

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

GROSSMONT UNION HIGH SCHOOL  
DISTRICT.

OAH Case No. 2017021078

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on February 23, 2017, naming Grossmont Union High School District.<sup>1</sup> The matter was continued for good cause on March 22, 2017.

Administrative Law Judge Chris Butchko heard this matter in El Cajon, California on May 30 and 31, 2017, and June 1, 2017.

Ashok Pathi and Corrin Johnson, Attorneys at Law, of the Law Offices of Schwartz and Storey, represented Student. Student's parent attended all days of hearing. Student did not attend the hearing.

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<sup>1</sup> District filed its response to Student's complaint on March 8, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. March 27, 2017) 858 F.3d 1189, 1199-1200.)

Sarah Sutherland and Kevin Fannan, Attorneys at Law, of Dannis Woliver Kelley, represented District. Rose Tagnesi, Director of Special Education, attended all days of hearing on behalf of District.

On June 1, 2017, OAH granted the parties' request for a continuance to allow the parties to file closing briefs. Upon timely receipt of the written closing arguments on June 16, 2017, the record was closed and the matter submitted for decision.<sup>2</sup>

## ISSUE

From February 23, 2015 to February 23, 2017, did District deny Student a free appropriate public education by:

- 1) Failing to develop appropriate present levels of performance;
- 2) Failing to offer appropriate goals; and
- 3) Failing to fully implement the specialized academic instruction services called for in his individualized education program?<sup>3</sup>

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<sup>2</sup> On June 21, 2017, District filed a motion to strike parts of Student's closing brief, arguing that it raised a new issue of whether "The District's actions... impeded Parent's opportunity to participate in the decision-making process regarding her son." (ellipsis in original) That is not a new cause of action, but a necessary element of proof for Student's claims. Further, District briefed the same issue in its final briefing. (See, e.g., District's Closing Brief at pp. 2, 4-7, and 13-14) District's motion to strike is denied.

<sup>3</sup> These issues are those presented in Student's complaint and framed in the Order Following Prehearing Conference. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student agreed at the PHC to narrow the issues as presented in his due process hearing to those presented here.

## SUMMARY OF DECISION

Student established that there were errors in the descriptions of his present levels of performance in his individualized education program reports for the 2015-2016 and 2016-2017 school years. Student did not establish that those errors denied him an educational benefit or impeded the ability of his parents to participate in planning his educational program and Student therefore was not denied a free appropriate public education. Accordingly, no relief can be awarded for those violations. Further, Student did not prove that the goals in his IEP report were inappropriate or that District materially failed to implement the specialized academic instruction services offered in his IEPs.

## FACTUAL FINDINGS

1. Student is a 17-year-old male who has resided in and attended school in District since at least the beginning of the 2014-2015 school year. Student is eligible for special education services due to specific learning disability and speech and language impairment. Student was first found eligible on April 28, 2006. Student also has challenges with executive functioning, anxiety, and self-esteem.

2. During the period at issue, Student attended Steele Canyon High School, a charter school. Steele Canyon offers rigorous academics and unconventional scheduling options. The school year is composed of four academic quarters, not including summer. The school offers longer-format block classes, which Parent and Student believed would be more suited to Student's executive functioning and organizational deficits than would a greater number of shorter classes. Student has been taking college preparatory classes to obtain a regular high school diploma with the intent to attend college.

## THE SEPTEMBER 26, 2014 TRIENNIAL REVIEW IEP

3. At the beginning of his ninth grade year, Student took the Wechsler Individual Achievement Test, Third Edition, referred to as the WIAT,<sup>4</sup> as part of District's assessments for Student's triennial IEP in September 2014.

4. District convened a triennial review IEP team meeting on September 26, 2014. The IEP report that was generated following the meeting included statements of Student's present levels of performance, goals by which his progress would be measured, and an offer of special education services to enable Student to receive a free appropriate public education.

5. The September 2014 IEP report set out four annual goals: one each in the areas of grammar and syntax, Algebra 1, writing organization, and word analysis. Each goal was accompanied by a statement labeled "Baseline," which set out Student's current performance level in each area. Parent consented to the IEP on September 26, 2014.

6. Under this IEP, Student was to receive a variety of aids and accommodations to support his education. In addition, District would provide Student with 900 minutes per year of language and speech services in a group setting and 8,550 minutes per year of specialized academic instruction in a group session.

7. In the 2014-2015 school year, Student was pulled out of his specialized academic instruction class to attend his speech and language services for 30 minutes per week.

8. Student's grades in the 2014-2015 school year were unexceptional. Student had C's in all graded classes the first two quarters, two B's and one C in the

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<sup>4</sup> The WIAT assesses individual strengths and weaknesses in eight areas specified by the IDEA regarding learning disabilities.

third quarter, and two C's and one D in the fourth quarter. Student received a B in his third quarter English class and a C in that class in fourth quarter. Student received a C's in Algebra in the first three quarters of the school year and a D in Algebra Intervention 2 in the fourth quarter.

