lisp on the right side, with occasional final consonant deletion and weak syllable deletion. On the oral motor examination, Student's right side of his mouth contracted more than the left, indicating possible facial weakness. His tongue slightly protruded to the right when extended and he presented with slow lingual (tongue) movements. She recorded teacher observations, noting that Student was understandable under most circumstances, less in noisy circumstances. She observed Student in class, although she did not observe him participate in a classroom discussion. Student exhibited saliva retention, muscle tension in his neck and shoulders, contraction of his neck and shoulders when he spoke. He

often self-monitored and self-corrected imprecise articulation errors. Ms. Marz did not observe any attention or behavioral difficulties during her assessment of Student.

43. Ms. Chirdon administered the standardized Goldman-Fristoe Test of Articulation, in Student's native language of English, because Ms. Marz did not have experience with that particular test. Ms. Marz observed. Ms. Chirdon had previously administered the test to approximately 500 students. In her opinion, Goldman-Fristoe contains all sounds in the English language that one would expect a person to produce. It was best practices for someone who had not administered the test to observe, which Ms. Marz did. Ms. Chirdon summarized her findings, which Ms. Marz incorporated into the report. Student demonstrated errors when producing the following sounds: /s/, /r/, /t/, /sh/, and /z/. He was 90 percent comprehensible in conversation. He communicated effectively in a quiet environment. In noisy environments such as less-structured classes or passing periods, his articulation and phonological errors impacted his comprehensibility, reducing it to 60 percent. He did not demonstrate knowledge of strategies to help increase comprehensibility in a noisy environment. Fluency and voice pitch and loudness levels were not a suspected disability. His scores in language memory, core, receptive and expressive language were 95 percent. He demonstrated good social comprehension and communication, used appropriate eye contact, facial expressions and tone of voice to express himself.

44. Overall, Student's language skills were average or above average, with a hyper nasal voice, articulation errors, and reduced comprehensibility secondary to muscle weakness associated with cerebral palsy. Ms. Marz recommended that Student continued to be eligible for speech or language impaired in the area of speech production, and that he continues to receive speech/language services on a consult/collaboration basis to learn strategies for increased comprehensibility. Ms.

Chirdon concurred and opined at hearing that she did not recommend that the IEP team discontinue language and speech services.

45. Ms. Marz opined at hearing that Student's disability required oral motor training through medical intervention, working with the musculature. School speech therapists did not deliver oral motor intervention designed to strengthen oral musculature. Her role was to teach strategies to Student, his paraeducators and teachers on how to produce sound, effective ways to encourage participation in class by sitting closer to the teacher, breath support and pausing. She evaluated whether Student's speech disability was affecting his grades, his ability to talk to his teacher, and his access to his educational program. She saw no reason to consult with Student's physician regarding his speech disability based on her observations of his performance, and teacher feedback.

46. On January 5 and 6, 2017, District administered a Transition to Adult Life Assessment. The assessment identified the same areas of interest as the 2016 assessment, and informed the development of two goals, similar to 2016. The IEP team met on January 12 and February 2, 2017. The IEP team meeting was continued to February 22, 2017, after Student filed his complaint.

Independent speech assessment – Karen Schnee

47. Karen Schnee was a licensed speech pathologist and a certified education specialist. She had master's degrees in special education/learning reading disorders, and in communication disorders. She had worked in private practice for 16 years as a consultant and diagnostician for children and adults with specific learning disabilities and developmental delays. Prior to her private practice, she worked in private institutions as a diagnostician and speech pathologist, and as a special education teacher. She had not worked as a school speech therapist. She had training and experience in administering assessments in cognition, memory, achievement, auditory

processing and language and speech. She frequently attended IEP team meetings and received referrals for independent educational evaluations from school districts, parents and special education attorneys. Ms. Schnee was qualified to offer expert opinions on Student's behalf. She testified at hearing.

48. Ms. Schnee met and evaluated Student in April 2017. Her evaluation was initiated as an independent educational evaluation through agreement with District. No one offered evidence that District actually funded Ms. Schnee's evaluation at the time of hearing, or what she charged for the evaluation. The IEP team did not review Ms. Schnee's April 27, 2017 written report or recommendations as of the time of hearing. Therefore, her findings and recommendations were relevant only to the applicable statutory period and remedies. She opined that she did not recall any deficiencies in the services District provided to Student before January 2016.

49. Ms. Schnee was critical of Student's 2016 speech goal. In her opinion, a goal addressing breath support did not address Student's needs given his complex communication needs associated with his disability, including breathing, muscle movement and articulation. She disagreed with District's offer in November 2015 to change the delivery model of speech services to a consultative model. In her opinion, providing consultation with Student, particularly in school hallways and common areas during transitions, was not an appropriate way to address Student's articulation/breathing needs. Student required appropriate seating during therapy, and instruction and attention to his use of oral musculature associated with breathing. In her opinion, if District had worked on breath support, vowel production and Student's lateral lisp, Student should have experienced notable improvement in one year.

50. Ms. Schnee opined District should have assessed Student before changing the method of delivery of the service. Student missed a "year of opportunity" from January 2016 until January 2017 because of the change from direct to consultative

delivery of services, lack of direct services, and inappropriate communication goals, all of which could have been addressed had District assessed Student before changing his services.

