

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SYLVAN UNION SCHOOL DISTRICT.

OAH Case No. 2017020355

CORRECTED DECISION¹

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on February 8, 2017, naming Sylvan Union School District. The matter was continued for good cause on March 30, 2017.²

Administrative Law Judge Christine Arden heard this matter in Modesto, California, on May 2, 3, 4 and 5, 2017.

Natashe Washington, Attorney at Law, represented Student. Mother attended the entire hearing. Father attended the hearing on May 3, 2017.

¹ This Corrected Decision is identical to the original Decision issued in this case on June 19, 2017, except that the date was inadvertently omitted from the original Decision.

² District served Student with its response to Student's complaint on February 16, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 2017 WL 2330662, ** 6-7.)

Rebecca Feil, Attorney at Law, represented District. Mitchell Wood, Director of Special Education for the District, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until May 30, 2017. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

1. Did District's offer of placement during the 2015-2016 school year deny Student a free appropriate public education?
2. Did District's offer of placement for the 2016-2017 school year deny Student a FAPE?
3. Did District deny Student a FAPE from December 2015 through February 2017 by failing to conduct a psycho educational and occupational therapy assessment?
4. Did District deny Student a FAPE by failing to implement Student's speech and language services as agreed upon in his May 20, 2016 IEP?

SUMMARY OF DECISION

Student, a preschool aged child with apraxia of speech, a severe and rare speech disorder, and average cognitive ability, was offered speech therapy services by District, but was not offered a general education preschool placement. District did not operate any general education preschool classes and was not willing to reimburse Parents for the cost of Student's private preschool. Student was unable to obtain preschool through the Head Start program. Parents contended Student needed a general preschool placement due to his severe speech disorder.

District gave Student a speech and language assessment³ and health/development assessment in preparation for his initial individual educational program meeting. Six months later Parents contended it was also necessary to give Student a psycho educational assessment and an occupational therapy assessment, which District did not believe were warranted. Student's IEP dated May 20, 2016, offered him ten individual speech therapy sessions a month. Evidence established that, for the time period at issue here, the District speech language pathologist provided Student with group speech therapy sessions, instead of individual sessions, on 42 occasions.

This Decision finds that District should have offered Student placement in a general education preschool classroom for the 2016-2017 school year. Its failure to do so denied Student a FAPE. Therefore Student prevailed on Issue 2. Student also met his burden of proof that District should have administered psycho educational and occupational therapy assessments to him and that District's failure to do so denied him a FAPE. Therefore, Student prevailed on Issue 3. As a result of these failures Student is awarded reimbursement for nine months of preschool tuition, starting from the date District should have offered Student a general education preschool placement. Student is entitled to independent education evaluations in psycho education and occupational therapy at District's expense. Student also prevailed on Issue 4 and is, therefore, also awarded compensatory education equal to the 42 individual speech therapy sessions he was not provided. Student did not prevail on Issue 1, since sufficient evidence was not presented pertaining to deficiencies in District's offer of FAPE for the 2015-16 school year.

³The terms "assessment" and "evaluation" are synonyms and are used interchangeably in this Decision.

FACTUAL FINDINGS

JURISDICTION AND PROCEDURAL BACKGROUND

1. Student was a four-year-old boy at the time of hearing, who resided in the District at all relevant times, and was eligible for special education under the category Speech and Language Impairment.

BIRTH THROUGH TWO YEARS OLD

2. Student was born with a sixth finger on each hand and an extra toe. Student had surgery in December, 2014, when he was about two years old, to remove the sixth finger from each hand and the extra toe. Student was in overall good health.

3. Parents first became concerned about Student's speech delays when he was one year old. At two years old Student's speech was still unintelligible.

EVALUATION BY THE REGIONAL CENTER

4. On June 18, 2015, when Student was two years, five months old, he was given a speech and language evaluation by the Valley Mountain Regional Center. Wendy Summers, the licensed speech-language pathologist who administered the speech-language assessment to Student on behalf of the Regional Center, found Student's speech to be unintelligible. She concluded Student had severely delayed expressive language skills and good receptive language skills. The Regional Center provided Student with individual speech therapy once a week for 60 minutes.

STUDENT'S PRIVATE PRESCHOOLS

5. Parents enrolled Student in a private preschool since he was about two and one-half years old through the date of hearing. Student attended St. Paul's School's preschool program from July, 2015, through April, 2016, at a cost of \$175 per month, which Parent's paid. Student attended St. Paul's on two-half-days per week.

6. Student attended Grace Academy private preschool from September, 2016, through the date of hearing in May, 2017. He attended Grace Academy three days a week for four hours a day. Grace Academy's tuition was \$300 per month, which Parent's paid. The registration fee for Grace Academy, which Parents' paid, was \$125.

7. Student made progress academically and socially at Grace Academy. Grace Academy was an appropriate preschool for Student. Carole Matzkind, who was the director of Grace Academy until April, 2017, credibly opined that Student progressed there. No contrary evidence suggested that Grace Academy did not offer an appropriate preschool program for Student.

PRIVATE SPEECH THERAPY STARTING IN AUGUST, 2015

8. In August, 2015, when Student was about two years, eight months old, Parents hired licensed private speech language pathologist Therese Faguendes to treat Student's communicative speech disorder. At first Ms. Faguendes saw Student three to four times a week for 25-minute sessions held at her private practice office located in Turlock. At the time of hearing Ms. Faguendes treated Student twice a week, in sessions ranging from 25 to 45 minutes in duration.

9. When Ms. Faguendes initially treated Student his speech was completely unintelligible. He did not have enough speech to permit Ms. Faguendes to definitely diagnose him as having childhood apraxia of speech, but it appeared to her as a likely diagnosis. Ms. Faguendes saw Student for multiple sessions before she thoroughly assessed him in October, 2015. In that assessment, she administered the Preschool Language Scale-4 to Student. He scored above normal limits for receptive understanding of language. His score for expressive communication revealed severe to profound deficits. Ms. Faguendes concluded that the disparity between Student's receptive and expressive communication scores was remarkable. Student's motor speech system was failing. Student was unable to make desired sounds, resulting in a

profound expressive language deficit. Ms. Faguendes also informally administered the Kaufman Speech Praxis Test to Student. She concluded that Student had difficulty with tongue lateralization, elevating his tongue, and alternating his lips between spreading and puckering. Based on results from her initial evaluation and observations of Student at multiple therapy sessions, Ms. Faguendes diagnosed Student as having severe to profound childhood apraxia of speech, meaning he was in the lowest one percent of children with this diagnosis.

10. Childhood apraxia of speech is a rare neurological speech disorder. Student knew what he wanted to say, but had difficulty producing the desired sounds. It was difficult for Student to correctly pronounce vowel sounds consistently. Children with childhood apraxia of speech demonstrate: (1) inconsistent production of words; (2) errors in pauses in speech and combining sounds; and (3) difficulties in moving lips and jaw.