9. Student participated in school sports that year. He played water polo in the second quarter and was part of the swimming team in the fourth quarter.

#### THE OCTOBER 25, 2015 ANNUAL IEP

10. Student's annual IEP team meeting for the 2015-2016 school year, Student's tenth grade, was held on October 25, 2015.

11. The October 2015 IEP report had five goals: one each in grammar and syntax, Math 2, writing organization, word analysis, and an unlabeled transition goal. Each goal was accompanied by a statement labeled "Baseline," which set out Student's current performance level in each area.

12. The October 2015 grammar and syntax goal contained an updated statement of Student's present level of performance from the September 2014 IEP and changed his goal from one requiring him to use descriptive sentences to generate a story to one aimed at having him use appropriate tensing and subject/verb agreement in conversation. This goal appears to be the focus of his speech services.

13. The Math 2 goal in the October 2015 IEP report did not contain a statement of Student's present level of performance in that discipline. The Baseline statement read:

By Annual Review 2016, [Name] will solve real-world and mathematical problems involving area, volume, and surface area of two- and three-dimensional objects composed of triangles, quadrilaterals, polygons, cubes, and right prisms

with at least 70% accuracy in 3 out of 4 trials as measured by student work samples and grade reports.

The name used in the IEP was not Student's, and was the wrong gender.<sup>5</sup>

14. At page three in the October 2015 IEP report there appeared a discussion of Student's Preacademic/Academic/Functional skills. In the section labeled MATH, the following was written:

Per teacher observation, [Student] is able to accurately solve both problems involving basic math operations (multiply, divide, add, subtract) as well as more complex multi-step equations. He currently has a 78% in Algebra 1 and has earned C's on all tests and quizzes thus far. Per WIAT, he scored at the following grade level equivalents on math subtests: Numerical Operations 8.7, Problem Solving 6.1, and Math Fluency 2.4 – 4.4.

This discussion of Student's baseline was identical to that contained in the same section of the September 2014 IEP report.

15. The Measurable Annual Goal for Math 2 in the October 2015 IEP report was changed from that presented in the September 2014 IEP report, in that it contained Student's correct name and increased Student's goal of accuracy from 70 to 75 percent. The new goal read:

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<sup>5</sup> Student has two first names, both of which are used to refer to him at different places in different IEP documents. It is assumed use of either of his first names is correct.

By Annual Review 2016, [Student] will solve real-world and mathematical problems involving area, volume, and surface area of two- and three-dimensional objects composed of triangles, quadrilaterals, polygons, cubes, and right prisms with at least 75% accuracy in 3 out of 4 trials as measured by student work samples and grade reports.

16. The October 2015 writing organization goal did not contain an updated statement of Student's present level of performance. The Baseline section was identical to that presented in the September 2014 IEP report, and read as follows:

No current course curriculum based information is available, as he is not currently enrolled in humanities. Per WIAT, he scored at the following [grade level equivalents] on the writing subtests: Spelling 4.2, Sentence comp 7.5, Essay comp 8. Per previous IEP, While [sic] he has made good progress at the paragraph level, he struggles with spelling and writing down ideas in grammatically correct sentences. Word form and word retrieval are difficult for [Student], and he sometimes requires help structuring his thoughts to put into words before writing. [Student], however, can be very insightful when engaged in conversation.

At this time, Student was in 10th grade. Student took Humanities 1/English 1C and 2C in the third and fourth quarters of the 2014-2015 school year. Student was not in a humanities class at the time of the October 2015 IEP team meeting.

17. The writing and organization goal baseline section in the September 2014 and October 2015 writing organization goal page was taken verbatim from the

discussion of Preacademic/Academic/Functional skills at page three in the September 2014 IEP report. The corresponding October 2015 discussion of Preacademic/Academic/Functional skills inserted the following after the first sentence, which reported that no current baseline information was available:

Teachers report that [Student] continues to improve his writing, as evidenced by his overall grade of 75% or higher in written tasks/assignments (non-modified) from humanities during Q4. However, there are some missing assignments that could change the overall average once completed.

18. Student's measurable annual writing and organization goal in the October 2015 IEP report was updated from the September 2014 IEP report, changing it from one requiring him to produce clear, coherent, and appropriate writing to one tasking him with using texts to examine and convey complex ideas.

19. The word analysis goal in the October 2015 IEP report did not contain an updated statement of Student's present level of performance. The Baseline section was identical to that stated in the September 2014 IEP report, and read as follows:

No current course curriculum based information is available, as he is not currently enrolled in humanities. Per WIAT, he scored at the following [grade level equivalents] levels on the reading subtests: Reading comp 6.4, Decoding 4.6. Per previous IEP, he can read and understand at an approximate [sic] 5<sup>th</sup> grade level, which is up from a third grade level last year. [Student] currently often just looks at the beginning of an unfamiliar word and guesses at the rest. He can decode

~50% of multisyllabic words at a 6<sup>th</sup> grade level. He passed the Susan Barton screening test, and will begin the program.