51. District's 2017 language and speech evaluation was not sufficiently comprehensive to identify all of Student's communication needs. In Ms. Schnee's opinion, it was not "even an evaluation." She disagreed that the Goldman-Fristoe was sufficiently comprehensive for a child with cerebral palsy. Ms. Marz and Ms. Chirdon did not look globally at Student's physical needs associated with cerebral palsy, and did not take any measures of breath support or how long he could phonate (produce speech sounds). They did not evaluate whether seating accommodations would support Student's sound production. Their observations were insufficient because they did not conduct multiple observations in the classroom, informal settings, between classes, and in a formal setting. Ms. Marz's language sample only sampled a small number of utterances. A valid sample typically recorded close to 200 utterances. The language sample should look at how many words are in a spoken statement. If Student had been taught and developed proper breath support, he would have been capable of forming adult-level sentences. Ms. Schnee disagreed that Student's needs in speech production were a "medical issue," and with Ms. Marz's and Ms. Chirdon's conclusions that school speech therapists could not address Student's needs in speech production related to limited range of motion of his tongue and oral musculature.

52. As part of her April 2017 evaluation, Ms. Schnee interviewed and observed Student for 45 minutes during English College Preparatory class, and consulted after class with the teacher, April D'Andrea. Ms. D'Andrea informed Ms. Schnee that, although Student reported to Ms. Schnee that his grades had dropped, in fact Student was performing at 89 percent in English and was making academic progress. Her reporting

was consistent with Mr. Smith's testimony about Student's success and progress in his video production class in 2015 and 2016.

53. Ms. D'Andrea understood Student's communication 90 percent of the time, providing she was close to him when he spoke. If she was at the front of the class approximately six feet away, she could not understand Student. Student was slow to volunteer in class participation, although he was prepared, ready to answer, and his answers were accurate. Student was often solitary, generally did not reach out to peers or seek engagement with them, but would respond if they approached him.

54. Ms. Schnee administered several standardized tests in oral language, oral reading, written language and math. Overall, she found that Student's language skills were within functional limits, although he was mildly weak in reading comprehension. His teachers and peers who were familiar with him understood him 90 percent of the time, while listeners who were unfamiliar with him asked him to repeat himself 50 percent of the time.

55. Ms. Schnee recommended Student should receive direct speech therapy to address speech production. In her opinion, two 30-minute sessions a week was appropriate. She did not explain in detail exactly what the services would look like, because they would be driven by Student's goals once developed. Ms. Schnee opined that "ideally" the services could be delivered after school by a non-public agency because Student did not want to be pulled out of class for speech therapy, or have his instruction in class interrupted.

56. Ms. Schnee also recommended that District should assess Student in occupational therapy to determine whether he would benefit from services to address his breath support, speech production and articulation. Student reported to her that his paraeducators wrote down his responses, which he felt they occasionally "dumbed down." Student expressed interest in having technology that would permit him to

generate his own responses to questions. Therefore, Ms. Schnee recommended that District conduct an augmentative alternative communication assessment to address Student's concerns.

Expert Opinion – Private Psychologist

57. After Student filed his complaint, clinical psychologist Dr. Tracey Bennett diagnosed Student with anxiety and panic disorder. Her opinions at hearing regarding Student's anxiety were given little weight because her preliminary diagnosis relied on Student's anecdotal incidents at school as reported to her by Mother. Dr. Bennett did not independently verify any of those reports with school staff. She did not complete her evaluation of Student, talk to anyone from the school, or produce a written a report.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to

³Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴All subsequent references to the Code of Federal Regulations are to the 2006 edition.

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to

typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In a recent unanimous decision, the United States Supreme Court 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 County Sch. Dist. RE-1* (2017) 580 U.S.____ [137 S. Ct. 988] (2017 WL 1066260)] (*Endrew*). The Supreme Court in *Endrew* stated that school districts needed to “offer a cogent and responsive explanation for their decisions” and articulated FAPE as that which is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstance.” *Id.*

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); 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, § 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).)

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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here Student was the filing party and had the burden of proof on all issues.

ISSUE 1: FAILURE TO ASSESS ALL AREAS OF SUSPECTED NEED

6. Student contended District denied Student a FAPE because it failed to assess Student in any area of suspected need from the time he began Camarillo High in August 2015, until January 2017. In particular, Student contended Student came to District in August 2015 with assessments from 2011, which the IEP team relied on to develop his November 2015 IEP and February 2016 IEP as amended. Student also contended District did not assess him in any area of need until it offered a triennial assessment plan in November 2016.

7. District contended it had sufficient information from Student's prior school district and its 2011 multidisciplinary assessment to develop an IEP to address Student's needs. It conducted an assistive technology assessment in November 2015, which addressed Student's fine motor skills. It evaluated Student's adult transition needs in January 2016 and January 2017. It met four times for Student's annual/adult transition IEP team meeting during the second semester of the 2015-2016 school year and discussed, among other areas, Student's speech and safety needs. Student reported everything was going well for him; teachers reported Student was doing well and his grades were good. District further contended Student's triennial assessment was due in February 2017 and it determined no need existed to assess Student prior to offering an assessment plan to Parents in November 2016.

Legal Authority

8. At the beginning of each school year, each local educational area must have an IEP in effect for each child with a disability within its jurisdiction. (34 C.F.R. § 300.323(a); Ed. Code, § 56344(c).) 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; 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).) When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

9. To determine the contents of an IEP, school districts must assess a student eligible for special education under the IDEA in all areas related to his or her suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) No single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subds. (c), (e), (f).)