REFERRAL BY REGIONAL CENTER TO DISTRICT FOR ASSESSMENT- SEPTEMBER, 2015

11. On September 21, 2015, the Regional Center held a transition meeting to facilitate Student's services transitioning from the Regional Center to the District because Student's third birthday was approaching in December, 2015.

12. The Regional Center referred Student to District for assessment for special education eligibility on September 25, 2015. The areas of suspected concern listed on the referral were: speech and language, and articulation. No other areas of suspected disability were identified in the referral.

DISTRICT'S INITIAL ASSESSMENT OF STUDENT - DECEMBER, 2015

13. In Fall, 2015, Susana Ramirez was a District special education program specialist. Student was in Ms. Ramirez's case load. She could not recall working with Student because at that time she worked with 80 to 100 preschoolers, as well as older

children. Ms. Rameriz went to Student's home on November 6, 2015, to present Mother with District's initial assessment plan. Mother immediately signed the plan and gave it back to Ms. Rameriz. The assessment plan indicated the areas to be assessed were communication development, to be administered by a speech language pathologist, and a health/developmental history to be completed by a school nurse. Mother did not read the assessment plan before signing it. Around that time Mother told Ms. Ramirez that Mother wanted to obtain a "baseline" of Student's pre-academic levels.

14. Ruth Quezada, who has been a speech language pathologist since 1993, administered the speech and language assessment to Student in the first week of December, 2015. At that time (and at the time of hearing) Ms. Quezada worked at Linda Reece Speech Services, an agency that contracted with the District for speech language assessment services. She gave Student an oral motor examination, and administered the following assessment instruments: Goldman Fristoe Test of Articulation, Second Edition; Spontaneous Speech Sample Analysis; Receptive One-Word Picture Vocabulary, Test 4; Expressive One-Word Picture Vocabulary, Test 4; Expressive One-Word Picture Vocabulary, Test 4; and Spontaneous Language Sample Analysis. She also observed him in his private preschool.

15. Student presented with a severe expressive speech disorder. His scores on the Goldman Fristoe Test of Articulation indicated his expressive speech skills were significantly below the average range, but his receptive language was age appropriate. Ms. Quezada concluded Student had a severe expressive speech and language disorder. Both Ms. Quezada and school nurse, Jennifer Given, collectively opined in the assessment report that Student met the eligibility criteria for special education services under the category of speech language impairment.

16. Ms. Quezada noted the following about Student, based on her observation of, and direct interaction, with him: His speech was primarily unintelligible. He did not

engage with other children. He became frustrated when other children did not understand him. He preferred parallel play. He liked to observe other children. He did not initiate interactions with his classmates, but participated in activities alongside his peers. His verbalizations were limited to single word utterances. He used gestures to make requests or to bring attention to an event or item. His voice, rate and rhythm of speech were abnormal and adversely affected his ability to communicate. He attempted to name items when asked and to respond when addressed. He was able to repeat specific words when asked. His communications were limited to gestures and single words.

17. Ms. Quezada did not remember Student when she appeared at hearing. Her only dealings with Student were her assessment of him in early December, 2015, and her attendance at his initial IEP meeting on December 14, 2015. She relied on District's Initial Multidisciplinary Report dated December 14, 2016, which she authored along with school nurse, Jennifer Given, to refresh her memory about Student. Ms. Quezada attended at least one hundred IEP meetings over the last two years.

18. When asked at hearing about Student's peer socialization deficits, Ms. Quezada responded that, generally, children with speech disorders do not typically interact with peers. She opined that if Student's language improved, he would have better interactions with his peers. Ms. Quezada recommended Student work on his language, which would facilitate his communication and interaction with peers. She further generally opined that usually when a child acquires more speech, his peers will be more willing to interact with him. She said if children have social deficits caused by something other than speech impairment they are usually assessed by someone on an IEP team other than a speech language pathologist.

19. Ms. Quezada opined that repetition and practice is important when treating a child with apraxia of speech. It is also important for that child to practice his

speech in daily life with peers and family. Ms. Quezada further opined that preschool was an appropriate placement for Student, and for all preschool age children, but Student did not need to be placed in a general education preschool setting. Ms. Quezada claimed to be unaware if Student's speech goals could be worked on in a general education preschool setting because she never worked in a general education preschool.

20. Ms. Quezada's testimony was given little weight because she had no independent memory of Student, her assessment of him, or of her attendance at his initial IEP meeting. Much of her testimony was generalized opinion about children with speech impairments, rather than about Student specifically. Moreover, some of her testimony did not appear candid and forthright. For example, her testimony that it is important for a child with apraxia of speech to practice speech with peers was inconsistent with her opinion that Student did not need a general education preschool placement. Her statement that she did not know if speech goals could be worked on in a general education preschool because she had never worked in a general education preschool lacked credibility. She offered no explanation as to why working on speech goals in a general education preschool placement would be any different than working on speech goals in any level preschool class. Ms. Quezada's response appeared to be merely an excuse for not answering a question that all speech language pathologists who work with preschoolers should be able to answer competently. Furthermore, her testimony that Student only needed to improve his speech in order to improve his peer interactions seemed overly simplistic and was not convincing.

21. Ms. Given, District credentialed school nurse, went to Student's home in early December, 2015, to conduct the health assessment. Student refused to participate in Ms. Given's vision and hearing screenings and height and weight measurements. Student hid under the table to avoid Ms. Given's health assessment. Ms. Given had

never before experienced this type of uncooperative conduct from a child during a health assessment. She concluded Student was in good overall health.

22. Ms. Quezada and Ms. Given made observations of Student which should have raised red flags that Student had suspected disabilities in the areas of social emotional, peer interactions and behavior. Despite Ms. Quezada's observations that Student did not interact with peers at his preschool, and Student's refusal to cooperate with Ms. Givens' health assessment, neither one of them recommended Student be given a psycho educational assessment or a behavioral assessment to explore the reasons for Student's isolation from peers and uncooperative behavior. Ms. Quezada and Ms. Given reasonably should have recognized that Student's behaviors warranted a psycho educational assessment and possibly a functional behavior assessment to enable the IEP team to get a clear picture of Student's suspected disabilities and needs.

23. If Ms. Quezada and Ms. Given had recommended that Student be given a psycho educational assessment and a functional behavior assessment at the initial IEP meeting in December, 2015, the IEP team would have been able to meet again by April, 2016, to discuss and consider those assessment results and whether a general education preschool placement was appropriate for Student. The IEP team should have, at the very least, considered including a general education preschool placement for Student in District's offer of FAPE for the 2016-2017 school year. Student's assessors and other IEP team members failed to recognize Student's needs for further assessments to address the underlying causes for his social deficits. The effects of Student's severe speech disability, pursuant to a rare condition (childhood apraxia of speech), on his social and behavioral development was not addressed by the IEP team.