20. The corresponding October 2015 discussion of Student's Preacademic/Academic/Functional skills inserted the following after the first sentence reporting that no current baseline information was available:

No current course curriculum based information is available, as he is not currently enrolled in humanities. Per teacher reports, [Student] continues to improve his comprehension, as evidenced by his overall grade of B in assessments (non-modified) from humanities during Q3. He can independently answer level 1 & 2 [depth of knowledge] questions but often does not turn in homework on time (or at all), which impairs the teachers [sic] ability to assess current reading level. Per previous IEP, he can read and understand at an approximate [sic] 5th grade level, which is up from a third grade level last year. According to Study Skills teacher, [Student] has not completed the Diagnostic reading comprehension test on Achieve3000.

21. Student's measurable annual goal for word analysis was similar but not identical to that presented in the September 2014 IEP report, which set the goal as follows:

By annual review 2015, [Student] will cite strong and thorough textual evidence to support analysis of what the text says explicitly as well as inferences drawn from the text

in 2 out of 3 trials with 80% accuracy as measured by student work and teacher records.

The October 2015 IEP report had the following as his measurable annual goal:

By annual review 2016, [Student] will cite strong textual evidence to support analysis of information presented explicitly in the text (ie. [sic] details related to setting, characters, etc.) as measured by curriculum based assessments, student work samples, or oral assessment on 2 out of 3 trials with 80% accuracy.

22. Parent participated in the discussion of Student's ability baselines at the IEP team meeting and contributed to the discussion of the goals, but her participation in and contribution to the discussion is not reflected in the IEP report.

23. Under the October 2015 IEP, District offered Student 900 minutes per year of language and speech services in a group setting, 450 minutes per week<sup>6</sup> of specialized academic instruction in mathematics in a group session, 180 minutes per year of assistive technology services, and 450 minutes per week of specialized academic instruction in reading and writing in a group setting. District also offered Student extended school year services of 250 minutes per day of specialized academic instruction.

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<sup>6</sup> The IEP report states that the service was to be delivered yearly in that amount, but the parties have jointed proceeded to implement the IEP to deliver 450 minutes of weekly service.

24. During the 2015-2016 school year, Student was pulled from his specialized academic instruction/study skills class for 30 minutes per week to receive speech services.

25. Student's grades for the first quarter of the 2015-2016 school year were disappointing. Student failed college preparatory science and received a D in Integrated Math, also a college-preparatory class.

#### THE JANUARY 19, 2016 AMENDMENT IEP

26. An amendment IEP team meeting was held to add educationally-related mental health services to Student's IEP to help Student deal with anxiety and self-esteem issues. Two goals were added, one labeled as adaptive and one unlabeled concerning self-esteem. The baseline for the adaptive goal was reported as "ERMHS assessment completed 1.16.2016 indicate [sic] concerns with low self-esteem and anxiety." No baseline was stated for the self-esteem goal.

27. An educationally-related mental health assessment was conducted by Kimberly Stull, a District ERMHS Case Manager and a Board-Certified Behavior Specialist. Ms. Stull issued a report dated December 1, 2015, which found that Student had social/emotional and behavioral needs and recommended "consistent school based individual therapy."

28. The adaptive goal directed that Student should use coping skills to reduce days of anxiety from five days a week to two. For the unlabeled goal, Student was to be able to verbalize five positive statements about himself to increase his self-esteem.

29. Six 30-minute counseling sessions were added to Student's IEP by the amendment. Student was taken from his specialized academic instruction/study skills class to receive the service.

30. Parent participated in the discussion of Student's emotional and mental functioning at the IEP team meeting and challenged the team's formulation of the

adaptive and self-esteem goals, but agreed to the IEP to enable Student to receive services. Her participation in and contribution to the discussion is not described in the IEP report.

31. Student's grades improved in the second quarter of the 2015-2016 school year. He received a C in college preparatory Integrated Math and passed college preparatory Science with a C grade. Although Student's grade reports indicated that he was still registered for water polo and swimming, he was ineligible to compete because of his first quarter grades, which added to his anxiety and self-esteem issues.

### THE MARCH 8, 2016 AMENDMENT IEP

32. A further amendment IEP team meeting was held on March 8, 2016. The team discussed Student's use of an iPad, accommodations in his classes, and his progress in the ERMHS counseling sessions. The report also noted that a District employee named Jennifer Trower "cleaned up the baselines for all of the goals" with information she received from Cheryl Acosta.