10. A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension (Ed. Code §56043, subd. (a)), and shall attach a copy of the notice of parent's rights to the assessment plan (Ed. Code §56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code §56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); assessment may begin immediately upon receipt of the consent. (Ed. Code, §56321, subd. (c).) Thereafter, a school district must develop an IEP required as a result of an assessment no later than 60 calendar days from the date of

receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code, §56043, subd. (f)(1).)

11. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on parent's opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. (*Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078; see also *Amanda J. v. Clark Cnty. Sch. Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.) 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 Sch. Dist.* (9th Cir. 2003) 394 F.3d 634, 657 (Gould, J. concurring in part and concurring in the judgment).) 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 informed involvement of parents is central to the IEP process. (*Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. supra*, 267 F.3d at p. 882.) The Ninth Circuit Court of Appeals in *Timothy O. v Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1124-1126, recently held that a school district's failure to assess Student may result in substantially hindering a parent's ability to participate in a child's educational program, and seriously deprived the child's parents, teachers and district staff of the information necessary to develop an appropriate educational program with appropriate supports and services for the child. Failure to assess the Student therefore resulted in a denial of FAPE.

Analysis

13. Student me this burden of proving that District denied him a FAPE and deprived Parents of the opportunity to participate in the IEP process by failing to assess him in and after November 2015 in language and speech. Student's February 2015 transitional IEP called for 100 minutes of direct speech therapy in the classroom. In November 2015, the IEP team changed delivery of those services to a consultation model, at Parents' request, to avoid interrupting Student's educational instruction. Ms. Schnee credibly opined that, before doing so, District should have assessed Student in language and speech.

14. District's contention that Student refused direct services because he did not want to be pulled out of class did not relieve it of the obligation to determine Student's needs before changing his program. Student had not been assessed in language and speech since 2011. District's failure to assess Student in language and speech until January 2017 not only deprived the IEP team of necessary information to develop appropriate communication goals for Student, but it also resulted in depriving everyone on the IEP team of data that would have helped the IEP team decide the appropriate model for delivery of services. Ms. Schnee credibly opined that Student missed one year of opportunity in speech from January 2016 to January 2017 because of the lack of information from a current assessment which would have assisted in the development of Student's communication goals and services.

15. Student did not prove that he required an occupational therapy assessment in 2015 or 2016. Both Mr. Okazaki and Ms. Schnee opined at hearing that given Student's interrelated physical challenges, particularly in the physical components of producing sound, an occupational therapy assessment would have been appropriate for Student to ensure that his needs were known to the IEP team. However, Mr. Okazaki attended Student's IEP team meetings in 2016 and never raised the issue of an

occupational therapy assessment to the IEP team. Parents never expressed concerns about occupational therapy needs to the IEP team. Ms. Schnee's opinions were based on her April 2017 assessment results of Student. He accessed his educational program and made appropriate progress. Student did not prove that District denied him a FAPE by failing to assess him in occupational therapy from August 2015 through November 9, 2016. However, the time after November 2016 will be discussed under Issue 4 in the context of parental participation.

16. Student offered no credible evidence that he required an assessment in alternative augmentative communication during the statutory period, or that District was aware that he had suspected needs in that area. Despite his articulation issues, Student could communicate in the classroom, with his peers and teachers, and he had assistance with note-taking by his paraeducators, and use of fellow students' and his teacher's notes. Student made meaningful academic progress in school without the use of any alternative communication device. Parents declined assistive technology services at the November 2015 IEP team meeting in lieu of ensuring that other areas of Student's IEP were implemented. Student did not prove that District denied him a FAPE by failing to assess him through November 9, 2016, in alternative augmentative communication. However, the time after November 2016 will be discussed under Issue 4 in the context of parental participation.

17. Student also did not prove that, during the statutory period, District denied him a FAPE by failing to assess him in any other area of suspected need, except as discussed under Issue 4. Academically, Student was doing well, getting good grades in all subjects, and making educational progress. Dr. Bennett's testimony that she had recently diagnosed Student with panic disorder was irrelevant to the statutory period. Her findings were preliminary; she had not spoken to any District staff about Student. She offered no evidence that tied her current findings to any reported incidents during

the statutory period that proved that District knew, or should have known, Student had social emotional needs requiring an assessment. Mr. Okazaki and Mother testified that Student had increasing anxiety after starting high school; however, their testimony was based on Student's unconfirmed anecdotal reports. Neither of them recommended or requested a social/emotional assessment at Student's IEP team meetings in November 2015 or at any time before November 9, 2016. Student offered no persuasive evidence proving that District knew or should have known that Student had suspected needs in the area of social emotional that required assessment before it offered the November 2016 assessment plan to Student.

18. In summary, District's failure to assess Student in language and speech from August 2015 until January 2017 denied him a FAPE. This Decision addresses the impact of District's procedural violation on parental participation under Issue 4. Student's remedies will be discussed below.

ISSUE 2: APPROPRIATENESS OF 2017 LANGUAGE AND SPEECH ASSESSMENT

19. Student contended that District's 2017 language and speech assessment was insufficient, not comprehensive, and inappropriately conducted. Although District acknowledged that it consented to an independent educational evaluation in speech by Ms. Schnee in response to Parents' challenge to the assessment, it argued in its closing brief that its language/speech assessment was appropriate, seeking findings on the issue by this Decision in District's favor. District's closing argument led the ALJ to conclude that whether District would fund Ms. Schnee's evaluation was still at issue. Therefore, this Decision addresses Student's claim based on the premise that District was defending its language and speech assessment and it did not agree that it should fund Ms. Schnee's evaluation.