INITIAL IEP-DECEMBER 14, 2015

24. Ms. Rameriz facilitated Student's initial IEP team meeting on December 14, 2015. The IEP team found Student eligible for special education services under the

category of speech and language impairment on December 14, 2015, two weeks before Student's third birthday. No placement was offered and no evidence was introduced that a general preschool placement was considered, discussed, or even raised, by any IEP team member, including Parents, at the December 14, 2015 meeting. District did not offer Student a preschool placement of any kind. Mother consented to District's December 14, 2015 offer of FAPE, which consisted of six, twenty-minute group speech therapy sessions a month. Three speech goals in the areas of vocabulary, expressive language and articulation were offered to Student in the December 14, 2015 IEP.

MAY 20, 2016 IEP

25. The primary purpose of the May 20, 2016 IEP meeting was to address whether Student should receive services for the 2016 extended school year. Gina Mason, District speech language pathologist, facilitated the May 20, 2016 IEP team meeting on behalf of District and took notes of the meeting for the team.

26. The IEP team's offer of FAPE to Student on May 20, 2016, for the 2016 extended school year and the 2016-2017 school year consisted of the following: ten individual twenty-minute speech therapy sessions per month; four individual and small group preschool instruction sessions of 30 minutes each per month to be provided through the Stanislaus County Office of Education's Early Intervention Readiness Program; and eight, twenty-minute sessions of speech therapy for the 2016 extended school year.

27. Parents consented to District's May 20, 2016 offer of FAPE.

28. At the May 20, 2016 IEP meeting Parents expressed concern that Student's speech deficits detrimentally affected his pre-academic and social skills and his preparation for kindergarten. Mother requested that District conduct a comprehensive assessment of Student, which District had not yet done. A preschool placement for Student was not discussed at this IEP meeting.

29. The notes to the IEP state: "Parents are concerned with [Student's] speech. They are also concerned with the amount of speech that [Student] is receiving right now because they are not able to consistently get [Student] to Turlock for private speech therapy. Parents are concerned with [Student's] speech affecting his pre-academic skills in preparation for kindergarten." Later, in the notes under the heading "Review continuum of services" the IEP contains the following typewritten words: "Assessment Plan for Preacademics" and "an Assessment plan will be drafted to address pre-academics concern and presented to parents within 15 days." Ms. Mason later unilaterally lined through this language from the IEP notes without Mother's knowledge or consent. Mother expected District would be submitting an assessment plan to her following the meeting, but that did not occur. Ms. Mason testified at hearing that she struck the language regarding assessment of Student from the IEP notes because Mother agreed after the IEP to omit this language from the IEP. Ms. Mason's testimony was contradicted by Mother, who stated she never agreed to strike this language from the IEP. Ms. Mason's testimony on this issue was not credible because she offered no details or explanation regarding a meeting with Mother in which Mother revoked her request for a comprehensive assessment of Student. Adjacent to the stricken language were the initials "GM," presumably for Gina Mason. There were no other initials next to the stricken language.

EARLY INTERVENTION READINESS PROGRAM- 2016-2017 SCHOOL YEAR

30. Julie Freriks, who oversaw the Stanislaus County Department of Education's Early Intervention Readiness Program, testified credibly at hearing. The program serves three to five-year-old children with mild to moderate delays and a wide range of disabilities. Any preschool child working with a speech language pathologist pursuant to an IEP was eligible to be included in the program. Children are screened, but are not assessed, prior to entering this program. Ms. Freriks conducted the

screenings and attended IEP meetings for children in the program. She worked with these preschoolers in the program either individually in their homes or in small groups of two students at school locations. Ms. Freriks worked for the Stanislaus County Department of Education for the last 23 years. Before that Ms. Freriks taught Head Start preschool classes for 12 years.

31. Ms. Freriks first met Student at the beginning of the 2016-2017 school year at her therapy room in the Margaret L. Annear School. Student's IEP called for Student to receive Early Intervention Readiness services four times a month for 30-minute sessions. However, Ms. Freriks and Mother agreed Student would instead attend three, 45-minute sessions each month. In August, 2016, Ms. Freriks could understand about 25 percent of Student's speech. She worked with him on fine motor development and pre-academic skills. At first Ms. Freriks provided services to Student and another preschool aged child at Annear School. In October, 2016, Ms. Freriks started to provide services to Student individually at his home instead pursuant to an agreement between Mother and Ms. Freriks.

32. At the beginning of the 2016-2017 school year Student's IEP lacked goals for him to work on in the Early Intervention Readiness program services program. Mother and Ms. Freriks developed two fine motor goals, one mathematics goal and one social emotional goal, which were added to Student's IEP pursuant to an August 30, 2016 amendment. The social emotional goal addressed Student's attention deficit. Student scribbled and avoided difficult tasks. Because goals were offered in social emotional and motor areas, District was aware, or should have been aware, that Student had fine motor and social emotional deficits and needs, in addition to his speech and language deficits and needs.

SPEECH THERAPY SERVICES PROVIDED IN 2016-2017 SCHOOL YEAR

33. Shortly after his initial IEP, Student began getting speech therapy services from a male speech language pathologist, followed by a female speech language therapist named Sabah. Beginning in late March or the beginning of April, 2016, through the date of hearing, Ms. Mason provided Student with speech therapy. Student was sometimes uncooperative with Ms. Mason in speech therapy sessions.

34. Student's IEP dated May 20, 2016, offered Student 10 individual, twenty-minute speech therapy sessions per month. However, Ms. Mason included another child in all but three of Student's speech therapy sessions from August 11, 2016, through January 11, 2017, when Mother complained that Student was not receiving the individual sessions called for in his IEP.

35. Ms. Mason's general preference and practice is to indicate on IEPs that a child will receive group, rather than individual, speech therapy sessions, so she then can independently decide at any particular time whether to give a child a group or individual session, by simply calling an individual therapy session a "group of 1" session.

36. Ms. Mason kept track of Student's attendance at therapy sessions and whether each session was an individual or group speech therapy session. For each individual session Student attended Ms. Mason marked the applicable date on her attendance records with a dot. Ms. Mason's attendance records indicate that from August 11, 2016, through January 11, 2017, only three of Student's 45 speech therapy sessions were individual sessions. The other 42 speech therapy sessions in that time period were all group sessions. Ms. Mason's attendance records indicate that starting on January 19, 2017, through March 2, 2017, all of Student's speech therapy was provided in individual sessions.