33. The Math 2 baseline on the annual goal and objectives page was replaced by the following:

Per teacher observation, [Student] is able to accurately solve both problems involving basic math operations (multiply, divide, add, subtract) as well as more complex multi-step equations. He currently has a 78% in Algebra 1 and has earned C's on all tests and quizzes thus far. Per WIAT, he scored at the following grade level equivalents on math subtests: Numerical Operations 8.7, Problem Solving 6.1, and Math Fluency 2.4 – 4.4.

That material was also identical to the present levels of performance statement given in Student's September 2014 IEP report.

34. The writing organization baseline was replaced by the following:

According to support teacher, [Student] is meeting grade level writing competencies. She states that [Student] benefits from a graphic organizer to help organize essay elements. Per WIAT, he scored at the following [grade level equivalents] levels on the writing subtests: Spelling 4.2, Sentence comp 7.5, Essay comp 8.

35. The word analysis baseline was replaced by the following:

According to support teacher, [Student] is able to read and comprehend at grade level. Per grade reports, [Student] is scoring an average of 80% on reading assignments. Per WIAT, he scored at the following [grade level equivalents] levels on the reading subtests: Reading Comp 6.4, Decoding 4.6.

36. The March 2016 Amendment continued Student's counseling services.

Although the service was again reported as "30 min x 6 Totaling: 180 min served Weekly," the team understood and the services continued to be delivered as 30 minutes per week. Student continued to be pulled from his specialized academic instruction/study skills class to attend counseling.

37. Student's third quarter grades were stable. He again received C grades in English and World History, his college preparatory classes. In the fourth quarter of the year he improved to B grades in both classes. Student recovered the credits for his college preparatory science class over the break, receiving a B.

## THE NOVEMBER 17, 2016 ANNUAL IEP

38. Student's annual IEP team meeting was convened on October 20, 2016 and completed on November 17, 2016. Student was then in the 11th grade. It was noted that Student's grades were a concern and that his challenges caused him difficulties with assignments and class participation and would draw negative attention at times. At this meeting, the IEP team reviewed Student's progress on the seven prior goals and found that they were all met. Eight goals were drafted for the November 2016 IEP report, in math, reading comprehension, written expression, transition, expressive language, adaptive, self-advocacy, and behavioral/emotional.

39. The math goal included a baseline that set forth his basic skills, his current ability, his classroom performance, and his test results from the Brigance Comprehensive Inventory testing. The goal set for Student was for him to support post-secondary activities by demonstrating ability to calculate costs on an installment loan with measureable accuracy.

40. Student's reading comprehension goal included a baseline that reported on his grades in humanities classes in the preceding school year,<sup>7</sup> set out his teacher's report of his ability, and listed testing results from the Gates-McGinitie Reading test. The measurable goal was for Student to be able to evaluate an author's point of view and analyze the effectiveness of rhetoric.

41. Student's written expression goal reported a baseline that included his current humanities grades and his teacher's assessment of his ability. In part, the

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<sup>7</sup> Student notes in his written closing argument that he took Humanities 3 and 4 in the last two quarters of the school year, and not, as reported in the baselines, in the first two quarters. The grades he received therein were correctly reported in the baselines.

statement of his present level of performance noted that his teacher reported that he was "able to utilize informative/expository texts to examine and convey complex ideas, concepts, and information clearly and accurately through the effective selection, organization, and analysis of content through written responses with approximately 80% accuracy." The goal set for written expression was for Student to use logical structure to introduce, establish, and distinguish claims. Both the reading and writing goals were to be measured for success by teacher reports of accuracy.

42. The behavioral/emotional goal<sup>8</sup> followed the adaptive and self-advocacy goals, which focused on Student's executive functioning and independent learning skills. In the baseline for this skill, it was noted that Student "tends to focus on his weaknesses and challenges in front of him." The measurable goal set for him was to practice positive self-talk and recognize his accomplishments in "at least 4 out of 5 instances over 6 consecutive weeks with 75% accuracy."

43. Parent and her advocate actively participated in discussing Student's present performance levels, his academic progress, his executive functioning, and his mental health. Parent suggested at this meeting that Student should not be pulled from study skills class for speech and counseling, but agreed to the IEP. Mother's main concern was to find out why Student was not progressing as rapidly as she thought he should.

44. Student received C grades for his college preparatory classes in Biology and Spanish in the first quarter of the 2016-2017 school year. In the second quarter he maintained the C in Spanish and improved his Biology grade to a B. Student took college preparatory English and college preparatory U.S. History in the third quarter,

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<sup>8</sup> Student did not challenge the transition, expressive language, adaptive, and self-advocacy baselines or goals from the November 2016 IEP report in his briefing.

receiving C's in both classes. Student was on track to graduate from high school with a diploma and would be eligible for secondary education. Student was slightly ahead of the number of credits he needed for graduation.

45. Student was pulled out of his specialized academic instruction/study skills class for counseling and speech and language services.