Legal Authority

20. Assessments must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

21. Individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area” must conduct assessments of students’ suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union Sch. Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

22. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by local educational agency,

subject to the following conditions. If a parent requests an independent evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in an impartial hearing under the IDEA that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(a)(3)(i).)

Analysis

23. Ms. Schnee credibly opined that the language and speech assessment conducted by Ms. Marz and Ms. Chirdon was cursory, and did not meet the criteria for a comprehensive assessment with valid results. She was qualified to render that opinion based upon her experience as a speech therapist who has administered speech assessments to children hundreds of times. The fact that she had no work experience as a school speech therapist, as District argued, did not negatively impact her credibility.

24. In her assessment report, Ms. Marz summarized information from Student's April 1, 2011 language and speech assessment, which reported Student ranked in the average range on the Goldman Fristoe. The current assessment consisted of one standardized test, a brief review of Student's background, a summary of observations by Student's teachers and an unidentified speech therapist, a short language sample and an oral motor exam conducted by Ms. Marz. Ms. Marz concluded Student should remain eligible as speech or language impaired, and should continue to receive collaborative services to "learn strategies for increased comprehensibility." Ms. Chirdon concurred at hearing.

25. Student met his burden of proving that the 2017 speech assessment was insufficient. The District assessors did not look globally at Student's physical needs associated with cerebral palsy, did not take any measures of breath support or how long he could phonate. They did not evaluate whether seating accommodations would

support Student's sound production. The District assessors did not sufficiently observe Student in the classroom, informal settings, between classes, and in a formal setting. Ms. Marz only sampled a small number of utterances to determine whether Student had proper breath support to enable him to form adult-level sentences. Ms. Schnee disagreed with Ms. Marz's opinion that Student's need in speech production was a "medical issue" that could not be addressed by a school speech therapist. Ms. Schnee had years more experience in the area of speech therapy associated with education than Ms. Marz, and therefore her opinion carried more weight.

26. Similarly, Mr. Okazaki offered opinions that supported Ms. Schnee's findings and opinions regarding the interplay between Student's cerebral palsy, his seating position, and his ability to produce sound. Communication was one of Student's two identified disabilities. Neither Ms. Marz nor Ms. Chirdon directly addressed those areas of need in the 2017 speech assessment or recommended further assessment in the area of occupational therapy. District failed to meet its obligations to Student and Parents under the IDEA when it administered only one standardized test and recorded the results of one observation and teacher comments as the main elements of the language and speech assessment. Compounded by the fact that Student did not receive any direct services in language or speech after November 2015, the evidence was persuasive that District's assessment was not sufficiently thorough.

27. District denied Student a FAPE and deprived Parents of valuable information regarding Student's needs in communication that would have enabled them to participate actively and with full knowledge at Student's IEP team meetings. Student's remedies will be discussed below.

ISSUE 3: RELATED SERVICES

28. Student contended that District denied him a FAPE by materially failing to provide appropriate speech therapy services; and failed to provide a paraeducator as

required by his IEP that was capable of lifting Student if he fell, and pushing him in his wheelchair in an emergency. Student also alleged in his complaint, and in proposed remedies, that he required a male paraeducator when he visited the restroom during the school day. Student did not specifically address in closing argument Issue 3(a) or any evidence supporting what, if any, specific occupational therapy services he contended District should have offered. Student also did not address in closing argument any other related service or support that fell into the definition of “including but not limited to” as phrased in the issue statement agreed upon by the parties.

29. District contended it provided Student a FAPE at all times, Student did not need occupational therapy services, and it provided appropriate speech services. District also contended Student’s paraeducators were trained and qualified to meet his needs as defined in his IEPs.

Legal Authority

30. Whether Student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.)⁵

⁵In *E.M. v Pajaro Valley Unified School Dist., et al.* (9th Cir. 2011) 652 F.3d 999, 1006, the Ninth Circuit Court of Appeals held that the district court erred by not considering whether a report generated three years after the due process hearing was otherwise admissible and relevant to the determination of whether the district met its obligations to the student under the IDEA several years earlier. (*E.M., supra*, 652 F.3d at p. 1006.) The holding in *E.M.* does not abrogate the general principle articulated in *Adams, supra*, 195 F.3d at p.1149, that the actions of school districts cannot be judged exclusively in hindsight.

31. Language and speech therapy services are included among the related services which “may be required to assist a child with a disability to benefit from special education” or that he might require language and speech services to benefit from his special education.(20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) Occupational therapy is also a related service that can be provided to assist a child to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

Analysis

ISSUE 3(A) OCCUPATIONAL THERAPY SERVICES

32. Student did not meet his burden of proving that District denied him a FAPE by failing to offer Student occupational therapy services. Mr. Okazaki and Ms. Schnee opined that an occupational therapy assessment might provide useful information on supports such as proper seating and body positioning to assist with Student’s communication needs. However, Student offered no persuasive evidence that proved that, from August 2015 through February 6, 2017,he required any specific occupational therapy services at school to access his education or make appropriate educational progress based upon the standards recently identified by the Supreme Court in *Endrew, supra*, 137 S.Ct at p. 1000. He did not prove through credible evidence that he had specific needs in the area of occupational therapy that District knew or should have known about, before Mother requested an occupational therapy assessment in November 2016. He did not prove that District knew or should have known that he had unique needs relating to his seating arrangements in class that impacted his access to his education.