37. In Fall 2016, Ms. Mason asked Mother if she would agree to the occasional inclusion of another student in Student's speech therapy sessions because it might

improve Student's behavior. Mother agreed, but believed the other child would be included only once, or a few times at the most. Ms. Mason was aware that any changes to an IEP must be made in writing. However, this change was not documented in writing. In Student's first speech therapy session in January, 2017, after the Winter break, Mother learned for the first time that the other child had come to all of Student's speech therapy sessions, despite the fact that Student's IEP offered individual therapy sessions. Ms. Mason testified that Mother had agreed to change from individual sessions to group sessions. Ms. Mason also testified that she mistakenly gave Student group sessions, instead of individual sessions. She further testified that the other child was included in only two out of every three of Student's speech therapy sessions. Ms. Mason's attendance records established that her testimony on this issue was inaccurate. Ms. Mason's testimony was inconsistent. She appeared flustered, unsure of the facts and confused while testifying.

STANFORD CHILDREN'S HOSPITAL ASSESSMENT-AUGUST 30, 2016

38. On August 30, 2016, when Student was three years, eight months old, he underwent a multidisciplinary evaluation at Stanford Children's Health Developmental Behavioral Pediatrics Clinic at Lucille Packard Children's Hospital in Palo Alto, California. Parents sought the assessment to seek a diagnosis for Student's speech and language delays and behavioral issues. The assessment was conducted by a team of professionals, including a clinical psychologist, a pediatrician, a developmental-behavioral pediatrician, a speech and language pathologist and a registered nurse/clinic coordinator. The Stanford team administered the Weschler Preschool and Primary Scales of Intelligence, Fourth Edition; the Child Behavior Checklist (parent and speech pathologist report); and the Social Responsiveness Scale (parent report form) in the psychological assessment portion of the Stanford evaluation.

39. The Stanford assessment report indicated as follows: The assessors could not give a full-scale intelligence quotient for Student due to a 22-point discrepancy between his verbal comprehension and visual spatial processing. Very little of Student's speech was intelligible. He played well with other children, according to Mother. He had no difficulty with fine or gross motor skills, according to Mother. On the Goldman Fristoe Test of Articulation he scored in the seventh percentile, indicating his articulation development was significantly below average. His receptive language was not a concern. His expressive language was negatively affected by his phonological disorder and articulation difficulty. He demonstrated no difficulties with reciprocal social interactions. He showed some inattention to tasks and became behaviorally dysregulated and ran through the clinic during the assessment. His scores on the Weschler Preschool and Primary Scales of Intelligence, Fourth Edition, indicated he had average verbal comprehension, significantly weaker visual spatial processing, and average working memory. Mother's responses to the Child Behavior Checklist indicated he had borderline issues with emotionally reactive behaviors, significant problems with attention and aggressive behaviors, and borderline issues with pervasive developmental problems. Mother's responses to the Social Responsiveness Scale indicated no behaviors suggesting Student was autistic. Student did not have a global developmental delay or a cognitive impairment to explain his speech and language deficits. The speech language pathologist diagnosed him as having a phonological speech disorder, rather than apraxia of speech. The assessors found him to be at high risk for inattention and hyperactivity.

40. The Stanford Report recommended the following for Student: He should continue speech therapy sessions. His speech and language should be re-evaluated in one year. He should continue to have an IEP. A preschool placement should be considered to assist with Student's behavioral regulation and development of pre-

learning skills and possibly a special day preschool program that would allow for frequent short pull out speech therapy sessions should also be considered.

41. Parents received the Stanford assessment report in October, 2016.

DECEMBER 5, 2016 IEP

42. Ryan Bullard, District special education program specialist, facilitated the December 5, 2016 IEP meeting on behalf of District. Parents provided a copy of the Stanford assessment report to the IEP team, but it was not discussed at the meeting.

43. At Student's December 5, 2016 IEP meeting Mother requested that District place Student in a general education preschool. She expressed her concerns about Student's pre-academic and social development. Mother mentioned that most other school districts provided a preschool placement for children with IEPs. Mr. Bullard said District had no general preschool program to offer and that District could, therefore, not put Student in a general education preschool. Mr. Bullard's response to Mother was corroborated by both Mother and Ms. Freriks, who was also at this IEP meeting. Mr. Bullard recommended Student apply for Head Start preschool programs. Mother informed the team that she had previously applied to multiple local Head Start preschool programs, but Student had been unable to obtain a spot in any of those programs.

44. District operates "autism" preschool special day classes and "moderate to severe" preschool special day classes. District does not operate a general education preschool class, or a "mild to moderate" preschool special day class. Mitchell Wood, District special education director, recalled only one instance when District offered a general education preschool class to a student with an IEP. In that instance District contracted with a private preschool to provide the general education preschool placement.

45. At the December 5, 2016 IEP meeting Mother asked the IEP team to develop social goals for Student. However, this was not done. Mother had the impression that District would only allow Student to have goals which could be implemented by Ms. Mason in the speech therapy sessions.

46. Ms. Freriks attended Student's December 5, 2016 IEP meeting. Mr. Bullard suggested Student be exited from the Early Intervention Readiness Program because he was progressing. Ms. Freriks objected to exiting Student from the Early Intervention Readiness Program because he was still somewhat behind on pre-academics and was very behind in his speech development. The IEP team then decided to continue to offer Student the Early Intervention Readiness Program.

47. In order to address Mother's concerns about Student's need for a setting in which he could develop social skills with typical peers, some members of the IEP team suggested one of Student's speech therapy sessions be conducted on the Sherwood School playground during the recess period for the transition kindergarten program. Mother did not consider that suggestion to be a reasonable option to address Student's need for interaction with peers. The children in the transition kindergarten class were at least a year older than Student and those children did not know Student. Mother believed that Student, who had very little language and was largely unintelligible when speaking, would not interact with these older children who were strangers to him.

48. In Student's December 5, 2016 IEP District offered Student speech and language services consisting of 10 group speech therapy sessions a month of 30 minutes each. Ms. Mason recommended Student's speech therapy sessions be changed from individual to group therapy sessions in the December 5, 2016 IEP. District also offered 130 minutes per month of the Early Intervention Readiness Program. No preschool program was offered.

49. Parents did not consent to the December 5, 2016 IEP because Student was not offered a preschool program. Shortly thereafter, Mr. Bullard approached Mother in the school parking lot and asked her to sign the IEP. Mr. Bullard told Mother that District would not change its offer of FAPE.

50. At the end of the December 5, 2016 IEP the notes indicate: "Team has tabled meeting to address how parent can sign IEP with a environment change." No continuation of this IEP meeting occurred. No evidence was introduced that the IEP team considered the Stanford report. A further IEP meeting was not scheduled or held to discuss the Stanford report, and its recommendation that the team consider adding a preschool placement to Student's program.

MEETING BETWEEN PARENTS AND SPECIAL EDUCATION DIRECTOR - JANUARY 3, 2017

51. Parents met with District special education director Mitchell Wood, on January 3, 2016, to discuss their dissatisfaction with the December 5, 2016 IEP meeting. Parents told him they believed District should pay for Student's preschool. Mr. Wood expressed concern over the financial burden to District which could result from the precedent of paying for Student's preschool. He told Parents he had to consult District's attorneys on the matter.