46. Parent actively monitored Student's progress. She attended and participated at all IEP team meetings. Beginning with an amendment IEP meeting held in August 2015, Parent was accompanied by an advocate at the team meetings. Student also attended all IEP team meetings discussed herein. Parent was in frequent contact with Student's specialized academic instruction/study skills teachers and his case managers.

47. Parent was not satisfied by the responses she received from District members of the IEP team when she would ask why Student was not improving in his skills. Parent and her advocate offered input on drafting Student's statements of his present levels of performance and his goals, and offered strategies for his education.

48. Although both Parent and her advocate were not professional educators, Parent believed that her advocate was highly knowledgeable about the IEP process and helped guide her. If terminology that Parent did not understand was used at the team meetings, she consulted her advocate or asked the team to explain. Parent was aware of Student's weaknesses and how he compared to other students. Parent contrasted Student's abilities with those of his brother, who was one year younger. Parent was a credible witness, and was clearly earnest in her desire to help her son in any way she could.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>9</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>10</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In

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<sup>9</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>10</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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

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

4. The Ninth Circuit Court of Appeals had held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these

phrases were applied to define the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The Supreme Court's recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.\_\_\_\_ [137 S.Ct. 988] reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The Ninth Circuit further refined the standard in *M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, stating that that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so as to enable the child to make progress in the curriculum, taking into account the child's potential.

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student, as the complaining party, bears the burden of proof in this case.

#### ISSUE 1: FAILURE TO DEVELOP ADEQUATE STATEMENTS OF PRESENT LEVELS OF PERFORMANCE

7. Student contends that the present performance levels reported for him in his October 2015, January 2016, March 2016, and November 2016 IEPs were vague,

contained outdated information, and did not provide necessary insight into his ability levels. District counters that there is no requirement in the IDEA that the present levels of performance box on the annual goals and objectives page contain all information on a student's performance level. District asserts that Student's IEP reports sufficiently described his unique needs to allow Parent and the IEP team to collaborate on Student's educational program and measure his academic progress.

#### Legal Authority

8. An annual IEP must contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The present levels of performance create baselines for designing educational programming and measuring a student's future progress toward annual goals.

9. A failure to include appropriate statements of a student's present performance levels is a procedural violation of the IDEA. A procedural violation constitutes a denial of FAPE only if it 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 to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) Said another way, "procedural flaws in an IEP's formulation do not automatically violate the IDEA, but rather do so only when the resulting IEP is not 'reasonably

calculated to enable the child to receive educational benefits.” (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 821, quoting *Rowley, supra*, 458 U.S. 176, 207.)

10. Parents play a “significant role” in the development of the IEP and are required and vital members of the IEP team. (*Winkelman v. Parma City School Dist.* (2007) 549 U.S. 1190 [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904]; 20 U.S.C. § 1414(d)(1)(B)(i); 35 C.F.R. § 300.322; Ed. Code, § 56341, subd. (b)(1).) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her 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.* (3rd Cir 1993) 993 F.2d 1031, 1036.) A parent has the right to participate not just in the formation of the IEP report, but also in the enforcement of it. (*M.C. v. Antelope Valley, supra*, 858 F.3d 1189, 1198)

#### The October 2015 IEP

11. Student contends that the statements of his present performance levels in the October 2015 IEP report for math, writing organization, and word analysis were inappropriate.

12. The October 2015 IEP had facially apparent defects in its statements of Student’s present performance levels. On the annual goal and objectives page, the baseline for Math 2 referred to another student and consisted of a statement that described a goal for review in 2016. That was clearly inadequate as a description of Student’s mathematical ability.

13. The October 2015 IEP included a summary of Student’s academic skills in an earlier narrative section which included a teacher’s report on his abilities, his overall grade, his performances on tests and quizzes, and his standardized testing results from

2014. That summary, however, was identical to the same section on his September 2014 IEP.

14. Student's transcript reflected that at the time of the September 2014 IEP team meeting, Student was taking Algebra Intervention 1, and he took a mathematics class in every quarter of the 2014-2015 school year. Further, his transcript disclosed that at the time of the October 2015 IEP team meeting, he was taking college preparatory Integrated Math II. Student's level of ability in mathematics was not frozen as of September 2014. Accordingly, there was no reason why his present level of performance in mathematics was not updated in the intervening year's time. The present level of performance given for Student's mathematical ability was inadequate.

15. The statement of Student's present level of performance in writing organization on the annual goal and objectives page was again taken from the September 2014 IEP report. However, the textual discussion of Student's academic skills in the October 2015 IEP report contained new material, consisting of his teacher's statement that his writing was continuing to improve and an incomplete report of his grades from his fourth-quarter humanities class.

16. That material did not meet the standard of a meaningful statement of Student's present level of performance. At the least, a statement of a pupil's present levels of performance should indicate whether the grade level standards are being met. Such a baseline could not be used to craft an educational program, as it did not describe Student's performance, much less his areas of weakness or need. If Student's educational program were based entirely on the displayed level of understanding of his needs displayed there, it likely would not provide him a free appropriate public education. The present level of performance reported for Student's writing organization ability was inadequate.

17. The October 2015 IEP's performance level for Student's word analysis ability on the annual goal and objectives page also was taken wholesale from the previous IEP, including a textual reference to the "previous" (presumably 2013) IEP and the fact that Student had again advanced to a fifth-grade reading level from a third-grade level "last year." The discussion on page three of his academic skills was updated, however, and included similar teacher impressions and a report on his third-quarter humanities grade. Also included were a description of his ability to answer depth-of-knowledge questions and his difficulty with homework. Although more detailed, this assessment also did not suffice as a statement of Student's present performance level for use by the IEP team.

#### The January and March 2016 Amendment IEPs

18. The IDEA does not set out specific standards for addendum IEP reports, but an IEP is similar to a contract between the Student and the educational agency. (*M.C. v. Antelope Valley, supra*, 858 F.3d 1189, 1197; but see *Van Duyn, supra*, 502 F.3d 811, 820-822 ["First, the IEP is entirely a federal statutory creation, and courts have rejected efforts to frame challenges to IEP's as breach-of-contract claims. See, e.g., *Ms. K. v. City of South Portland*, 407 F.Supp.2d 290, 301 (D.Me.2006)('[A]n IEP is not a legally binding contract.'). [Appellant] offers no example of a court treating an IEP as a contract, nor have we been able to locate any. [¶] . . . An IEP is not a contract—but even if it were, we could not read into it additional terms the parties did not agree to include."].) Any alteration of that the IEP report should meet the same standards required of the original document. Student's October 2015 IEP was amended on January 19, 2016, to add counseling services.

19. Student states that there was no present level of performance set out in the January 2016 Amendment IEP. In fact, that document cited the mental health assessment, stating that that it indicated "concerns with low self-esteem and anxiety."

Such incorporation by reference is disfavored as a means of establishing a baseline. Doing so implies wholesale adoption of the viewpoint of the assessor, which is a dereliction of the IEP team's role as decisionmaker. Decisions about a disabled student's special education and services must be made by a properly constituted IEP team. (20 U.S.C. § 1414(d)(1), (e); 34 C.F.R. §§ 300.321-322, 300.324; Ed. Code, §§ 56340, 56342, 56342.5.) However, absent a showing that the team did not properly discuss and consider the mental health assessment report, it can be accepted for its description of Student's present performance levels.

20. The March 8, 2016 Amendment IEP team meeting was held to discuss Student's iPad use, his accommodations, and his progress in counseling. It was noted that Ms. Trower would "clean up" the baselines for all goals, but it was done by obtaining information from a staff member and not by discussion with the IEP team. Doing so did not remediate the prior defects in the baselines. Student's services were set at the October 2015 meeting, so adjusting the baselines five months later did not wipe clean any errors previously committed. Unless there was open and renewed discussion of Student's baselines, goals, and services by the full team, which did not appear to have happened, such attempts to "clean up" prior errors has no effect.

The November 17, 2016 IEP

21. Student contends that the statements of his present performance levels in the November 2016 IEP report for math, reading comprehension, written expression, and behavioral/emotional functioning were inappropriate.

22. The present performance level given for Student in mathematics set forth his basic skills, his current ability, his classroom performance, and his test results from the Brigance Comprehensive Inventory testing. The report highlighted that Student had difficulty doing grade-level work. Student argues without explanation that the description of his baseline skills was inappropriate, noting that some material was

historical and only part described his then-current ability. Least persuasively, Student contends that it was unintelligible to discuss how Student would be able “to find’ various geometrical quantities.” In so doing, Student leaves out that he was described as being able “to find” area, perimeter, surface area, and volume of two- and three-dimensional shapes. Student has not met his burden of showing that this present level of performance was inadequately identified.

23. Similarly, Student states that the November 2016 IEP had an inadequate and unintelligible present performance level for reading comprehension. The report recited his grades in humanities classes in the preceding school year, his teacher’s view of his ability, and listed testing results from the Gates-McGinitie Reading test. Student argues that it is unintelligible to say, as the baseline did, that he was “able to cite textual evidence to support analysis of information presented explicitly in the text with 80% accuracy,” because it did not explain how often or in what context he could do so. The statement appears to meet those concerns. Student has not met his burden of showing that this present level of performance was inadequately presented.

24. Student also challenges the reported present performance level for Student’s written expression ability as unintelligible. Specifically, Student argues that there is no context for the statement that Student can “utilize informative/expository texts to examine and convey complex ideas, concepts, and information clearly and accurately through the effective selection, organization, and analysis of content through written responses with approximately 80% accuracy.” The objection is not well-taken; Student has not explained what further context is lacking. Student has not met his burden of showing that this present level of performance is inadequately identified.

25. Lastly, Student challenges the statement of his Social/Emotional/Behavioral present level of performance. He states that it only indicated that Student met his previous goals and found that continued counseling

would be beneficial. Although Student does not cite what he is referencing, it appears that he is describing the narrative in the section headed "Social Emotional/Behavioral" on page five of Student's Exhibit 22, and not the annual goal and objectives page, as was done for the other present levels. The annual goal and objectives page for Goal Eight, titled Behavioral/Emotional, set for a baseline describing Student's focus on his weaknesses and the challenges in front of him. Student has not met his burden of showing that this present level of performance is inadequately identified.

26. In conclusion, Student has met his burden of showing that the statements of his present levels of performance in mathematics, writing organization, and word analysis in his October 2015 IEP were inadequate. Student has not met his burden of showing that any present levels statements from the January, March, and November 2016 IEP reports were inadequate.

27. Not every procedural violation results in the denial of a FAPE. Student does not contend that his right to a FAPE was impeded or that he suffered a deprivation of educational benefits. He does contend that the failure to produce accurate statements of his present levels of performance materially impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to him.

28. Parent was forthright about being actively involved in her son's education. To the best of her knowledge, she was informed about her son's strengths and weaknesses. She kept up with his classroom assignments and grades, and was in frequent contact with her son's teachers. As much as it is possible for a parent, she was well informed about her son's education.

29. A parent's lay knowledge does determine whether a procedural violation has deprived a parent of her right to participate in the forming of her child's educational program. A parent has a right to adequate baseline information precisely because she may not be aware of matters which are significant to the expert members of the team.

30. Even though Parent was well-informed and actively participated in the IEP process, there still must be an inquiry into whether the failure to give adequate statements of Student's baselines impeded her ability to consider, suggest, or object to any part of Student's educational program.

31. The three areas in which there were inadequate statements of present levels of performance were mathematics, writing organization, and word analysis in the October 2015 IEP. Each of these areas of need were addressed the same way, by the provision of academic support and study skills classes. Student's progress in these areas was monitored by his progress on goals, which broadly translated into his progress in the general education curriculum.

32. There is no evidence that Parent was impeded in participating in the forming of her child's educational program, as the program that was designed for him met his needs and was successful for him. There were no unmet needs or undiscovered areas of weakness to which Parent's attention could have been directed had the baseline statements been full and adequate. Accordingly, although technical violations of the IDEA have been found, Parent was not deprived of meaningful participation in the development of Student's October 2015 IEP, and Student was not thereby denied a FAPE. Student is not entitled to any relief.

## ISSUE 2: FAILURE TO DEVELOP APPROPRIATE GOALS

33. Student contends that the goals set out for him in his October 2015, January 2016, March 2016, and November 2016 IEPs were based on inadequate present level of performance baselines and were unrelated to his present performance levels. District asserts that Student's goals were designed to allow him to measure his progress in meeting his challenges and in accessing the general education curriculum.

## Legal Authority

34. Measurable annual goals must also be present in the annual IEP. They must be designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).)

35. Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler* (OSERS 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must also show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

36. A failure to include appropriate and measurable annual goals in an IEP is a procedural violation of the IDEA.

## Analysis

### THE OCTOBER 2015 IEP

37. Student argues that all goals in the October 2015 IEP were inappropriate because they arose from inadequate statements of his present levels of performance. Further, Student argues that since an IEP must show a direct relationship between the present levels of performance and the goals, the fact that the present levels of performance statements were inadequate means that they cannot relate to the goals.

Because the goals were a means of measurement without a starting point, he argues, they were meaningless and therefore inappropriate.

38. In effect, Student argues that inadequacies in the statements of present levels of performance mandate a finding that the goals are also inappropriate. Student cites no authority for this per se rule. In addition, Student's premise may be unsound. The requirement that an IEP show a relationship between baseline ability, goals, and services does not mean that a failure to properly set out any of those three steps results in a denial of FAPE. Instead, a failure to connect present performance level, goals, and the offered services is in itself a procedural violation even if there were no errors in the formulation of each individual piece. The failure to make an adequate statement of Student's present level of performance does not require a finding that the goals in those areas are also inadequate. Student must show that the goals are, on their merits, inappropriate.

39. Student has chosen not to address the goals on their own terms. Accordingly, there being no precedent directing that the goals be found invalid simply because the baseline information was incorrect, it must be found that Student has not carried his burden of proving that the goals are inappropriate. (*R.A. v. West Contra Costa Unified School District* (9th Cir. 2017) --- Fed.Appx. ---, 2017 WL 2829525 ["[G]iven the lack of any clear evidence that [a procedural violation] infringed on [Student's] parents' opportunity to participate in the IEP process, this procedural violation did not deny [Student] a FAPE."].)

#### THE JANUARY AND MARCH 2016 AMENDMENT IEPs

40. Student argues that the January 2016 Amendment IEP's goals for anxiety and self-esteem were also based upon invalid present performance level statements. For the same reason set forth above, the proposal to find a per se rule is declined.

41. Student also argues that the goal relating to reducing anxiety “does not describe how to measure when [Student] has reduced his anxiety or in what context it will be measured.” As stated, the goal required Student to use coping skills to reduce anxiety until his days of perceived anxiety were reduced from five days per week to two days per week, as reported by Student and school staff. Measurement and context were both present in the goal. No defect has been established in those goals.

42. Student noted that the baselines of the March 2016 Amendment IEP were adjusted to include reference to Student meeting grade-level competencies in reading and writing. As discussed, changes made in the guise of “cleaning up” an IEP report are not effective. If a District wishes to make changes to an IEP, it must do so through an IEP team meeting with full notice and participation. Student argues that the goals cannot be legitimized by such changes, and they have not been found adequate because of the changes made months after the IEP team meeting.

#### THE NOVEMBER 2016 IEP

43. Student again argues that all goals in the November 2016 IEP were inappropriate because they arose from inadequate statements of his present levels of performance. For the reasons stated above, Student did not carry his burden of demonstrating that these statements of his present performance levels were inadequate and this argument is again found unpersuasive.

44. The behavioral/emotional goal is, however, specifically challenged by Student on the ground that the goal was unrelated to the baseline. Student notes that the baseline stated that Student focused on his weaknesses and the challenges in front of him, and that this baseline did not set forth the extent of Student’s difficulty or his then-present level of ability to deal with poor self-image or challenges. Student’s arguments are well-taken. The baseline was inadequate. However, the goal was connected to Student’s difficulty with self-esteem and motivation, met his needs for

support, and was measurable. Student produced no evidence that his needs were unmet or that the counseling he received provided him with inadequate support. Student's demonstrated ability to express positive self-image and recognize his achievements provides an appropriate goal by which to measure his progress.

45. In conclusion, Student has not met his burden of showing that any goals from the 2015 or 2016 IEPs were inadequate.

### ISSUE 3: IMPLEMENTATION OF IEPs

46. Student contends he was denied the services he was entitled to under the October 2015 and January, March, and November 2016 IEPs because he was taken from his specialized academic instruction support classes for speech and language and counseling services. In response, District notes that it has a mandate under the IDEA to keep Student in general education to the greatest extent possible, and pulling him out of support classes instead of general education complied with that directive.

#### Legal Authority

47. A school district violates the IDEA if it materially fails to implement a child's IEP. However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Van Duyn*, 502 F.3d at 815, 822.) *Van Duyn* emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school 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." (*Id.* at p. 822.) The court held that that "when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the 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." (*Id.* at p. 815.)

48. Because of speech services and his counseling sessions, Student calculates that he missed 68.6 hours of his specialized academic instruction from February 23, 2015, to the date of the due process hearing. Seen another way, because of his speech services Student missed 30 of 450 minutes per week of support class from February 23, 2015, to January 19, 2016. Once counseling was added as a service, Student missed 60 of 450 minutes per week from January 19, 2016, to the date of hearing.

49. Student's loss of service is not de minimus. An hour a week of classroom time is consequential. However, the opposite perspective must also be seen. Attendance at school and provision of related services during a school day is a zero-sum game. If Student's academic support were increased by an hour a week, he would not have an extra hour of school time. Instead, he would miss an additional hour of general education instruction. Indeed, using Student's logic, if District pulled Student out of his general education classes, District would not be implementing Student's IEP by not providing the general education time provided in his IEP.

50. Student's academic support is designed to enable him to succeed and thrive in general education. It would be perverse to favor the support classes over those classes meant to be supported. District is correct that mainstreaming is a priority under the IDEA. It was reasonable to pull Student from his academic support classes, rather than his general education classes, for the speech and counseling services.

51. This is not a situation where District discovered a mistake in the IEP, concealed it from Parent, and stealthily amended the IEP. (*M.C. v. Antelope Valley, supra*, 858 F.3d 1189, 1195.) Although District specified that Student was to receive 450 minutes of academic support per week, it was clearly the understanding of all parties that Student would be taken from that class for additional services. Student did not object to this arrangement until sometime before May 10, 2017, on which date the IEP

team met and agreed to stop pulling Student out of his support class for speech services.

52. District neither unilaterally changed the terms of Student's IEPs nor materially failed to implement the IEPs. Accordingly, no violation of the IDEA took place and Student was not denied a FAPE.

## ORDER

All relief sought 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, District prevailed on all issues.

## RIGHT TO APPEAL

This decision is the final administrative determination and is binding upon 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).)

DATE: July 28, 2017

\_\_\_\_\_  
/s/  
CHRIS BUTCHKO  
Administrative Law Judge  
Office of Administrative Hearings