33. On the contrary, Student made appropriate progress at school, he consistently received better than average grades, he successfully accessed his classroom with a walker, he was able to sit in class and participate, his paraeducator assisted him with note-taking and getting around the campus outside of the classroom, and he communicated effectively most of the time with teachers and peers in and out of the classroom. Student did not prove by the preponderance of evidence that District denied him a FAPE by not offering occupational therapy services during the relevant time period.

ISSUE 3(B) SPEECH THERAPY SERVICES

34. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) The IDEA requires that an IEP contain a projected date for the beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

35. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker Sch. Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) The *Van Duyn* court emphasized that IEP's are clearly binding under the IDEA, and the proper course for a school district that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

36. Student met his burden that District denied him a FAPE by failing to offer appropriate language and speech services. Student's transition IEP from February 2015 required District to provide Student with 100 minutes a month of direct speech therapy in the classroom. At Student's November 2, 2015, IEP team meeting, in response to Parents' and Student's objections to being pulled out of class for speech therapy, District changed the method of delivery of speech therapy services. Parents participated in the process and agreed to the change. However, as discussed above, District did not assess Student in the area of language and speech from the time he started District in August 2015 until January 2017. His previous assessment in communication was from 2011. The IEP team did not have enough information about Student's unique communication needs in the context of his disability, from and after November 2015, to develop appropriate goals or design an appropriate method of delivery of speech therapy in his IEP, or to make progress in his communication skills. Ms. Schnee's opinions supported this finding. Therefore, District denied Student a FAPE by failing to offer appropriate speech therapy services from November 2, 2015, until he filed his complaint. Student is entitled to remedies as discussed below.

37. Student did not prove District committed a procedural violation and denied him a FAPE by failing to implement his IEP speech services for "the past two years" as he argued in his closing brief. Student argued that District did not implement Student's IEP from August through November 2015 because it pulled Student out of class instead of providing services in the classroom as required by the IEP. The evidence established that District delivered direct services outside of the classroom, to which Student objected. No one offered evidence of exactly what type of services were delivered or by whom, or whether District materially failed to implement Student's IEP, other than by changing the location of services. Student did not prove that by changing the location of services District denied Student a FAPE. Student made academic progress

that semester, obtaining straight A's on his first semester report card, and he communicated successfully in class and with his peers. Although Ms. Schnee opined that Student lost a year of opportunity in the area of communication support after the IEP team changed the method of delivery of speech services, beginning in January 2016, she offered no opinion as to whether Student lost opportunity before January 2016.

38. Student did not prove, as he argued in his closing brief, that District denied him a FAPE by failing to implement his IEP speech therapy services after January 2016, claiming he never received any services. Ms. Chirdon credibly testified that four different District speech therapists consulted with Student, as needed, on his communication goal, and collaborated with his teachers on how to assist him in the classroom. Their log notes corroborated that some services on a collaborative model were delivered. The method of delivery in his IEP was consultation/collaboration. Student met his 2016 IEP communication goal. Within the parameters of his known communication and articulation deficits, Student effectively communicated with his peers and teachers in and out of the classroom. His communication during his testimony at hearing was generally understandable.

39. In summary, Student prevailed on Issue 3(b) by proving with sufficient evidence that District did not and could not offer him *appropriate* speech therapy services from and after November 2015. Student did not prove District denied him a FAPE by failing to implement his IEP language and speech services in his November 2015 IEP, and his February 2016 IEP, as amended.

ISSUE 3(C) PARAEDUCATOR CAPABLE OF LIFTING/PUSHING/MALE SUPPORT

40. Student met his burden of proving that District's failure to offer Student in his February 2016 IEP, as amended through June 2016, a male paraeducator for when he visited the restroom denied him a FAPE. He did not otherwise prove Student's

paraeducators were not capable of meeting the duties outlined in Student's IEP, resulting in a denial of FAPE.

41. Both Mr. Okazaki and Ms. White opined that a male paraeducator should be available to Student when he used the restroom to assist him if he fell, to ensure his dignity at all times. Their opinions were credible, and logical. Student proved that FAPE for Student included a male paraeducator as part of his supports. A male paraeducator was an "appropriate" related service for Student to meet his "unique" needs as a teenage boy with cerebral palsy who had the likely potential of falling down in a restroom while partially undressed. The need for a male paraeducator was no surprise to District; the IEP team discussed assigning a male to Student's paraeducator team during the four IEP team meetings while developing the February 2016 IEP. There was no evidence that a male paraeducator was ever available to Student when he used the restroom. The February 2016 IEP, as amended, was also silent as to that service. As such, District denied Student a FAPE by failing to offer Student a male paraeducator for purposes of restroom visits.

42. Student did not prove that the paraeducators assigned to him during the statutory period could not lift him or push him in his wheelchair in emergencies. Numerous witnesses, including Mother, Student, Mr. Okazaki, Ms. White, and Dr. Bennett, acknowledged that Student perceived, to the point of becoming anxious and developing possible panic disorder, that he was not safe at school because he worried that paraeducator Ms. Freedman, in particular, might not be able to lift him if he fell. He based his perception on a comment by Ms. Freedman to another employee about Student's backpack being too heavy, and because he observed her "sweating" when pushing his wheelchair, without him in it, with the backpack attached. His anxiety about his paraeducators' ability to meet his needs increased based on anecdotal incidents at

school where his paraeducator was allegedly not present or asked another student to push Student's wheelchair.