TESTIMONY OF THERESA FAGUNDES, PRIVATE SPEECH LANGUAGE PATHOLOGIST

52. Ms. Fagundes holds a California speech language pathologist license. She received advanced training and clinical expertise in childhood apraxia of speech at a multi-day professional training session given by the Childhood Apraxia of Speech Association of North America. She has a Bachelor's and Master's degree in speech pathology and has operated a private speech pathology practice since 2006. Before that she worked as a speech pathologist for the Merced County Office of Education and the

Turlock Unified School District. In addition to providing speech therapy treatment to children, she has also assessed many children and has attended between 250 to 400 IEP team meetings.

53. Ms. Faguendes very credibly opined that Student needs a preschool placement due to his severe speech impairment. Student must learn to move his lips appropriately when trying to make a sound. He needs to practice using speech in an academic setting and in a social setting, such as a preschool. Ms. Faguendes' testimony was credible because it was candid, straightforward, competent and supported by reason. Ms. Faguendes had worked with Student more than any other professional testifying at hearing. She appeared to know Student well and she had a strong understanding of his disabilities and how they should be addressed. Also, Ms. Faguendes was the only witness at hearing who had advanced training in childhood apraxia of speech, which is a rare and very disabling condition.

COMPREHENSIVE ASSESSMENT PLAN OFFERED - FEBRUARY 23, 2017

54. On February 23, 2017, after Student had filed this case, District provided Mother with an assessment plan, completed by Ms. Mason. This assessment plan proposed to assess Student in the following areas: academic achievement (to be administered by an educational specialist); social/emotional (to be administered by a school psychologist); behavioral (to be administered by a school psychologist); psychomotor development (to be administered by a school psychologist and occupational therapist); communication development (to be administered by a speech language pathologist); intellectual/cognitive development (to be administered by a school psychologist); health/development history (to be administered by a school nurse); observation by a team member other than the child's teacher (to be administered by an educational specialist, school psychologist and speech language pathologist). The indicated purpose of the proposed assessment was: "[t]hree year re-

evaluation to determine continued eligibility for special education” and “[o]ther assessment.” According to regular timelines Student’s triennial IEP should normally occur in December, 2018, since his initial IEP was held in December, 2015. Mother did not give her written consent to this assessment plan because this case was pending when the assessment plan was presented to her and Parents are seeking independent educational evaluations in this matter.

55. The proposed assessment plan dated February 23, 2017, constitutes evidence that Student’s IEP team believed that Student had suspected disabilities in all the areas which the plan proposes to address. No evidence was introduced to establish that anything about Student had changed, other than some improvement in his speech, from Student’s initial IEP meeting on December 14, 2015, through February 23, 2017.

OPINIONS REGARDING PRESCHOOL

56. Ms. Freriks opined that all children deserve preschool, but that preschool is particularly important for Student because of his severe speech impairment. Ms. Freriks’ testimony was very credible, candid and frank. She worked with Student significantly in small groups and individually. She appeared to know Student well and had a firm grasp of his unique needs in multiple areas of suspected disability. By virtue of her extensive experience she appeared to have a strong understanding of the various needs of, not only Student, but of preschoolers with disabilities in general. Ms. Mason, who never observed Student at his private preschool, opined that Student did not need preschool, but she did not give an explanation of the basis for this opinion. Her opinion was merely conclusory and unconvincing.

57. Mr. Wood testified that he had reservations about setting a costly precedent for District if it paid for Student’s general education preschool. He also stated that District would do it if Student needed a general education preschool. Mr. Wood’s testimony raised an inference that District’s refusal to pay for Student’s preschool may

have been motivated by concern that it would set a precedent which would bring a significant ongoing financial burden for District, rather than because District legitimately believed Student did not require a preschool placement in order to receive a FAPE.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

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)⁵et 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 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

⁴Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵All subsequent references to the Code of Federal Regulations are to the 2006 version.

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)(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.) 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 School Dist. RE-1* (2017) 137 S.Ct.

988, 1000 (*Andrew*). The Supreme Court in *Andrew* stated that school districts must "... offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)& (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student is the filing party and therefore has the burden of proof as to all issues raised in his complaint.

ISSUE 3: FAILURE TO ADMINISTER PSYCHO EDUCATIONAL AND OCCUPATIONAL THERAPY ASSESSMENTS⁶

5. Student contends District denied him a FAPE from December, 2015, through February, 2017, by failing to conduct a psycho educational and/or occupational therapy assessment. District contends it did not deny Student a FAPE during that time period by failing to give Student a psycho educational and occupational therapy assessment because these were not areas of suspected disability for Student.

6. Legal conclusions 1 through 4 are incorporated by reference.

7. A student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (c) (e), (f).) Before any action is taken with respect to the initial placement of a student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).)

8. When a student is referred for special education assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school

⁶Issue number three, which addresses District's failure to assess is addressed first in this Decision because portions of the applicable law and analysis of issue three are applicable to and incorporated by reference into the analysis of issues number one and two.

sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, § 56321, subd. (c) (4).) The district has 60 days from the date it receives the parent's written consent, excluding days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56043, subds.

(c) & (f).

9. As part of an initial evaluation or a reevaluation, the IEP team must review evaluations and information provided by the parents; current classroom-based assessments and observations; and observations by teachers and related service providers. The team must then decide if additional data are needed to determine if a child is or continues to be eligible for special education services, the child's present levels of performance, the child's educational needs, and the child's special education and related services. (20 U.S.C. § 1414(c); 34 C.F.R. § 300.305(a); Ed. Code, § 56381, subd.(b).)

10. Violations of a school district's obligation to assess a student are procedural violations of the IDEA. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464F.3d 1025, 1031-1033.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.

11. A procedural violation does not result in a denial of a FAPE unless it (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23, Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1484.)

12. Ms. Quezada noted in her portion of the initial multidisciplinary report discussed at the IEP team meeting on December 14, 2015, that Student did not interact with his peers at his preschool. Ms. Given noted in the same report that Student was uncooperative with the health assessment, which she testified was behavior she had never seen before when assessing a child. Ms. Quezada and Ms. Given erred by not raising these observations to the attention of the other IEP team members, and the team erred by failing to recommend that Student be given a comprehensive assessment, including a psycho educational, occupational therapy, and behavioral assessments, at the IEP meeting on December 14, 2015. There was sufficient data about Student's potential social emotional deficits presented to District by December 14, 2015, to alert District that a comprehensive assessment of Student was necessary, particularly in light of his severe speech impairment and extremely limited ability to communicate. Additionally, Mother had previously told Ms. Ramirez that Mother wanted to obtain a "baseline" for Student's pre-academic skills. This request was ignored.

13. Mother again raised her concerns about Student's deficits in pre-academics at the May 20, 2016 IEP meeting. The notes to the May 20, 2016 IEP expressly state that an assessment plan would be drafted to address Parents' pre-academics concerns within 15 days. Mother was expecting to receive an assessment plan from District, but none was forthcoming. Unbeknownst to Mother, Ms. Mason unilaterally

crossed out this notation from the notes of the May 20, 2016 IEP meeting. Ms. Mason claimed Mother agreed to forget about her request for an assessment. Mother denies this. There is no evidence or reasonable explanation to support Ms. Mason's controverted testimony that Mother changed her mind about getting a comprehensive assessment of Student, since she had expressed concerns about Student's pre-academics and had previously requested from Ms. Ramirez that a baseline for Student be established.

14. Additionally, District's comprehensive assessment plan dated February 23, 2017, which proposed to assess Student in academic achievement, social/emotional, behavioral, psychomotor development, communication development, intellectual/cognitive development, health/development history and to observe Student, is proof that District was aware of Student's need for a comprehensive assessment to address all areas of his suspected disability. No evidence was introduced to establish that District learned new information about Student, or that anything about Student had changed, other than some improvement in his speech, from December 14, 2015, through February 23, 2017, which would explain why District proposed a comprehensive assessment of Student in February, 2017.

15. District's failure to administer a psycho educational assessment and an occupational assessment to Student from December 14, 2015 through February 23, 2017, constitutes a procedural violation of the IDEA. This procedural violation significantly impeded Parent's opportunity to participate in the decision-making process because Parents did not have important information, which would have been derived from those assessment results about Student's suspected social emotional, pre-academic and motor deficits and needs. District's failure to assess Student in all areas of suspected disability also caused Student to be deprived of educational benefit, since the IEP team lacked valuable information about Student's suspected social emotional

deficits when it failed to offer Student a general education preschool placement at the IEP meeting on May 20, 2016. Consequently, District denied Student a FAPE from December 14, 2015, through February 23, 2017, by failing to give Student a psycho educational assessment and an occupational assessment in that time period.

ISSUE 1: DENIAL OF A FAPE FOR THE 2015-2016 SCHOOL YEAR

16. Student contends District failed to offer him a FAPE for the 2015-2016 school year because it did not offer him a general education preschool placement. District contends it did not deny Student a FAPE for the 2015-2016 school year because Student did not need a preschool placement.

17. Legal Conclusions 1 through 4, 10 and 11 are incorporated herein by reference.

DUTY TO EDUCATE DISABLED CHILDREN AGES THREE THROUGH FIVE

18. Under the IDEA and California special education law, school districts must offer an IEP to a pupil who turns three years of age. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a); Ed. Code, §§ 56001, subd. (b); 56026, subd. (c)(2).) For the period between three and six years of age, California does not mandate compulsory education for typically developing preschool children. (Ed. Code, § 48200.) However, if a preschool child requires special education and related services in order to receive a FAPE, school districts must offer the child an appropriate program. (20 U.S.C. § 1414(d)(1)(A)(i)(bb); Ed. Code, § 56345, subd. (a)(1)(B).) A private, nonsectarian, preschool program can be an appropriate setting for a district to provide to such a student. (Ed. Code, § 56441.4, subd. (a).) If a public agency determines that placement in a private preschool program is necessary for a child to receive a FAPE, the public agency must make that program available at no cost to the parent. (See U.S. Dept. of Education, Off. of Special Education and Rehabilitation Services, final Regs., Assistance to States for the Education of

Children With Disabilities and Preschool Grants for Children With Disabilities, 71 FR 46540, 46589; *Letter to Anonymous* (OSEP 2008) 50 IDELR 229, 108 LRP 33626.)

19. When a school district does not operate regular preschool programs, the United States Department of Education's Office of Special Education Programs (OSEP) has long taken the position that the obligation to provide placement with typical children can be satisfied by considering alternative methods for meeting the preschool child's needs in the least restrictive environment, including:

- a. providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies, such as Head Start;
- b. placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and
- c. locating classes for preschool children with disabilities in regular elementary schools.

(*Letter to Neveldine* (OSEP 1993) 20 IDELR 181.) (See, *Letter to Neveldine* (OSEP 1995) 22 IDELR 630) (Preschool placement for disabled preschool age child with nondisabled peers is provided at no expense to parents.)

20. In 2012, OSEP reiterated the above position in *Dear Colleague Letter* (OSEP 2012) 58 IDELR 290 as follows:

The LRE requirements in section 612(a)(5) of the IDEA apply to all children with disabilities who are served under Part B of the IDEA, including preschool children with disabilities aged three through fiveThe statutory provision on LRE does not distinguish between school-aged and preschool-aged

children and therefore, applies equally to all preschool children with disabilities.

(See, *Dear Colleague Letter* (OSEP 2017) 69 IDELR 106) (Updating and affirming OSEP's position that LRE applies to preschool children with disabilities.)

ADEQUACY OF DISTRICT'S OFFER OF PLACEMENT AND SERVICES

21. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)) If the school district's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the district provided a FAPE, even if the petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412, subd. (a)(5)(A); Ed. Code, § 56031; see *Board of Educ. of LaGrange School Dist. No. 105 v. Illinois State Bd. of Educ.* (7th Cir. 1999) 184 F.3d 912, 915.)

SNAPSHOT RULE

22. An IEP for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Department of Educ., Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d

431, 439.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.) In reviewing the sufficiency of an IEP's offer of FAPE, the snapshot rule looks at what is reasonable given the information available to the team at the time the IEP was developed.

23. The relevant IEP meeting pertaining to the offer of FAPE for the 2015-2016 school year occurred on December 14, 2015. This was Student's initial IEP meeting. That IEP offered Student only speech language therapy services. Mother did not object to the offer of speech therapy at that IEP meeting. Also, Mother did not request a preschool placement or inform the IEP team she was concerned that Student might have social emotional and motor deficits which would require a preschool placement at that meeting. Based on the information known to District about Student at that time, which was limited to the referral from the Regional Center, the multidisciplinary assessment, consisting of a speech and language assessment by Ms. Quesada and a health assessment by Ms. Given, and information provided by Mother at the IEP meeting, the offer was appropriate. Therefore, District was not yet on notice that Student needed a preschool placement to address his social emotional deficits.

24. No evidence was introduced to support the conclusion that Student should have been offered a general education preschool placement at the initial IEP meeting on December 14, 2015. Therefore, Student failed to meet his burden to prove that District denied Student a FAPE in the 2015-2016 school year by failing to offer him a general education preschool placement.

ISSUE 2: DENIAL OF A FAPE FOR THE 2016-2017 SCHOOL YEAR

25. Student contends District failed to offer him a FAPE for the 2016-2017 school year, in the IEP's dated May 20, 2016 and December 5, 2016, because it did not offer him a general education preschool placement. District contends it did not deny

Student a FAPE for the 2016-2017 school year because Student did not need a preschool placement.

26. Legal Conclusions 1 through 4, 9, 10, 11, 18, 19, 20, 21, and 22 are incorporated herein by reference.

27. The implementing regulations of the IDEA provide that if the parent shares with a school district an independent educational evaluation obtained at private expense, the results of the evaluation must be considered by the school district, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. (34 C.F.R. § 300.502(c).) California law is even broader in that it requires a school district to consider any independent educational evaluation obtained at private expense with the respect to provision of a FAPE. (Ed. Code, § 56329, subd.(c).)

28. In *G.D. v. Westmoreland School Dist.* (1st Cir. 1991) 930 F.2d 942, two private assessments were considered at an IEP team, and small changes made to the student's IEP, but the appellants claimed that one of the evaluations was not "properly considered." The First Circuit held the district had complied with New Hampshire law and federal regulations because the evaluation was reviewed at an IEP team meeting and incorporated into the student's IEP. In this context, the First Circuit's pronouncement that an independent evaluation need only "be considered, " and not "substantively discussed," simply puts a reasonable limitation on the team's discussion, and does not absolve school districts of the need to convene an IEP team meeting to consider an independent evaluation with parental participation.

29. As of the beginning of the 2016-17 school year and in any event by August 30, 2016, District was aware, or should have been aware, that Student had fine motor, social emotional and pre-academic deficits and needs, in addition to his speech and language deficits and needs. At the beginning of the 2016-2017 school year Mother and Ms. Freriks developed two fine motor goals, one mathematics goal and one social

emotional goal for Student, which were added to Student's IEP pursuant an amendment on August 30, 2016. As early as the May 20, 2016 IEP meeting, the team added the Early Intervention Readiness Program, to Student's services, establishing that they believed Student had deficits, in addition to his speech impairment, that needed to be addressed with services. If the team had started the process of assessing Student comprehensively immediately following his initial IEP meeting, they would have had the results of Student's psycho educational and behavioral assessments by the end of March, 2016. At that point the IEP team would have been equipped to discuss Student's social and behavioral needs and a placement appropriate to address those needs.

30. District was obligated to consider *any* privately funded independent evaluation of Student. District submitted no evidence that it ever considered the Stanford report after it was provided to District by parents on December 5, 2016. No evidence was introduced that District ever discussed the Stanford report with Parents, either in an IEP team meeting, or otherwise. District was required to consider the results of that independent assessment of Student obtained at Parents' expense with respect to the provision of a FAPE to Student. (Ed. Code, § 56329, (c)). Parents were vital members of the IEP team and District materially impeded Parents' right to participate regarding the provision of FAPE to Student by failing to consider the Stanford report.

31. The IEP team's failure to hold an IEP meeting to discuss and consider the Stanford report after receiving it on December 5, 2016, constitutes a procedural error which materially impeded Parents right to participate in the IEP process regarding a provision of a FAPE to Student.

32. At the December 5, 2016 IEP meeting Mother requested a preschool placement. She expressed her concerns about Student's need for social development and the opportunity to interact with typical peers. Also, at that meeting Mother gave District the Stanford report, which recommended considering adding a preschool

placement to Student's IEP to assist with Student's behavioral regulation and development of pre-learning skills. The team received the report the day of the meeting, but a continued meeting was not held to review it and to address Mother's request that preschool be offered to Student. In fact, Mr. Bullard informed Mother shortly after the December 5, 2016 IEP meeting that District would not change its offer of FAPE, even though the team had not yet discussed and considered the Stanford report, and the team had not discussed and considered whether or not Student needed a preschool placement in order to reasonably benefit from his education.

33. On December 5, 2016, when Mother requested that Student be offered a preschool placement, the IEP team should have, at the very least, considered the notes of the assessors in District's initial multidisciplinary assessment which were relevant to Mother's request. The notes of Ms. Quezada's observation of Student in his preschool revealed that Student did not engage with other children, he was frustrated when other children did not understand him, he preferred parallel play, he liked to observe other children, but he did not initiate interactions with them, and he did not participate in activities with his peers. Ms. Given's note that Student hid under the table in order to avoid the health testing would have also given the IEP team valuable insight about Student's possible social and behavioral deficits. However, the team did not review relevant portions of the initial multidisciplinary report or the Stanford report for information relevant to whether or not Student needed a preschool placement. It appeared District IEP team members did not consider a general education preschool because District did not operate one. Student's needs for a preschool placement were not legitimately considered by the team.

34. The testimony of Ms. Faguendes, Ms. Freriks and Mother, along with the information and recommendations in the Stanford report, constitute strong and convincing evidence that District should have known that a general education preschool

placement was necessary for the 2016-2017 school year, in order for Student to develop socially and in an academic setting, particularly because of his severe speech impairment. Therefore, Student met his burden of proof that District denied him a FAPE from the beginning of the 2016-2017 school year through the date of hearing, by failing to offer Student a general education preschool placement, and by materially impeding on Parents' opportunity to participate in the IEP process when District failed to consider the Stanford report. Student's remedy is discussed below.

ISSUE 4: FAILURE TO IMPLEMENT MAY 20, 2016 IEP AS TO INDIVIDUAL SPEECH AND LANGUAGE SESSIONS

35. Student contends District denied him a FAPE by failing to provide him with individual speech and language therapy as required by his May 20, 2016 IEP. District contends that Student received the appropriate amount of speech and language services and that Mother verbally agreed Student could receive group therapy, instead of individual therapy sessions.

36. Legal Conclusions 1 through 4 are incorporated herein by reference.

37. 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).)

38. 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 School Dist. (9th Cir. 2007) 502 F.3d 811, 815, 822 (*Van Duyn*.) 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 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." (*Ibid.*)

39. Student met his burden of proof on issue number four. The evidence is clear that Ms. Mason disregarded the specifications contained in the May 20, 2016 IEP for individual speech therapy sessions by giving Student his speech therapy services in a group setting. The operative IEP provided for 10 individual sessions of 20 minutes per month of speech therapy. Ms. Mason's attendance records establish that 42 out of 45 of Student's speech therapy sessions of 20 minutes each were group sessions, rather than individual sessions, from August, 2016, through January 11, 2017. This constitutes a material failure by District to implement Student's May 20, 2016 IEP.

40. District's defense that Mother agreed to the change from individual to group therapy sessions is not believable. District's other defense that Student received the promised "minutes" of speech therapy, albeit in group sessions, rather than individual sessions, is also without merit. Although the group therapy sessions may have benefitted Student and he made progress during that period of time, *Van Duyn* instructs that a child does not have to suffer a demonstrable harm in order to sustain his burden of proof that he was substantially denied services mandated by his IEP. Accordingly, Student met his burden of proof as to Issue 4. Student's remedy is discussed below.

REMEDIES

REMEDY FOR ISSUE 2 – REIMBURSEMENT OF PRESCHOOL TUITION

1. Student prevailed on Issue 2 for the time period from the start of the 2016-2017 school year, through the date of hearing. As a remedy, Student requests that District reimburse Parents for the cost of Student's preschool. District disagrees, and contends that Student is not entitled to reimbursement because he did not need a preschool placement to address his speech and language deficits.

2. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L.Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, pp. 11 & 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress].)

3. The Supreme Court has held that parents may obtain reimbursement for private school tuition if the placement offered by the school district is inappropriate, the private placement selected by the parents is appropriate and equitable considerations

support the parents' claim. (*Florence County School Dist. Four, supra*, 510 U.S. at p. 15.) Additionally, reimbursement to parents for the cost of private school is an equitable remedy which may be imposed in the discretion of the district court. (*St. Tammany Parish School Bd. v. State of La.* (5th Cir. 1998) 142 F.3d 776, 783; *Board of Educ. of LaGrange School Dist. No. 105, supra*, 184 F.3d at p. 917–18.)

4. Reimbursement is the usual remedy when a district denies FAPE by failing to place a preschooler in the LRE and parents make an appropriate unilateral placement. (*LaGrange, supra*, 184 F.3d at pp. 917-918; *Board of Educ. of Paxton-Buckley-Loda Unit School District No. 10 v. Jeff S. ex rel. Alec S.* (C.D. Ill. 2002) 184 F.Supp.2d 790, 803–804.)

Analysis

5. Student established that District denied him a FAPE from the start of the 2016-2017 school year, through the end of hearing on May 5, 2017, by failing to offer him a preschool placement. Student also established that his placement at Grace Academy preschool was appropriate. District failed to introduce evidence that would support reduction of the tuition paid by Parents to Grace Academy preschool.

6. The registration fee for Grace Academy, which Parents paid, was \$125. The tuition cost for Grace Academy, which Parents paid, was \$300 per month. Student is awarded the registration fee and tuition for Grace Academy for nine months (September, 2016, through May, 2017) for an aggregate award of \$2,925.

REMEDY FOR ISSUE 3 – DISTRICT FUNDING FOR INDEPENDENT EDUCATIONAL EVALUATIONS

7. Student prevailed on Issue 3. As a remedy, Student seeks an Order that District shall fund independent psycho-educational and occupational therapy

assessments. District disagrees and contends Student does not require these assessments and Parents did not request them.

8. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); see *School Committee of Town of Burlington, Mass., supra*, 471 U.S. at p. 369.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11.)

9. When a district has failed to conduct a requested reassessment of a student within the statutory timelines, the student may be equitably entitled to an independent evaluation at public expense. (See, e.g., *M.S. v. Lake Elsinore Unified School District* (C.D. Cal. July 24, 2015); *Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 821–822.)

10. An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the district. (34 C.F.R. § 300.502 (a)(1).) A district may impose criteria to ensure that publicly funded independent evaluations are not unreasonably expensive. (*Letter to Wilson*, 16 IDELR 83 (OSEP October 17, 1989).) Public agencies are not required to bear the costs of independent evaluations where those costs are clearly unreasonable. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989).) To avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Id.*) If a district does establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. (*Id.*) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*)

Analysis

11. As a remedy for District's failure to conduct psycho educational and occupational therapy assessments, which would have provided Parents information about Student's needs and an opportunity for the IEP team to offer Student an appropriate preschool placement and supporting services, Student is entitled to appropriate equitable relief, which includes District funded independent educational evaluations. Accordingly, Student is entitled to independent evaluations in psycho education and occupational therapy funded by District.

12. Student may select qualified independent evaluators, who may be located in Stanislaus County or any immediately adjacent county, and who shall be free to arrive at their own decisions as to how to conduct their evaluations. The assessors selected by Student shall meet either District's or Stanislaus County SELPA's criteria for independent educational evaluators. The fees charged by Student's selected assessors shall not exceed the maximum amount established by either District or the Stanislaus County SELPA for the rate of pay for independent educational evaluators for evaluations in psycho education and occupational therapy. The cost of the assessments to be paid by District shall also include up to four hours payment, at the assessor's normal rate, for the assessors to attend IEP team meetings to discuss the assessments after they are completed, including the assessor's travel time to and from the IEP team meetings.

REMEDY FOR ISSUE4 – COMPENSATORY SPEECH THERAPY

13. Student prevailed on Issue 4, demonstrating that District materially failed to implement the individual speech and language therapy required by his May 20, 2016 IEP. As a remedy, Student seeks compensatory education for 42, twenty-minute individual speech therapy sessions. District disagrees and contends Student is not

entitled to compensatory education because he made progress in the group speech therapy sessions he received.

14. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) 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 v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) 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.” (*Ibid.*)

Analysis

15. The evidence established that Ms. Mason provided Student 42 group speech therapy sessions of 20 minutes in duration, when Student should have received individual speech therapy sessions.

16. Accordingly, Student is entitled to 42 individual speech therapy sessions of twenty minutes in duration, to be provided through a non-public agency which is able provide therapeutic services through a qualified speech language pathologist. These compensatory educational services appear to 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.” They shall be used by Student by December 31, 2018. These compensatory educational services shall be provided in

addition to District's provision of services which constitute FAPE, not in place of those services.

ORDER

1. Within 30 days of the date of this Order, District shall reimburse Parents \$2,925.
2. District shall fund independent evaluations of Student in the areas of psycho education and occupational therapy, to be conducted by qualified independent evaluators selected by Student, who may be located in Stanislaus County or any immediately adjacent county. The assessors selected by Student shall meet the District's criteria for independent educational evaluators. If the District does not have criteria for independent evaluators, the Stanislaus County SELPA's criteria shall apply. The independent evaluators' fees funded by District shall not exceed the maximum amount established by the District for the rate of pay for independent educational evaluators for evaluations in the areas of psycho education and occupational therapy. If District does not have a maximum amount established for the rate of pay for independent educational evaluators for evaluations in the areas of psycho education and occupational therapy, the maximum amount established by the Stanislaus County SELPA shall apply. The cost of the assessments shall also include up to four hours payment, at the assessor's normal rate, for the assessors to attend IEP team meetings to discuss the assessments after they are completed, including the assessor's travel time to and from the IEP team meetings.
3. District shall provide Student with 42 individual speech therapy sessions of 20 minutes in duration each, to be provided through a non-public agency with the ability to provide speech therapy services by a qualified speech language pathologist, through December 31, 2018.

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 2, 3 and 4. District was the prevailing party on issue 1.

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: June 23, 2017⁷

/s/

CHRISTINE ARDEN

Administrative Law Judge

Office of Administrative Hearings

⁷ This Corrected Decision is identical to the original Decision issued in this case on June 19, 2017, except that the date was inadvertently omitted from the original Decision.