43. However, no witness credibly testified that, from August 2015 until he filed his complaint, Student ever experienced an episode where he was in actual or imminent danger because any paraeducator assigned to him could not lift him or was physically incapable of pushing his wheelchair up inclines or down sloped driveways in an emergency situation, or otherwise. Similarly, although Student reported that his paraeducator left him unattended in September 2016 during a lockdown and/or during an evacuation drill, Student failed to offer any credible corroborative evidence that the alleged absence of his paraeducator was caused by her inability to lift him or push his wheelchair over uneven surfaces. No other eyewitness corroborated Student's testimony on those events. Student also did not prove that his safety was ever actually in jeopardy during the statutory period, or that his paraeducators were not trained or failed to meet their duties as required in his IEP, resulting in a denial of FAPE. District staff credibly testified that all paraeducators assigned to Student had the required training and ability to meet those duties.

44. Additionally, neither Mr. Okazaki nor Ms. White offered any opinion that District paraeducators assigned to Student during the relevant time period were not qualified to lift him in an emergency or push his wheelchair with him in it. They concurred on the requirements for the paraeducators incorporated into the February 2016 IEP signed by Parents in June 2016. Student did not prove that District failed to implement the IEP requirements for the paraeducator.

45. In summary, Student met his burden of proving in Issue 3(c) that District denied him a FAPE by failing to offer in his February 2016 IEP, as amended, a male paraeducator to assist him in the restroom on campus and during off-campus school activities.

46. Student did not prove that District denied him a FAPE by failing to offer any other related support or service, other than discussed above.

ISSUE 4: PARENTAL PARTICIPATION

47. Student contended that Mother added specific areas of concern for assessment on the November 2016 assessment plan and signed the plan with those added areas. District did not notify Parents before January 2017 that it was not assessing in all of the areas requested by Mother, and as a result District procedurally violated the IDEA by failing to provide prior written notice to Parents. The procedural violation resulted in depriving Parents of the opportunity to participate in Student's IEP with all necessary information. District contended Parents actively participated in all of Student's IEP team meetings, that District assessed Student in some of the areas requested by Parents, and that it was not required to send Parents prior written notice.

Legal Authority

48. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has participated in the development of an IEP in a meaningful way when he or she is informed of the child's problems, attends the IEP team 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 v. East Hanover Bd. of Educ.*, 993 F.2d at p. 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].)

49. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations 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 a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) The hearing officer "shall not base a decision solely on non-substantive procedural errors, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).)

50. Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Ibid.*) A school district cannot independently develop an IEP without input or participation from the parents and other required members of the IEP team. (*Target Range, supra*, 960 F. 2nd at p. 1484.) 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 Sch. Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

51. Prior written notice must be given when the school district proposes or refuses to initiate a change in the identification, assessment, or educational placement of a child with special needs or the provision of a FAPE. (20 USC §1415(b)(3) & (4); §1415(c)(1), §1414(b)(1); 34 CFR §300.503; Educ. Code §§ 56329 and 56506(a).)

52. 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 Henlopen Sch.*

Dist.(3rd Cir. 2010) 606 F.3d 59, 70.) Prior written notice must be sent “a reasonable time” before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement or provision of FAPE to the child. (34 C.F.R. § 300.503(a)(1); Ed. Code, § 56500.4, subd. (a).) This is to ensure that “parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect.” (*Letter to Chandler*, 59 IDELR 110 (OSEP April 26, 2012).)

53. A prior written notice must include (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; (3) a description of each evaluation procedure, assessment, record, or report which is the basis of the action; (4) a statement that the parents of an individual with exceptional needs have protection under the procedural safeguards, and the means by which a copy of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance; (6) a description of the other options the IEP considered and the reasons why those options were rejected; and (7) a description of other factors relevant to the proposal or refusal of the agency. (20 U.S.C. 1415(b)(3) and (c)(1); 34 C.F.R. § 300.503(a) and (b); Ed. Code, § 56500.4, subd. (a) and (b); see also Ed. Code, § 56500.5 [requiring “reasonable written prior notice” that a student “will be graduating from high school with a regular high school diploma . . .”].) The notice is required even if the change is being proposed by the parent. (*Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).)

54. When a violation of the prior written notice procedures does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*C.H. v. Cape Henlopen Sch. Dist.*, *supra*, 606 F.3d at 70.)

Analysis

55. Student met his burden on this issue as to certain areas in which Mother requested additional assessments. Mother added the following assessments to the

proposed November 2016 assessment plan: social/emotional, motor skills development for occupational therapy, vocational/prevocational, and augmentative alternative communication. She wanted a comprehensive assessment because Student's teen transition had been difficult and she wanted the team to have enough information to develop appropriate goals for Student. Student proved District committed a procedural violation and denied parental participation as to the occupational therapy and augmentative communication assessments.

56. District procedurally violated the IDEA by failing to send Parents prior written notice explaining why it was not assessing Student in motor skills development for occupational therapy, and augmentative alternative communication. District did not respond at all to Parents' request. District did not assess Student in those areas, as requested by Parents. Therefore, the analysis requires determination of the impact of the procedural violation.

57. Ms. Schnee and Mr. Okazaki both credibly opined that District should have considered Student's needs in occupational therapy and alternative augmentative communication to ensure that he had the needed supports to allow him to sit properly and communicate effectively. His paraeducators were tasked with note-taking, although Parents requested that Student have the use of an iPad earlier in 2016. Parents raised questions as to Student's needs in those areas by requesting assessments. Without the information from an occupational therapy or alternative augmentative communication assessment, as requested by Mother, District could not ensure that the IEP team, including Parents, had the necessary information to address all of Student's unique needs in order to develop an IEP that met the standards of *Andrew, supra*, 137 S.Ct at p. 1000.

58. District argued that assessments in the areas Mother requested were not needed because it assessed Student in assistive technology in 2016, which addressed his

fine motor skills, including writing. The IEP team had information about Student's needs in both fine motor and augmentative communication and provided accommodations and supports in those areas. District's arguments were not persuasive. Mother did not learn that District was not assessing in all areas of the assessment plan she signed until the 2017 annual IEP team meeting. District did not explain in a prior written notice why it concluded the assistive technology assessment was sufficient in lieu of an alternative augmentative communication assessment, depriving Parents of the opportunity of knowing that District was not assessing in that area, and why. Without information from the assessments Mother requested, Parents and the IEP team did not have information to make informed decisions as to the development of the IEP up to the date they filed their complaint. (See, *Timothy O.*, *supra*, 822 F.3d at pp. 1124-1125.) Therefore, Student met his burden of proving the procedural violation deprived Parents of the right to effective parental participation at his 2017 IEP team meeting.

59. Student did not prove he was denied a FAPE or educational benefit as a result of District's procedural violation. Student continued to maintain good grades and make educational progress, based on his grade reports and the results of his 2016 assessment report. He was able to ambulate throughout the campus, with assistance, and access his classroom. He completed his assignments and participated in class, with note-taking assistance. Student offered no evidence that the lack of supports in occupational therapy or alternative augmentative communication impeded his access to his education or caused him not to make progress at school.

60. Mother also requested vocational/prevocational assessments in the November 9, 2016 assessment plan. District administered career interest and ability evaluation tools, and conducted interviews with Student, in January 2016 and January 2017. The IEP team and Parents were well aware of Student's desire to work in the area of video production and broadcasting. He actively participated in Mr. Smith's video

production class during both school years at issue. All of this information was readily available to Parents and Student's IEP team, and it was discussed as part of the IEP process at his IEP team meetings from the time he came to District. The IEP team developed goals based on Student's career goals. Thus, Student did not prove that District failed to assess Student in vocational/prevocational areas as requested by Mother, or that its failure to respond to Parents' request for an assessment in that area of need deprived Parents of necessary information to participate in the development of Student's educational program.

61. Similarly, the 2016-2017 psycho educational evaluation included social emotional assessments, as requested by Mother in the November 9, 2016 assessment plan. Thus, District's failure to provide prior written notice to Parents regarding the social emotional assessment was not a material procedural violation, and did not deprive Parents of the opportunity to participate in the development of Student's IEP. Student dismissed the issue of appropriateness of District's psycho educational assessment at the prehearing conference.

62. In summary, Student met his burden on Issue 4 by proving District procedurally violated the IDEA by failing to provide Parents with prior written notice as to the occupational therapy and alternative augmentative communication assessments. Its procedural violation resulted in depriving Parents of the opportunity to participate in a meaningful way at Student's 2017 IEP. Remedies are discussed below.

REMEDIES

1. Student prevailed on Issues 1, 2, 3(b) and 3(c), and 4. As a remedy, Student requests both prospective and compensatory relief. Student requests two 30-minute sessions of speech therapy as part of his educational program, and 2,000 minutes of compensatory services for two years of missed opportunity. Next Student requests

independent educational evaluations in prevocational/vocational testing, occupational therapy to address his seating needs at school, and in augmentative communication to address fine motor deficits. He seeks an order that District pay for Ms. Schnee's language and speech evaluation. Student also seeks an order compelling District to provide him with a male paraeducator at either Level I or Level IV to assist him in the restroom, and "fidelity checks" to ensure his assigned paraeducators are capable of lifting Student in accordance with Student's IEP. Finally, Student seeks an order compelling District to hold an IEP to develop appropriate goals and services.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489,1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia, supra*, at p. 524.)

3. A school district must set criteria under which an independent educational evaluation can be obtained at public expense, including the location of the evaluation and the qualifications of the examiner, which must be the same as the criteria the public agency uses when it initiates an evaluation, to the extent those criteria are consistent

with the parent's right to an independent educational evaluation. (34 CFR §300.502(e)(1).) Other than establishing these criteria, a public agency may not impose conditions or timelines related to a parent obtaining an independent educational evaluation at public expense. (34 CFR §300.502(e)(2).)

4. Regarding Issues 1 and 4, Student is entitled to independent evaluations in occupational therapy and augmentative communication because District did not assess in those areas and did not explain to Parents why it was not doing so. Student is entitled to independent educational evaluations at public expense consistent with District policies, by a provider of Student's choosing in occupational therapy and augmentative communication. District shall fund two hours at the assessor's usual hourly rate for assessors in occupational therapy and augmentative communication to attend Student's IEP team meeting to discuss their report.

5. Regarding Issue 1 as to language and speech, and Issue 2, Student proved he is entitled to an independent evaluation in language and speech because District did not assess him before changing his speech services in 2016, and District failed to appropriately assess him in the area of language and speech in January 2017. The parties did not dispute Ms. Schnee's testimony that she initiated her evaluation as an independent educational evaluation under contract with District. Neither party offered evidence of what Ms. Schnee's fees were for her assessment, or whether District paid for any part of the evaluation. As a remedy for Issue 1, as to language and speech, and Issue 2, District shall fund Ms. Schnee's April 2017 evaluation at Ms. Schnee's customary rate for assessments, consistent with District's policies for independent evaluations. If District has funded some or all of Ms. Schnee's independent evaluation, District shall receive credit for that amount. District may reimburse Parents, or their attorney, up to the rate consistent with District policies, if either has funded Ms. Schnee's evaluation. District shall also fund up to two hours of Ms. Schnee's time at her usual hourly rate to prepare

for, attend and participate at Student's IEP to discuss her assessment and proposed goals and services.

6. Regarding Issue 3(b), Student proved District denied him a FAPE by failing to offer appropriate language and speech services. Ms. Schnee credibly opined Student missed "one year of opportunity" in communication development after District changed the manner of delivery of the services. The evidence did not support a finding that Student did not receive speech therapy services at all before January 2016, and therefore Student's request for two years of compensatory services was not supported by the evidence. Student's IEP called for 100 minutes a month of direct services before the service model changed in January 2016. The District's regular school year is 38 weeks.⁶One school year of missed opportunity equates to nine months, or 900 minutes, or 15 hours of services. Student requested 2,000 minutes of compensatory education in speech based upon 100 minutes a month for two years, which equates to approximately 33 hours. His claim was not supported by the evidence, including by Ms. Schnee's opinions. Therefore, as a compensatory remedy for the one year of "missed opportunity" as opined by Ms. Schnee, District shall fund 15 hours of direct one-to-one speech therapy services by a non-public agency of Student's choosing as a compensatory remedy. The compensatory services shall focus on communication goals, as recommended by Ms. Schnee unless or until the IEP team develops communication goals for Student's IEP that are agreed upon by Parents and implemented by District.

7. Ms. Schnee opined that, "ideally," two 30-minute speech therapy sessions weekly by a nonpublic agency was an appropriate amount of services for Student during

⁶The ALJ took official notice of District's online school calendar for the 2016-2017 school year because the parties did not offer the school calendars for the relevant time period into evidence.

the school year. District was not required under the IDEA to provide "ideal" services to Student. Instead, under *Andrew, supra*, 137 S.Ct at p. 1000, District was obligated to ensure that Student's educational program was reasonably calculated to enable him to make progress appropriate in light of his circumstances. Because Ms. Schnee's report had not yet been reviewed by Student's IEP team, the IEP team shall decide on prospective IEP goals and services in language and speech after considering Ms. Schnee's input and evaluation report.

8. Student proved in Issue 3(c) that District should have offered him a male paraeducator for support when he used the restroom. As such, District shall amend his IEP within five days after the start of the 2017-2018 school year to include a trained male paraeducator who shall be available to Student whenever he needs to use the restroom on campus or during any school event off campus where a paraeducator is assigned to assist him as part of his IEP.

ORDER

1. District shall fund an independent educational evaluation in occupational therapy by an assessor chosen by Parents. The assessor shall be knowledgeable regarding the impacts of Student's medical diagnoses of cerebral palsy and associated communication deficits. The cost of the assessment shall be at a rate in accordance with and not to exceed District's policies for independent educational evaluations. District shall fund two hours at the assessor's usual hourly rate for the assessor to attend and participate at the IEP team meeting to discuss the assessment report.

2. District shall fund an independent educational evaluation in alternative augmentative communication by an assessor chosen by Parents. The cost of the assessment shall be at a rate in accordance with and not to exceed District's policies for independent educational evaluations. District shall fund two hours at the assessor's

usual hourly rate for the assessor to attend and participate at the IEP team meeting to discuss the assessment report.

3. District shall fund Ms. Schnee's April 2017 independent speech evaluation at Ms. Schnee's customary rate for assessments, providing the rates are in accordance with District's policies for independent evaluations. District shall receive credit for any amounts it has already paid to Ms. Schnee. District may reimburse Parents, or Parents' attorney, up to the District's rate for independent evaluations, if they have paid for Ms. Schnee's evaluation. District shall also fund up to two hours of Ms. Schnee's time to prepare for, attend and participate at Student's IEP to discuss her assessment, at her usual hourly rate. This remedy shall satisfy District's obligation to fund an independent educational evaluation in language and speech at public expense in connection with its 2017 triennial speech assessment.

4. District shall fund 15 hours of direct language and speech services, in accordance with the recommendations by Ms. Schnee in her April 2017 evaluation report, by a non-public agency of Parents' choosing. The services shall be provided in accordance with communication goals recommended by Ms. Schnee unless or until Student's IEP team develops goals that are agreed upon and implemented. The compensatory hours shall be available to Student until June 30, 2018, and shall expire if not used. The time and place of delivery shall be decided by Parents in collaboration with the service provider. If the services cannot reasonably be delivered within the District boundaries, District shall reimburse Parents for one round trip per session at the then-applicable Federal rate for mileage reimbursement if so requested by Parents.

5. District shall hold an IEP team meeting no later than 30 calendar days after receipt of the last of the assessment reports ordered by this Decision, to consider all reports, including Ms. Schnee's report.

6. Notwithstanding paragraph 5, District shall hold an IEP team meeting no later than five school days after the start of the 2017-2018 school year, to amend Student's last agreed upon and implemented IEP to include a male paraeducator trained in lifting Student, and who shall be assigned and available to Student whenever he has the need to use the restroom either on the school campus or during any scheduled school activity off campus. District and Parents may, at their option, mutually agree to amend the IEP in accordance with this specific order by phone and fax to ensure a male paraeducator is available to Student as close to the first day of school as possible.

7. All other relief requested by Student is 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 on Issues 1, 2, 3(b) and 3(c), and 4. District prevailed on Issue 3(a).

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 13, 2017

/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings