

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

NEW HAVEN UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017050260

DECISION

Student filed a Due Process Hearing Request on May 4, 2017, with the Office of Administrative Hearings, State of California, naming New Haven Unified School District. On June 2, 2017, OAH granted a continuance for good cause.

Administrative Law Judge Clifford H. Woosley heard this matter at District's facilities in Union City, California, on September 12 and 13, 2017, and at the Alameda County Office of Education in Hayward, California, on September 19, 20, and 21.

Attorney Kathryn Dobel appeared on behalf of Student. Mother and Father attended the hearing.¹ Attorney Melanie Larzul represented District. Director of Special Education, Sarah Rebeca Kappler, attended on behalf of District.

At the parties' request, OAH granted a continuance to October 16, 2017, for the filing of written closing arguments. On October 16, 2017, the parties submitted their

¹ Mother or Father excused themselves from the hearing on occasion, for short periods of time, providing permission for the hearing to proceed in their absence.

final written closing briefs, the record was closed, and the matter submitted for decision.

ISSUES²

1. Beginning June 17, 2015, through the 2016-2017 school year, did New Haven School District violate Student's procedural rights under the Individuals with Disabilities Education Act by failing to evaluate all areas of educational need and disability impact while denying continued IDEA eligibility, thus denying Student a free appropriate public education?

2. Beginning June 17, 2015, did District deny Student a FAPE by failing to seek an order permitting it to terminate Student's individualized education program eligibility or to stop providing Student with access to and the benefit of an IEP?

3. Did District violate Student's procedural rights under the IDEA by failing to convene an IEP team meeting during the 2014-2015 school year in a timely manner, by June 17, 2015, in order to prepare to transition to and participate in high school during the 2015-2016 school year, thus denying Student a FAPE?

4. Did District violate Student's procedural rights under the IDEA by failing to convene an IEP team meeting during the 2015-2016 school year in a timely manner so that Student could prepare for and participate in high school during the 2016-2017 school year, thus denying Student a FAPE?

5. Did District violate Student's procedural rights under the IDEA by failing to convene an IEP team meeting during the 2016-2017 school year in a timely manner so that Student could prepare for and participate in high school during the 2017-2018 school year, thus denying Student a FAPE?

² The issues have been reorganized for purposes of analysis. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. ex rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

6. Did District violate Student's procedural rights under the IDEA by failing to convene an evaluation for an individualized transition plan or hold an IEP team meeting in a timely manner during the 2016-2017 school year by March 9, 2017, when Student turned 16 years of age, thus denying Student a FAPE?

SUMMARY OF DECISION

Student prevailed on Issues 4, 5, and 6. Student proved by a preponderance of the evidence that District committed procedural violations by failing to convene IEP team meetings for the 2016-2017 and 2017-2018 school years. Parents were therefore unable to participate in the development of the IEP and Student's individualized transition plan, thus denying Student a FAPE. District was unpersuasive in arguing it was not obligated to convene the meetings, or that the procedural violations could not have denied Student a FAPE, because District IEP team members concluded Student was no longer eligible for special education at the June 2015 IEP. Parents did not consent to District's offer to exit Student from special education and District did not obtain an OAH order permitting District to do so without parental consent. Student was and remains eligible for special education and is entitled to state and federal procedural and substantive protections. Student is entitled to reimbursement of a portion of his tuition and transportation mileage for two academic years.

Student did not prevail on Issue 1. District appropriately assessed Student in all areas of suspected disability. Student was academically and socially proficient, managed his workload, and participated in group assignments, benefiting from accommodations. District considered Parents' input, teacher reports, assessors' school and clinical observations, and assessments and evaluations. Although Student was diagnosed with autistic spectrum disorder, Student no longer presented an area of disability for which special education and related services were required. Student did not require special education because his needs could be met with accommodations and supports in the

general education setting.

Student did not prove in Issue 2 that District was mandated to file a due process request and obtain an OAH order exiting Student from special education. Therefore, District's decision not to file an OAH complaint did not deny Student a FAPE.

Student did not prove in Issue 3 that, because required IEP team members did not attend the June 15, 2015 meeting, District failed to timely convene an IEP for 2015-2016 school year by June 17, 2015. Mother clearly and unambiguously agreed in writing and in compliance with federal regulations to District speech pathologist's absence at the June 15, 2015 IEP team meeting.

FACTUAL FINDINGS

1. At the time of the hearing, Student was a 16-year-old boy and in 11th grade at Moreau High School, a private Catholic college preparatory school in Hayward, California. He qualified for special education under the eligibility of autism when he was three years old. Student was provisionally diagnosed with Pervasive Development Disorder – Not Otherwise Specified and was diagnosed with autism at four years old. At all times relevant to this decision, Student resided within District's boundaries.

2. Student attended a District preschool special day class for two years. Thereafter, Student never attended a District program. Student attended a nonpublic school kindergarten at Arbor Bay School from 2006 to 2008, which District financed pursuant to an agreement with Parents.

HOPE TECHNOLOGY SCHOOL

3. Parents unilaterally placed Student at Hope Technology School in fall 2008 for second grade. Student continued to attend Hope Technology through eighth grade in June 2015.

4. Hope Technology was a private nonprofit day school in Palo Alto,

California, consisting of about 120 students from kindergarten through eighth grade. It was not certified by the California Department of Education's Special Education Division. Classes consisted of eight to 13 students, with one teacher and one paraeducator. The entire school was located in the back of a church building; the classrooms were configured along a hallway, with lower elementary on one side and upper elementary on the other.

5. Hope Technology had an inclusive school environment. About one half of the students had some type of special need, such as autism or other learning disability, while the remaining students were typically developing. The school had general education and special education teachers.

2013 IEP and Settlement Agreement for 2013-2014 School Year

6. District financed Student's attendance at Hope through various settlement agreements. District continued to convene annual individualized education program meetings.

7. District convened an annual IEP team meeting on June 17, 2013, for Student's upcoming seventh grade school year. The IEP confirmed that Student was parentally placed at Hope. The June 2013 IEP summarized District's offer of placement and services, including extended school year, if Parents had allowed Student to attend public school. The June 2013 IEP unambiguously stated that Hope was not District's placement offer for FAPE but, instead, was the consequence of a compromised settlement agreement. Hope would provide related services of speech and occupational therapy. Student would also participate in a Hope summer program.

8. The parties executed the settlement agreement related to the June 2013 IEP and the 2013-2014 school year on August 15, 2013. The agreement provided that District and Parents would review it annually and the IEP documents would continue to reflect District's offer of FAPE on the educational services page. District would reimburse

Parent for Hope tuition, not to exceed \$12,000 for the 2013-2014 school year, including extended school year. District would also provide occupational therapy of 60 minutes per week and speech and language therapy for 60 minutes per week at and through Hope. District would reimburse Parents for Student's transportation at standard mileage rates for one round trip per day (including a one-way bridge toll).

9. District reserved a discretionary right to assess Student in the spring of 2014. Regardless of assessment, District promised to convene an IEP team meeting by June 17, 2014. The settlement agreement further stated at paragraph 2E that, should the Parties not agree on a placement at the IEP team meeting, Student's stay put placement would be Hope pursuant to the terms of the Agreement.

2013-2014 School Year and Individualized Service Plan

10. For his seventh grade 2013-2014 school year, Student attended a Hope full-inclusion classroom of 12 students, consisting of both typically developing and special needs students receiving instruction in the same learning environment. The class was staffed with a full-time teacher and a paraeducator, who worked closely with all students. As a middle schooler, Student had four different teachers for his academic subjects of math, language arts, social studies, and science. His grades were average to above average.

11. Each academic year, Hope held and documented an individualized service plan meeting for Student. The plan consisted of evaluating Student's performance, progress toward service plan goals, and proposed continuing services and accommodations. Hope convened Student's seventh grade service plan meeting on March 17, 2014. Student was described as a happy, easy going, and highly motivated young man, with a positive attitude, determined to do well and complete assignments.

12. Student was found to have made great strides in language arts since the beginning of the school year, while performing at or above grade level in social studies,

science, and math. He had received all A's on his math tests. He met or made significant progress toward his academic goals. Student got along with all his classmates and greatly enjoyed sports. Student set a great example of being focused and working quietly on independent class assignments, though he required occasional reminders to slow down and check his work. Generally, the service plan team was pleased to see the extent of Student's growth academically, socially, and in his self-confidence.

13. The service plan adjusted some academic goals and recommended continuing accommodations. The accommodations included a full-inclusion classroom (Student was noted to relate well with neurotypical peers), small class size, calculator when necessary, additional time for assignments and tests, preferential seating, visual support for schedules and tasks, sensory diet as needed (e.g. a rocking chair), and frequent comprehension checks, especially during whole-class instruction. Student's curriculum was not modified and he received no specialized academic instruction.

14. Hope's speech and language pathologist, Sandra Burke, reviewed Student's speech and language performance. Ms. Burke testified at hearing. She worked at Hope since 2005 and possessed a state license and credential in clinical rehabilitative services. She was Student's speech and language pathologist since Student started second grade at Hope, providing all of his therapy and service plan evaluations.

15. Student was receiving speech and language therapy service, twice a week, for 30-minute session, to address deficits in the areas of inferential reasoning, vocabulary and semantics, executive functioning, and perspective taking. His overarching seventh grade goal was to increase his independence with completing assignments, for which he developed checklists and rubrics (for writing assignments). He met or made progress on all his plan goals.

16. Student made great gains in vocabulary development and writing skills, with progress in expressive and receptive skills. Ms. Burke believed that Student

continued to have significant difficulty with higher-level language processing, such as comprehension, making inference, critical thinking, and reasoning. She recommended continued speech and language services, focusing on executive functioning, writing skills, and inferential reasoning/critical thinking skills.

17. Student met or made progress on all occupational therapy goals. Student's scores on standardized assessment were within normal limits for many of his fine motor and perceptual skills. He had some difficulties with high level sensory based skills. Student's teacher reported that he participated in classroom activities at the same level as his peers. However, the services plan recommended continued occupational therapy of 30-minute sessions, twice a week.

18. Hope's individualized service plan did not evaluate or assess Student for purposes of determining if Student continued to meet eligibility requirements pursuant to state and federal special education law. Parents signed and agreed to the individualized service plan.

2014 IEP and Settlement Agreement for 2014-2015 School Year

19. District convened an annual IEP team meeting on June 10, 2014, for Student's eighth grade school year of 2014-2015.

20. The June 2014 IEP summarized District's offer of placement and services, including extended school year. District's offer of FAPE included, but was not limited to: small group instruction as appropriate, preferential seating, additional time on assessments and assignments, clarification of instructions and directions, project-based learning, oral retesting as appropriate for some assessments, use of a calculator, graphic organizers, writing organizers, models and visuals for instruction and work production. Student would have access to a computer for some writing and editing tasks. District would address Student's sensory regulation needs with breaks, chunking of material and assignments into smaller portions, hands-on assistance for some activities, self-

monitoring, strategy support, sensory tools, and other curricular accommodations.

District offered extended school year for summer 2015.

21. District offered 60 minutes a week of language and speech services and consultative occupational therapy (the IEP team agreed that direct occupational therapy was no longer warranted). District did not further specify its offer of public school placement and accommodations because Student was parentally placed at Hope. The June 2014 IEP unambiguously stated that Hope was not District's placement offer for FAPE but, instead, was the consequence of a compromised settlement agreement.

22. The parties executed the settlement agreement related to the June 2014 IEP and the 2014-2015 school year by July 31, 2014. The agreement terms substantively mirrored those of the August 2013 settlement agreement. District would reimburse Parent for Hope tuition, not to exceed \$12,000 for the 2014-2015 school year, including extended school year. District would also fund speech and language therapy for 60 minutes per week at and through Hope. District would reimburse Parents for Student's transportation at standard mileage rates for one round trip per day (including a one-way bridge toll).

23. District reserved a discretionary right to assess Student in the spring of 2015. Regardless of assessment, District promised to convene an IEP team meeting by June 17, 2015. The settlement agreement further stated at paragraph 2E that, should the Parties not agree on a placement at the IEP team meeting, Student's stay put placement would be Hope pursuant to the terms of the Agreement.

24. District's Director of Special Education, Sarah Kappler, executed the agreement on behalf of District. She testified at the hearing. Ms. Kappler held credentials in general education and special education, was a special education teacher from 1996 through 2006, and was a special education program director from 2008 to 2012. She became Director of Special Education in 2012.

25. Student attended Hope when Ms. Kappler became director. Ms. Kappler relied on her program director to monitor Student at Hope, including scheduling his IEP team meetings. In her opinion, Hope was not an appropriate placement, but agreed to District's funding of the placement, by way of settlement, for Student's seventh and eighth grades.

2014-2015 School Year and Individualized Service Plan

26. For his eighth grade 2014-2015 school year, Student was in a full-inclusion classroom of 11 students, consisting of both typically developing and special needs students receiving instruction in the same learning environment. The class was staffed with a different instructor for each academic subject in the areas math, language arts, social studies, and science. His grades were average to above average.

27. Hope held its individualized service plan meeting for Student on Monday, May 18, 2015. The plan consisted of evaluating Student's performance and progress toward service plan goals, with proposed continuing services and accommodations. Hope summarized Student's classroom functioning and social skills. He independently managed his schedule, transitions, and assignments. He was fully adjusted to the routine of middle school. Student completed as much work as possible while at school and would sometimes work on homework ahead of time during recess, consistently completing and turning in assignments on time without needing reminders. Student stayed focused and on task for extended periods of time, working quietly. Student progressed in asking for help when unsure and benefited from frequent check-ins to assess comprehension.

28. Hope described Student as well-liked by his peers, interacting with his classmates during instruction and at recess. Student was cooperative when working in groups on assignments and tasks. He maintained a positive attitude when asked to help teachers or classmates. Student made significant progress in his reading comprehension

and writing, having read several novels that year of different genres, including historical fiction, free verse poetry, and nonfictions. He read a variety of informational articles and books of his own choosing for his reports. Student sometimes hesitated to speak in class, which might hinder him from being fully engaged in discussions and activities. However, he would speak when called upon and willingly followed directions.

29. Student's vocabulary was at grade level. His reading comprehension was below average, but his curriculum-based assessments demonstrated that he had made consistent progress. Student sometimes had difficulty comprehending grade-level text in the classroom so he benefitted from frequent comprehension checks, to summarize and review. Student scored the highest level possible on the intermediate spelling inventory assessment for eighth grade and probably could have scored higher on a more advanced assessment.

30. Student's writing had grown in its complexity and organization since the beginning the year to where he was writing one to two paragraphs without using his graphic organizer. He conveyed his thoughts and ideas clearly in writing, learning how to use evidence to support claims, though not always the best and most relevant evidence. Student continued to benefit from using graphic organizers to help him structure and organize his writing. Student was well above average in his Algebra 1 class. He understood solving and graphing linear equations, linear inequalities, quadratic equations, and factoring polynomials. Student did well in social studies and science, where he worked best in groups where he was comfortable. Student confidently completed any assigned tasks and excelled at learning when using technology.

31. Ms. Burke reviewed Student's speech and language performance and administered a number of standardized tests. By the time Student was in middle school, she focused on higher language skills, including executive functioning, inferencing, and receptive/expressive language. Student had facial tics and would mumble, especially if

anxious, but these had primarily diminished by eighth grade. Ms. Burke believed Student had tactile sensitivity and he would flinch if she unexpectedly tapped Student on the shoulder.

32. Ms. Burke would sometimes observe Student sit quietly and cry. She believed this was when Student was stressed when he was dealing with something difficult. She thought this happened occasionally and, in response, would carefully interact. However, Ms. Burke did not report this observation in the individualized services plan.

33. Ms. Burke administered a number of standardized tests. Student scored within the average range on the Oral and Written Language Scales, which measured expressive and receptive language skills, and on the Receptive One-Word Picture Vocabulary Test (Fourth Edition), which assessed receptive vocabulary by measuring Student's ability to match an object, action, or concept with its name.

34. Ms. Burke gave Student the Social Language Development Test – Elementary. However, Student was two years outside the age limit for the normed group. Student scored in the below average range, but Ms. Burke admitted the development test scores were not valid. Mr. Burke also administered the Test of Problem Solving (Third Edition - Elementary) and the WORD Test-3 (Elementary), but Student was also out of these tests' normed age range. Accordingly, Ms. Burkes speech and language evaluation would not be deemed legally appropriate if part of a school district assessment.

35. Ms. Burke recommended continuing the twice weekly 30-minute speech and language therapy sessions. The service plan also recommended accommodations. The accommodations included a full-inclusion classroom, small class size, calculator when necessary, additional time for assignments and tests, preferential seating, visual support for schedules and tasks, sensory diet as needed, and frequent comprehension

checks, especially during whole-class instruction. Student's curriculum was not modified and he received no specialized academic instruction.

36. Hope's March 2015 individualized service plan did not evaluate, assess, or analyze whether Student continued to meet eligibility requirements for special education under state and federal law. Parents signed and agreed to the individualized service plan.

DISTRICT'S 2015 ASSESSMENTS AND IEP TEAM MEETINGS.

37. Ms. Kappler sent a March 3, 2015 letter to Parents reminding them that the settlement agreement would end with the close of the 2014-2015 school year and that she would like to talk with them regarding placement at an IEP team meeting. She attached a notice of IEP team meeting for April 20, 2015. Ms. Kappler also invited Parents to visit District's high school program at James Logan High School, commenting that District believed it had an appropriate program for Student. She asked Parents to schedule the Logan observation with District program specialist, Jessica Farrand.

38. Ms. Farrand testified at the hearing. She held a master of science in special education, a general education teaching credential, and was credentialed as a special education teacher for mild/moderate disabilities. She was a District program specialist since 2014, a District education specialist from 2012 to 2014, a resource specialist with Newark Unified School District from 2006-2012. Her duties included program management of mild-to-moderate and moderate-to-severe special education students, nonpublic school case management, and professional development of teachers and staff. As a case manager, she managed IEP services for the students, facilitated timelines for scheduling IEP team meetings, and managed the IEP paperwork. She had administered more than 200 academic assessments and, as a program specialist, occasionally conducted academic assessments of students in nonpublic and private schools. Ms. Farrand first saw Student in November 2014 when she toured Hope where

some of her new caseload children attended. Ms. Burke escorted Ms. Farrand and described the school's full inclusion model. Ms. Farrand saw Student participating in class, using his flexible chair. Student participated in grade level appropriate curriculum and was generally indistinguishable from his general education classmates.

39. Mother responded to Ms. Kappler's letter via email on March 15, 2015, stated that April 20, 2015, would not work and asked for an IEP team meeting on May 18, 2015. Ms. Kappler responded that Ms. Farrand would work with Mother on rescheduling the IEP team meeting. Ms. Kappler and Mother also planned to meet personally and discuss a possible extension of the settlement agreement. However, Ms. Kappler emailed Mother on May 12, 2015 and postponed their personal meeting until after Student's IEP. Ms. Kappler wanted the IEP team input before separately meeting with Parents.

40. Ms. Farrand determined that Student was due for his triennial IEP. She assembled a team to assess Student to update present levels of performance in order to develop an IEP for Student's transition to high school. She emailed Mother on May 5, 2015, to coordinate Parents' observation of Logan. She also told Mother about the triennial assessment and IEP. She sent Mother an Assessment Plan, which Mother signed and returned on May 11, 2015.

41. Ms. Farrand took Mother to observe Logan on May 13, 2015. Terri Lampi, a Logan resource specialist, joined them on the tour because she was well acquainted with Logan and was the resource specialist for Logan's Institute of Community Leaders program. Ms. Lampi briefly shared with Mother and Ms. Farrand information about the Institute of Community Leaders program while walking through its campus location.

42. Mother emailed Ms. Kappler on May 19, 2015. Mother expressed concern about Student's sensory issues on Logan's campus of 4000 students, saying Student would shut down from the anxiety caused by all the tactile, auditory, and visual stimuli

inherent in such an enormous school. She noted that Student's IEP team meeting would probably not take place until the middle of June 2015. She said she was therefore left with no choice but to consider other placement options "at this point." Parents reserved a spot for Student at private Moreau Catholic High School for 2015-2016 school year. Hope's pilot ninth grade would not have an appropriate placement because it would have consisted of five students, who were much more impacted than Student, with no typically developing peers.

43. Parents submitted Student's application to Moreau in fall 2014. Student interviewed at Moreau in January 2015, Parent interviewed thereafter, and Student was accepted in mid-March 2015. Parents paid a deposit on March 19, 2015 in the amount of \$1,311.05, \$800 of which was nonrefundable. Parent started making monthly tuition payments to Moreau beginning June 2015.

44. District started Student's triennial assessment. The tests and other evaluation materials used by District in assessing Student were selected and administered so as not to be racially or culturally biased, and given for the specific purpose for which the standardized test was validated. District assessors administered and interpreted all standardized instruments consistent with the publishers' protocols.

Student's Academic Assessment

45. Ms. Farrand conducted Student's academic assessment. Ms. Farrand was qualified by her education, credentials, training and experience to conduct Student's academic assessment. She was familiar with Student at the time she assessed Student. She met all legal standards for evaluating Student, properly reporting her findings and recommendations.

46. Ms. Farrand observed Student at Hope on April 29, 2015, as part of her assessment. He was in a general education cluster, watching a video about a natural disaster. The class then assembled into groups to discuss the video. The teacher gave

directives and assigned roles to the students. Student moved into a group of four, was shy and soft-spoken, but was working and interacting with classmates. Nothing in Student's manner or conduct distinguished him from his classmates or suggested he was a special education student. Again, the curriculum was grade level, general education appropriate. No special education academic instruction was provided. She observed and interacted with Student during two subsequent assessment sessions.

47. Ms. Farrand administered the Woodcock-Johnson III Tests of Achievement, which provided a comprehensive measure of Student's general academic achievement ability, as well as measuring his oral language ability and specific achievement skills. Student's conversational proficiency seemed typical for his age level. He was exceptionally cooperative throughout the examination; his activity level was typical for his age. He was attentive to the tasks during the examination. Initially, in the first testing session, Student occasionally appeared tense or worried. Student responded promptly, but carefully, to test questions, and visibly increased efforts for difficult tasks. Student and Ms. Farrand discussed Student's attachment to the Golden State Warriors.

48. The test results indicated Student's oral language skills (oral expression and listening comprehension) were average when compared to the range of scores obtained by others at his age level. His academic skills and fluency with academic tasks were both within the high average range. His academic knowledge and ability to apply academic skills were both within the average range. Student's standard score was very superior in math calculation skills; his broad mathematics and brief mathematics scores were superior. Ms. Farrand had never tested a pupil who scored as high as Student on math calculation skills.

49. Student's basic reading skills, math reasoning, and brief writing scores were in the high average range. His standard scores were average in broad reading, reading comprehension, brief reading, broad written language, and written expression.

When scores for a selected set of his achievement areas were compared, Student demonstrated a significant strength in broad mathematics. He demonstrated a relative weakness in broad reading.

Student's Occupational Therapy Assessment

50. Robin Shopbell conducted an occupational therapy assessment of Student and testified at the hearing. She held a California occupational therapist license and was certified by the National Board for Certification in Occupational Therapy. She had a 1990 bachelor of science in occupational therapy. Ms. Shopbell worked for District since 2013, was an occupational therapist for two Colorado school districts from 2004 to 2013, and previously worked as a therapist in Seattle, Washington, and Medford, Oregon.

51. Her District duties included conducting assessments, collaborating with assessment and IEP team members to develop goals, and providing direct and consultative occupational therapy services to students. At the time of hearing, she supported four elementary schools, one middle school, and Logan High School. She carried a case load of 30 students, providing direct services to about 40 percent and consultative to the rest. She averaged assessing 20 students per year, 25 percent of whom were autistic. Ms. Shopbell was qualified by her education, credentials, training and experience to assess and evaluate Student.

52. Ms. Shopbell reviewed Student's records, noting Student had received occupational services since entering Hope in second grade. Occupational therapy had focused on Student's anxiety and tactile defensiveness. Student only received consultative occupational therapy services over the past school year. He no longer received any direct occupational therapy services.

53. Ms. Shopbell interviewed the Hope occupational therapist who reported Student was concerned about being seen as different by his peers. He was therefore reluctant to take sensory breaks that would require him to remove himself from his

group or use a tool (like a squeeze ball) that might be obvious to others. Movement and breaks were embedded in his day, often as part of the whole class routine. He received extra time as needed for tests and visual support for schedules and tasks. He could discuss what self-monitoring strategies were helpful. Student participated in sports, which developed social skills and tactile tolerance; exercise reduced anxiety. Student would sometimes quietly “shut down” if overwhelmed by anxiety, so the teacher would check on him to make sure he was following the material. The Hope therapist reported to Ms. Shopbell Student might be challenged when moving between classes in crowded hallways at a future school placement, unless he was provided an appropriate accommodation.

54. Ms. Shopbell observed Student in his math class. He sat in the second of two rows of two-student desks, in a rocking desk chair. He and his desk partner shared the space equally. Student worked diligently throughout the 50-minute observation, preparing for a test. While the class was very quiet, two students were quite mobile. Student screened out these visual distractions and remained focused on his work. Student once raised his hand and interacted with the teacher. Student’s writing posture was functional; he properly stabilized his paper with his left hand and held his pencil with a modified cross thumb grasp. Pencil pressure was appropriate and letter and number formation was legible. Throughout the observation, he rocked slightly in his rocking chair.

55. Ms. Shopbell administered the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, which measured Student’s fine motor and gross motor control skills over three composite areas. Student was low average in fine motor precision and fine motor integration, while high average in manual dexterity.

56. Ms. Shopbell utilized the informal sensory preference checklist to evaluate Student’s sensory issues. She asked Student to complete a brief checklist and indicate

how certain sensory experiences affected him. Ms. Shopbell was very impressed by Student's keen awareness of how sensory input impacted him, particularly in the areas of oral motor and movement. He indicated that taking slow deep breaths and drinking through a straw helped calm him down. Chewing gum reportedly helped him become more alert. Student also reported that rocking movement calmed him, while tapping his toes or a pencil, as well as aerobic exercise, could be alerting. He preferred a quiet environment in which to work, although he effectively filtered out distractions.

57. Ms. Shopbell concluded that Student did not require direct occupational services to benefit from his educational program. Student was functional, other educational personnel could implement accommodations, and Student continued to make progress without direct services. Student's needs were for self-regulation. Therefore, Ms. Shopbell recommended consultative services for the purpose of designing and implementing accommodations related to helping Student self-regulate, remain calm, and be alert and "ready to learn."

Student's Speech and Language Assessment

58. Deborah Short assessed Student's language and speech, issuing a June 2015 assessment report. She held a bachelor of science and a master of science, both in speech language pathology. She held a certificate of clinical competence from the American Speech-Language-Hearing Association and a license from the California Speech-Language Pathology and Audiology Board of California. Ms. Short was a speech-language pathologist for District since 2007. She has been working at District high schools since 2008.

59. Ms. Short's duties included speech and language assessment in the areas of articulation, phonology, fluency, voice, expressive and receptive language, morphology, and pragmatic language. She assisted in development and implementation of IEP's, with multi-disciplinary team collaboration. She conducted pure tone hearing

screenings and aural rehabilitation. Ms. Short facilitated interactive social groups for students with pragmatic communication deficits. She also supervised clinical fellows and graduate students who were interning with District. At the time of hearing, she had assessed more than 200 students on the autism spectrum, including high-functioning autistic children. She had a case load of 56 students, 20 of whom had autism. Ms. Short was qualified by her education, credentials, training and experience to conduct assessment of Student's speech and language functioning. She met all legal standards for evaluating Student, properly reporting her findings and recommendations.

60. Ms. Short reviewed Student's file, including IEP's and Hope interdisciplinary reports. She clinically observed and interacted with Student during the two-and-a-half to three-hour assessment session. She witnessed Student easily engaging in conversation and appropriately responding to all questions. Student was respectful, sweet, and family oriented. He freely spoke about his family life, classroom setting, grades, and self-reported social challenges. When dealing with a difficult question, Student took extra time to process auditory information. However, Student completed all assessments within the standardized tests' administration times. He wanted to finish the assessments and declined offered breaks. Between assessments, Student and Ms. Short chatted and talked about life, discovering they both liked the same home improvement television show. Student avoided eye contact when a question was hard, but he made eye contact when just talking,

61. Student's score on the Receptive One-Word Picture Vocabulary Test–Fourth Edition indicated that Student' receptive lexical knowledge was within expected range for his age group.

62. The Comprehensive Assessment of Spoken Language measured oral language processing of auditory comprehension, oral expression and word retrieval (knowledge and use of words and grammatical structured), use of language for special

tasks that required higher cognitive functioning, and the knowledge and use of language in communication with others. Student scored within the average range for his age. He could comprehend complex sentence structures, as indicated by his pragmatic judgment and non-literal subtests' scores; his responses were multifaceted and mature for his age range. Student did not demonstrate any difficulties providing socially appropriate responses to, or identifying what was wrong in, given scenarios. Student could abstract figurative speech, indirect requests, and sarcasm from selected scenarios, which did not contain literal meaning.

63. Ms. Short reviewed Hope's May 2015 service plan, noting that the speech assessor had used the elementary version of the Social Language Development Test, though Student was well beyond the normed age range. Hope's elementary development test results also indicated that Student had social skills less than a six-year-old. This puzzled Ms. Short because she personally interacted with Student and found his social skills to be age appropriate.

64. Ms. Short also administered the Social Language Development Test—Adolescent, which consisted of five subtests. The making inferences subtest had Student interpret the body languages presented by a set of pictures. Student scored below the average range because he had moderate difficulty in identifying a facial expression, gesture, or postures to extract what another person was thinking or feeling in the photograph.

65. The subtest for interpreting social language required Student to demonstrate an action or give an illustration. For example, Ms. Short asked Student to show "mad." Student demonstrated knowledge of many idioms, scoring in the moderately high average range. Student performed well when given a scenario and asked to solve a problem, scoring in the average range on the problem solving subtest. In the social interaction subtest, Ms. Short tested Student in his ability to see things from

his peers' perspective. Student scored in the average range.

66. The fifth subtest, interpreting ironic statements, assessed Student's ability to recognize sarcasm and interpret ironic statements; this subtest was not on the elementary version of the social language development test. Student listened to recordings that included ironic or sarcastic statements (e.g., "piece of cake"). Student scored within the average range.

67. Student's total standard score on the adolescent social language development test was within the average range for his age group. He was very capable at interpreting social language. All the subtests were within the average range with the exception of making inferences.

68. Ms. Short determined that Student's clinical articulation abilities were not a concern. His voice volume was within appropriate age and gender parameters. Student's fluency (flow of verbal expression), including rate and rhythm, did not adversely affect his communication skills.

69. On June 10, 2015, Ms. Short held a scheduled telephonic meeting with Mother regarding the speech and language evaluation. Mother had a draft copy of Ms. Short's report. Mother told Ms. Short that Student's performance on the assessment did not reflect how Student did in real life. Mother believed that Student did not generalize the abilities indicated by his average scores. Mother asked for further testing. Ms. Short offered and administered an additional standardized instrument, the Test of Pragmatic Language--Second Edition.

70. The pragmatic language test evaluated Student's social communication in context, measuring how he listened, chose appropriate content, expressed feelings, made requests, and handled other aspects of pragmatic language. The test took about two hours. Student's standard score was within the average range. On the descriptive rating scale, Student could decipher non-verbal body language. He was also able to

identify when a person was off-topic and when it was an appropriate time to be apologetic. Student had difficulty identifying others' perspective, including mood. Student was able to compensate for his perspective taking difficulties, as indicated by his well within normal range scores in all other social areas on earlier assessments (e.g., problem solving, non-literal language, and overall expressive language).

Summary of Student's Language Evaluation

71. Ms. Short measured Student's mean length of utterance score, which found Student's linguistic productivity to be age expected. His grammar and vocabulary skills were in the average range. Student used a multifaceted vocabulary, including negatives, conjunctions, personal pronouns, adjectives, prepositions, adverbs, and interjections. Student's expressive language was age appropriate and within the average range.

72. Student's receptive language was a strength, with an oral comprehension at the complex sentence level. He comprehended direct and indirect requests and literal and figurative language. He understood gestures and body language. He could follow multistep directions.

73. Though Student had been diagnosed with autism spectrum disorder, Student's receptive and expressive language skills tested within normal limits. He formed complex sentences to express his wants and needs, incorporating modifiers. During assessment, Student interacted well with Ms. Short, answered and asked questions, and demonstrated age-appropriate conversational skills. Student self-reported difficulties with social skills. Additional assessment revealed that Student's pragmatic skills were in the average range. Though the results indicated that Student had difficulty with perspective taking, that difficulty did not impede his ability to access his curriculum and learning.

74. Ms. Short concluded that Student did not qualify for special education

eligibility based upon a language or speech disorder, as defined in the Education Code and California Code of Regulations. She indicated that the IEP team should consider the impact of Student's speech and language on the Student's educational performance. Ms. Short administered five standardized assessments and all provided similar results regarding Student's skills and social language. She noted that the observations of Student's teachers, and other members of District assessment team (Ms. Loveall and Ms. Farrand), confirmed that Student socialized with peers, demonstrated interest in others, and appropriately interacted within the classroom.

Student's Psychoeducational Assessment

75. School psychologist Jessica Loveall conducted Student's Psychoeducational Evaluation and issued a report dated June 12, 2015. Ms. Loveall had a bachelor's degree from Colorado State University, a master's degree in educational psychology from Chapman University College, was a licensed educational specialist in school psychology, possessed a California Pupil Personnel Services credential, and was a member of the National Association of School Psychologists. She was a school psychologist at District since 2012, a school psychologist at Oakland Unified School District from 2011 to 2012, and interned as a school psychologist at District from 2010 to 2011.

76. At the time of hearing, Ms. Loveall primarily supported middle school students, but had served students from preschool to transitional adults. She also conducted assessments of nonpublic and private school students. She conducted about 400 psychoeducational assessments, averaging 55 a year. Ms. Loveall's education, credentials, and experience qualified her to conduct Student's psychoeducational assessment and prepare the report.

77. Ms. Loveall reviewed all available documents, including the available Hope individualized service plans. She interviewed Mother, Student, and Student's teachers.

She used standardized instruments and assessed Student's cognitive functioning, processing skills, social functioning (including social perception), and behavioral and executive functioning.

78. Student's teachers reported that Student managed his schedule, transitions and assignments independently. He was well-liked by his eighth-grade peers and interacted with them in class and at recess. He was cooperative and able to successfully work in groups. He worked quietly and completed most of his work at school, including some of his homework. Student was diagnosed with a tic disorder, but this had substantially diminished at school. Student's home room and science teacher, Howard Kiyuna, indicated that Student sometimes spoke in a flat tone, would not ask for what he needs, not initiate conversation, or avoid direct eye contact. Student would shut down if overwhelmed, but Student had improved over the years as Student became more independent. Student was better at one-to-one interaction with peers and teachers, but participated in group activity. Mr. Kiyuna reported that Student generally demonstrated very mild characteristics associated with autism in the school setting, which were addressed by Student's accommodations. Student was performing at or above grades level in all academic areas.

79. Mother reported that Student was very capable, compliant and eager to please. She believed that Student experienced significant anxiety and sensory issues and became easily overwhelmed. When Student was overstimulated, he would "shut down." However, she noted Student was very independent in a small environment. Parents were generally concerned about Student's social skills, sensory issues, and executive functioning. Mother was concerned that Student would "fall through the cracks" because he was so quiet.

80. Student told Ms. Loveall that he was nervous about going to ninth grade because he feared there would be a lot of homework. His favorite subjects were algebra

and social studies, and he liked using the computer and reading sports books. Student said he had friends at school and in Boy Scouts. Student was aware of his tendency to worry and knew that long-term assignment with multiple steps could provoke his anxiety.

81. Ms. Loveall assessed Student over two sessions and twice observed Student at Hope school. When she clinically observed Student in the first assessment session, Student was persistent and wanted to do his best. She then observed Student in Mr. Kiyuna's class for 45 minutes with program specialist Ms. Farrand. At school, he was focused and diligent. While doing independent work, he got up and asked questions of the teacher; he also asked a question of a peer. When the science class crickets escaped, Student barely acknowledged the commotion and continued to work. Student sat in a chair, which enabled him to rock for self-regulation.

82. During the second assessment session, Student was light-hearted, smiled more, was more relaxed, expressed some humor, and talked about watching sports. He verbally expressed relief that the assessments were coming to a close. Each assessment session was from one to one and a half hours. Ms. Loveall also observed Student in school with Ms. Shopbell. Ms. Loveall never observed any indication of Student's tic disorder.

83. Ms. Loveall administered the Differential Ability Scales, 2nd Edition, to measure Student's cognitive functioning. Student's general conceptual ability score was not interpretable due to a variability between spatial cluster subtest scores. However, in such situations, the best practice was to use the Student's strong average nonverbal reasoning cluster score, as a reliable estimate of Student's cognitive ability. Both subtests in the verbal cluster also demonstrated the quality of Student's early education, cultural opportunities, richness of early environment, intellectual curiosity, interests, and reading patterns. Student demonstrated understanding at the expected age level. The

test's spatial cluster consisted of two measures. The subtest for recall of designs, measured Student's short-term visual recall, spatial perception, visual memory, and fine-motor coordination. Student scored in the borderline range, which substantively varied with all other scores. However, he was in the average range on the pattern construction subtests, which measured nonverbal, fluid reasoning with spatial visualization, visual-motor coordination, syntheses, attention, and concentration.

84. Ms. Loveall used two instruments to evaluate Student's processing skills. She used Student's scores on the Differential Ability diagnostic subtests to measure his auditory memory that required mental manipulation. Student auditory working memory was in the above average range. Ms. Loveall used subtests from the Developmental Neuropsychological Assessment (NEPSY-II) to measure functional domains. On the visuospatial processing tests, Student scored in the average to superior range, indicating good visual-motor integration. On the memory and learning domain, Student was demonstrated significant weakness, which was consistent with one of the Differential Ability recall of design subtests. On the affect recognition subtest, for the social perception domain, Student demonstrated adequate ability to recognize common emotions in others, such as happiness, sadness, neutrality, fear, anger, or disgust. However, Student had great difficulty on the theory of mind subtest, which measured his ability to identify how another person may think or feel, at a level consistent with his age.

85. For Student's social and behavioral functioning, Ms. Loveall used two instruments – the Gilliam Autism Rating Scale, Second Edition,³ and the Behavior

³ The Gilliam – Third Edition was issued before Student's 2015 testing. However, the Gilliam – Second Edition was still valid, since the publisher permitted about a year of transition to new editions.

Assessment System for Children – Second Edition. For each instrument, Mother completed the parent rating scales and Mr. Kiyuna filled out the teacher scales.

86. Neuropsychologist Cynthia Peterson, Ph.D., testified on behalf of Student at the hearing. Dr. Peterson conducted a neuropsychological evaluation of Student in April 2010. She found Student to have had severe pragmatic language deficits and emerging executive functioning deficits, with high anxiety. She also found that Student had adequate academic skills and was performing adequately academically. She recommended Student continue with all services at Hope. Dr. Peterson had not assessed or seen Student since 2010.

87. Parents sought guidance from Dr. Peterson on choosing an appropriate high school for Student. Dr. Peterson said she helped Parents navigate their choices of options and resources. She cared for Student's well-being and admired Parents' dedicated support of Student. Dr. Peterson opined that Student's anxiety would be triggered in Logan's large high school setting, especially with the elimination of all program support. She never knew of a student who was moved from such a restrictive setting to a compressive campus without a transition plan. She recommended a private high school for high functioning autistic students, but Parents found the recommended school too far away and expensive, so they chose Moreau. Dr. Peterson did not address District's offer to enroll Student in Logan's Institute of Community Leaders, provide a Section 504 plan, implement accommodations and supports in the general education setting, include Student in social skills groups, and provide Student with a study skills class. She did not explain how Student met the criteria for any special education eligibility.

88. Dr. Peterson reviewed Hope and District assessments for her testimony. She criticized Ms. Loveall's use of the Gilliam scales, instead of the Autism Diagnostic Observation Schedule, which was in her opinion the "gold standard" instrument for

autism and was used by multiple school districts. Dr. Peterson would also have used some additional instruments to further evaluate Student's anxiety. However, she did not opine that District assessments were improperly administered or that the results were not valid. She also did not offer any opinions that the use of the autism diagnostic schedule or additional standardized tests would have rendered different results.

89. Ms. Loveall chose the Gilliam scales as a good school-based instrument for reassessment because her evaluation goal was to assess Student to see if he improved functionally and behaviorally, in light of his long standing autism diagnosis. The Gilliam scales could estimate the severity of Student's disorder, not merely whether Student might be on the autism spectrum. The Gilliam scales were an appropriate instrument to reassess the extent to which Student's autism affected his ability to function in the classroom and access his education.

90. Mr. Kiyuna completed the Gilliam teacher scales and rated Student as having mild autistic characteristics in the school setting. Student was able to cope well with the accommodations. Socially, Student resisted physical contact from others. Mother rated Student as having more elevated autism characteristics in the home setting and outside of school. Mother reported Student would avoid eye contact, look away from a speaker, and did not initiate conversation, generally resisting physical contact. Ms. Loveall noted that this differential between teacher and Mother was not unusual, given that Student was bright. Student had developed effective coping skills in the school environment, enabling him to participate and access his curriculum.

91. On the Behavior Assessment System for Children, Mr. Kiyuna's responses indicated that he did not observe any clinically significant behaviors in the school setting, though Student was at risk for withdrawal, anxiety, and atypical ("odd") behaviors. Student could be fearful and nervous and become annoyed by others. Mother rated several areas in the clinically significant range, such as atypicality,

withdrawal, anxiety, and functional communication. Student was nervous and worried at home, fearful about making mistakes. Mother reported Student sometimes had a "tic" in his eye, heard sounds that were not there, fell down, slept with Parents, and would eat too much.

Psychoeducational Report Summary and Conclusion

92. Ms. Loveall summarized her findings, describing Student as well-liked at school, where he was very independent. Though quiet and soft-spoken, Student engaged in social and cooperative interactions and was very successful at school. He could experience anxiety when overstimulated. Student's evaluations indicated average nonverbal intellectual ability and just below average verbal expression and reasoning. His visual-spatial analysis skills were intact, though his visual memory was an area of weakness. He had excellent auditory memory and above average visual-motor abilities. In the area of social perception, Student had difficulty understanding mental states attributed to others, though he recognized basic facial expressions. However, Ms. Short's pragmatic language assessment found that Student performed mostly in the average range. Teacher reports indicated Student's communication and social impairment was mild and did not significantly interfere with his learning.

93. Ms. Loveall concluded that Mother and teacher saw the same concerns, such as anxiety, withdrawal, or communication, but at school these characteristics were not to a degree where Student could not learn. Though Mother testified that Student was deeply hampered by anxiety, Ms. Loveall concluded that such anxiety was not debilitating in school. Student's accommodations enabled him to access his education very well, where he participated in groups and was part of the school community.

94. Ms. Loveall analyzed whether Student qualified for special education under different eligibilities. She applied the statutory definition of other health impairment because of Student's anxiety and medical diagnosis of a tic disorder. The assessments

and many observations confirmed that Student did not exhibit impairment that adversely affected Student's educational performance. Ms. Loveall correctly determined that Student was not eligible for special education under the criteria of other health impairment.

95. Ms. Loveall analyzed whether Student met the emotional disturbance criteria. Though Student could have anxiety, he did not exhibit anxiety over a long period of time and to a marked degree, which adversely affected his educational performance. Student could learn quite well, was able to build some satisfactory relationships with adults and peers, did not have symptoms of chronic depression, and had no reports of psychosomatic symptomatology. Though Student had some "odd" behaviors associated with this autism, they did not adversely affect his ability to learn. Student did not meet the criteria for serious emotional disturbance eligibility.

96. Ms. Loveall also concluded that Student did not meet criteria for specific learning disability. Student had indications of a processing disorder (low visual memory), but he did not demonstrate a discrepancy between his ability and performance.

97. Ms. Loveall reviewed and analyzed the legal criteria for eligibility under autism. She acknowledged Student's long-standing autism and that Student had been receiving regional center services. However, for eligibility under the category of autism, Student's behaviors must significantly affect verbal and nonverbal communication and social interaction, and adversely affect educational performance. Student did not demonstrate debilitating delays in verbal or nonverbal communication, or notable social impairments. He was superbly performing academically and socially engaged at school to a degree adequate to access the curriculum. His autism did not significantly adversely affect his educational performance. Student was not eligible for special education because of autism.

98. Ms. Loveall opined that her conclusion that Student was not eligible for

special education was clearly indicated by the overall assessments. In her opinion, Student was unmistakably succeeding in the school environment, benefiting and excelling with accommodations. Student was not receiving and did not require specialized academic instruction. Student was able to participate in the school community and was highly functional, using his coping skills.

99. Ms. Loveall recommended District offer Student a Section 504 service plan.⁴ The plan would include the effective accommodations Student had been receiving and structured social skills activities and support.

Student's Triennial IEP

100. The District's IEP team members and Parents struggled to find an IEP team meeting date that all could attend. The IEP timeline required the team meet by June 17, 2015. Mother had inflexible dates around a family wedding; Ms. Short also had certain dates that were unavailable because of family commitments. Ms. Farrand and Mother exchanged numerous emails seeking a process where Mother could be advised of the assessments results, ask questions, and participate. Parents and District agreed to hold the IEP team meeting in two parts: Mother and Ms. Short would participate on June 10, 2015, and all team members would be present on June 15, 2015, except Ms. Short. The parties clearly and unambiguously agreed in writing to the IEP team meeting schedule that included Ms. Short's absence at the June 15, 2015 meeting.

101. For part one of the meeting, Mother and Ms. Short held a telephonic meeting on June 10, 2015. Ms. Shopbell presented and discussed her speech and

⁴ Pupils may qualify for service plans under Section 504 of the Rehabilitation Act of 1973, which guarantees certain rights to disabled people, including students in public schools. The Office of Administrative Hearings has no jurisdiction over Section 504 claims.

language evaluation. Ms. Short discussed her opinion that Student would not be eligible for special education under the category of speech or language impaired.

102. Ms. Farrand, Mother, Ms. Loveall, Ms. Shopbell and, telephonically, Hope pathologist Ms. Burke and Student's general education teacher Mr. Kiyuna, attended part two of the meeting on July 15, 2015. The team received a copy of Ms. Short's speech and language evaluation report. Ms. Shopbell reviewed the occupational therapy assessment report and Ms. Farrand presented the academic evaluation. Ms. Loveall presented and discussed the psychoeducational evaluation. The IEP team discussed District's determination that based on all assessments, Student was not eligible for special education under the categories of autism, other health impairment, emotional disturbance, and specific learning disability.

103. The team discussed options for Student when he attended Logan for ninth grade. These included the summer Bridges program, a Section 504 accommodations plan, a study skills period, participation in social skills group, a referral for counseling support during the school day to address any anxiety, and enrollment in Logan's Institute of Community Leaders. District informed Parents that Student would continue to receive accommodations and supports as a general education student, but without an IEP.

104. Mr. Kiyuna provided information consistent with what he reported to Ms. Loveall for the psychoeducational assessment. Ms. Burke opined at the IEP team meeting that her use of the elementary Social Language Development Test was as valid as the adolescent version of the test. She opined at hearing that she could not explain why her development test scores differed from those obtained by Ms. Short. Ms. Burke's primary concern was Student's struggle with social inferencing. She felt that a large school environment, like Logan's 4000 student body, would cause Student serious anxiety because of his difficulty interpreting social situations and his sensory issues. He

would then quietly withdraw or “shut down.” She believed that Student needed to be in a small academic environment, where he would receive classroom supports regarding executive functioning, social inferencing, and writing skills. Ms. Burke generally thought Student would be lost in a large classroom on a huge high school campus. Ms. Burke, however, assumed that Student would be in large classes with little support at Logan. She did not address at hearing District’s offer to enroll Student in Logan’s Institute of Community Leaders or the other accommodations and supports to which Student would be entitled as a general education student.

105. Mother was shocked that District determined Student was no longer eligible for special education under autism. At hearing, she emphasized Parents’ struggles over the years with Student’s anxiety, executive functioning, social pragmatics, and sensory issues. Neither she nor Father could envision Student on a large campus like Logan. They felt that the sensory stimuli alone would cause Student to be so anxious, that he would just “shut down,” and likely would not be supported because no one would notice, given Student’s quiet and compliant demeanor.

106. District did not make a FAPE offer because it determined that Student was no longer eligible for special education. The IEP team acknowledged that it would need another meeting to reconsider eligibility so Ms. Short could review her additional assessment and Ms. Burke’s comments. The meeting concluded.

107. Mother emailed Ms. Kappler on July 2, 2015, expressing her disagreement with District’s determination that Student was no longer eligible for special education. Mother felt that Parents could not await the outcome of District’s further assessment “while the IEP team is still establishing eligibility.” Parents were therefore enrolling Student in the Moreau summer program that began on July 6, 2015. Though District offered the Logan summer transition program, Mother did not believe it was appropriate while eligibility and placement issues were undecided. Mother stated she

intended to later seek reimbursement for Moreau expenses.

108. Mother, Ms. Farrand, Ms. Short, Ms. Loveall, and general education teacher Alicia Elbert attended the third session of the IEP team meeting on July 30, 2017.⁵ Ms. Short reported Student's performance on the Test of Pragmatic Language–Second Edition was within the average range. Ms. Short stated that Student had good social skills. Ms. Short and Ms. Loveall acknowledged that perspective taking was an area of difficulty for Student, but he had developed skills that enabled him to perform academically and interact socially. Mother expressed concern that Student's compliant manner would mean his sensory and anxiety struggles would go unnoticed.

109. Ms. Elbert attended the IEP team meeting primarily to provide Mother with further information regarding the Institute of Community Leaders program at Logan. Ms. Elbert was instrumental in the development of the Institute and she detailed the history and workings of the program to Mother at the third session.

110. Ms. Elbert worked with the Institute from its inception and testified at the hearing. The Institute of Community Leaders was a small school within a school that was started at Logan in 2011. Some families – many with children coming from small, private school settings – sought a smaller school option on the large Logan campus. Total enrollment was capped at 105 high school students. Institute students often had some social anxiety and needed a smaller population within which to learn and socialize. Some had IEP's or Section 504 plans; all attendees were on a general education college preparatory curriculum. The program was located in the "200 Wing" of the Logan campus. Other than physical education, the program's classes were provided in the 200 Wing. As Institute students moved into upper classes, they had options to choose

⁵ All team members agreed to excuse the occupational therapist's attendance at the July 30, 2015 session.

classes on the general campus at large. The institute had high academic expectations of its attendees, supported by teacher collaboration, aligned instruction, and student check-ins and surveys throughout the year.

111. For the new ninth grade student, the program utilized an intense cohort design with peer support from fellow upper-class Institute students and family oriented activities. The Institute sponsored its own science fair, career night, and student presentations, had its own student government, associated and networked with other smaller school programs, had an engaging social justice teaching experience (e.g., meeting holocaust survivors), and maintained a strong relationship with University of California at Berkeley. Ms. Elbert told Mother that a place could be reserved for Student in fall 2015.

112. The IEP team discussed how the program would address Parents' concerns about Student attending Logan. Mother said she wished she had known more about the Institute earlier. Parents agreed to consider the program and were very appreciative of the assessments and the IEP team. The meeting adjourned with the understanding that Mother would let Ms. Kappler know the family's decision.

113. Parents did not sign the IEP and Parents did not agree to exit Student from special education.

STUDENT ATTENDS MOREAU CATHOLIC HIGH SCHOOL, SAINTS AND SCHOLARS PROGRAM.

114. Parents unilaterally placed Student at Moreau for the 2015-2016 ninth grade school year. Student participated in the Saints and Scholars Program. Coordinator of the program, Stacey Ferreira, testified at hearing. She also was on Moreau's admission committee that interviewed Student in January 2015.

115. Moreau has approximately 950 students with class sizes of about 28 pupils. Out of seven classes, a student must take one religion class each semester;

students attend chapel once a week. About 10 percent of Moreau students were in the Saints and Scholars Program, which was for high performing students with identified learning differences.

116. Moreau was not a special education school and did not have special education classes. The school had no speech and language pathologist or occupational therapist on staff. Moreau did not conduct assessments of students with suspected disabilities but, instead, referred students needing assessment to their school district or private assessor. Moreau never referred Student for assessment.

117. Moreau provided Student with accommodations, which were updated at annual meetings of Ms. Ferreira, Moreau's resource specialist, and Parents. Parents signed a Saints and Scholars Program accommodation verification, for the 2015-2016 school year, on June 22, 2015. The accommodation program stated that Student had a diagnosis of high functioning autism spectrum disorder and listed the accommodations to be provided Student, which were very similar to those provided at Hope. The accommodation verification described Student's demeanor in almost the same manner as Hope's teachers and District's assessors – quiet, well-mannered, pleasant, with a strong work ethic.

118. On January 27, 2016, Mother emailed Ms. Kappler, informing her Student performed above expectations during his first semester at Moreau, with a 3.90 grade point average. She wanted to resolve Student's case with District as soon as feasible. Mother sought District's financial contribution for Moreau, similar to what District did with Hope.

119. Mother wrote a May 4, 2016 letter to Ms. Kappler, reminding her Parents had not yet agreed to Student's IEP. Mother gave notice of Parents' intent to reenroll Student at Moreau for the 2016-2017 school year, "[g]iven the lack of FAPE options," Parents would continue to seek reimbursement.

120. Ms. Kappler responded by letter of May 12, 2016, stating that District refused Mother's request to pay Student's Moreau tuition. Ms. Kappler said District found that Student was not eligible for special education at the June 2015 IEP and that the letter was prior written notice to the family of District's position.

121. District did not file for due process to obtain an order from OAH permitting District to exit Student from special education without Parents' agreement before the end of the 2015-2016 school year. District did not give notice of or hold Student's annual IEP in June 2016, for the 2016-2017 school year.

122. Mother wrote a letter to Ms. Kappler dated May 2, 2017, again stating that there had not been any agreement with District regarding Student's IEP for two years. Because District had refused to offer an IEP at all, Mother informed District Parents had no choice but to maintain Student's current placement at Moreau for the 2017-2018 school year. Parents would continue to seek reimbursement.

123. Ms. Kappler responded with a prior written notice letter on May 10, 2017, informing Parents that District refused Parent's request to pay Student's Moreau tuition. Ms. Kappler reminded Parents of District's assessments and the June 2015 IEP where District found that Student was not eligible.

124. District did not file for due process to obtain an order from OAH permitting District to exit Student from special education without Parents' agreement before the end of the 2017-2018 school year. District did not give notice of or hold Student's annual IEP for the 2017-2018 school year by June 2017.

125. Ms. Kappler opined at hearing that if Parents chose to keep Student at Hope for ninth grade, District would have filed a due process request with District, because District would have paid Student's ninth grade at Hope under the settlement agreement as "stay put." Ms. Kappler further said the District did not file for due process because Parent unilaterally placed Student at Moreau, which was not designated as stay

put under the settlement agreement and, further, District was not paying for Moreau's tuition.

126. Student demonstrated proactive ownership over his educational experience during his first two years at Moreau. He advocated for himself, such as requesting a letter of recommendation from Ms. Ferreira for Eagle Scouts. He asked for an accommodation and sought teacher assistance, when needed. He had a core group of friends at lunch, was very social, looked happy and was not withdrawn. Ms. Ferreira described Student as an academic superstar, with a cumulative grade point average of 3.94. Student was benefiting from his education at Moreau.

127. Father testified at hearing regarding the family's costs associated with Student's Moreau attendance. For extended school year in summer 2015, Parents paid \$285. For the 2015-2016 school year, Parents paid \$15,720. Parents received some tuition forgiveness during the first year at Moreau. For the 2016-2017 school year, Parents paid \$17,736. The Moreau tuition for 2017-2018 was \$18,180. Parents paid tuition on a 12-month payment plan, where the first payment for a school year was made the prior June. Therefore, as of the time of hearing, Parents had not yet completely paid for the 2017-2018 school year.

128. Father also provided costs related to transportation. Student's prior IEP's provided for reimbursement for one roundtrip between home and school per school day. Moreau had 175 school days per year; Student did not miss a day of school at Moreau. A roundtrip between home and Moreau was 15.7 miles. The IRS mileage rate at the time of hearing was \$0.535 per mile.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

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)⁷ 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 (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 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

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

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

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 Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has 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 mean the *Rowley* standard, which should be applied to determine whether an

individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test.'" (*Andrew F. v. Douglas School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Andrew F.*)) The Supreme Court in *Andrew F.* stated that school districts must "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

4. The IDEA affords parents 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. (j).) 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 carries the burden of persuasion.

ISSUE 1: FAILURE TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY AND FIND STUDENT ELIGIBLE

5. Student contends that District denied Student a free appropriate public

education by failing to properly assess Student in all areas of suspected disability and by erroneously finding Student was not eligible for special education. Student generally contends that District's assessments and IEP team meetings disregarded evidence that Student's social pragmatic, sensory, and anxiety struggles significantly impacted his ability to access his education. District asserts that it comprehensively evaluated Student for his triennial IEP, utilizing numerous standardized assessments and multiple observations by qualified assessors, all of whom were previously unacquainted with Student. The assessments were properly and fully reviewed at the June 2015 IEP, at which District team members agreed that Student was no longer eligible.

Applicable Law

6. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

7. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessment must use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must

be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii)); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).)

8. Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3) [tests of intellectual or emotional functioning must be administered by a credentialed school psychologist], 56322 [assessment shall be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education local plan area]; 56324 [a psychological assessment shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed].) Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).)

9. If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. Once selected, the instrument must be administered in accordance with the instructions provided by the producer, including use of composite scores if called for by the instructions. (Off. of Special Education Programs (OSEP) interpretative letter, *Letter to Anonymous* (September 17, 1993), 20 IDELR 542; cited approvingly in *Parent v. Manteca Unified School Dist.* (2013) Cal.Ofc.Admin.Hrgs. Case No. 2011060184.) The personnel who assess the student must prepare a written report of the results of each assessment, and provide a copy of the report to the parent. (Ed. Code, §§ 56327 and 56329.)

10. A school district's failure to conduct appropriate assessment or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) A procedural violation results in liability for denial of a FAPE only if the violation: (1)

impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*.)

11. A pupil shall not "be determined to be an individual with exceptional needs" if they do not meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).) The law defines an individual with exceptional needs as one who, because of a disability, "requires instruction and services which cannot be provided with modification of the regular school program" in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).) Thus, "a child is not considered a 'child with a disability' if it is determined that a child only needs a 'related service' and not special education." (*W.H. v. Clovis Unified School Dist.* (E.D. Cal. 2009) 2009 WL 1605356, at p. 21 (*Clovis*), citing 34 C.F.R. § 300.8(a)(2)(i) (2006).)

12. In *Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1107-1108, 1110, the Ninth Circuit found that a child may have a qualifying disability, yet not be found eligible for special education, because the child's needs can be met with modification of the general education classroom. In *Hood*, the due process hearing officer and the reviewing court looked to the child's above-average success in the classroom as shown by the child's grades and the testimony of teachers as evidence that the child's needs could be met in a general education classroom without specialized education and related services. (*Ibid.*) "By definition, the IDEA only applies to children with disabilities *who require special education and related services*. 20 U.S.C. § 1401(3)(B) (emphasis added)." (*Clovis*, at p. 7.)

13. California Code of Regulations, title 5, section 3030, subdivision (b)(1),⁸ describes the criteria for determining whether a child qualifies for special education under the category of autism. Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

Analysis of Issue 1

14. Student did not meet his burden of proving that District failed to appropriately assess Student in all areas of suspected disability or that District improperly concluded that Student was no longer eligible for special education. District's 2015 triennial assessments evaluated Student over a broad range of possible disabilities, including how Student's deficits affected his ability to access and benefit from his education. District thoughtfully applied the statutory criteria for six eligibilities to the assessment result, concluding that Student was not eligible for special education.

15. Student does not challenge District's conclusion that Student was not eligible under the categories of occupational therapy, speech and language impairment, specific learning disability, other health impairment, or emotional disturbance. Instead, Student contends that the assessments did not properly evaluate and consider Student's sensory needs, social pragmatic deficits, and anxiety, associated with his longstanding medical diagnosis of autism, in concluding that Student was not eligible as a child with autism or autistic like behaviors. Yet, District focused on these areas of concern in

⁸ The state regulations for autism eligibility were refreshed to match the federal language (34 C.F.R. § 300.8(c)(1)(i)), effective July 1, 2014.

assessment, evaluation, and eligibility consideration.

16. The tests and other evaluation materials used by District in assessing Student were selected and administered so as not to be racially or culturally biased, given for the specific purpose for which the standardized test was validated, and comported with the publishers' protocols in administration, scoring, and reporting. District's assessors – Ms. Farrand, Ms. Shopbell, Ms. Short, and Ms. Loveall – were qualified by their education, training, and experience to administer and report the results of the standardized test and evaluate Student in their areas of expertise.

17. Student argues that Ms. Loveall used the wrong tests to evaluate Student's autism and anxiety. Student's expert Dr. Peterson said that the "gold standard" for autism evaluation was the Autism Diagnostic Observation Schedule, not the Gilliam Autism Rating Scale used by Ms. Loveall. She also believed that Ms. Loveall should have further tested Student's anxiety with additional standardized instruments. However, since Ms. Loveall was professionally and legally qualified to assess Student, the selection of particular testing or evaluation instruments was at District's discretion.

18. Dr. Peterson's testimony in this regard was also unpersuasive. Dr. Peterson had not tested Student since 2010 and, in fact, had not observed or met Student for more than seven years. She only reviewed documents and talked to Parents. She did not update her 2010 neurological evaluation or provide any test results that differed from District assessments. She could not credibly testify that District assessments were in error.

19. Dr. Peterson criticized District's finding of ineligibility by stating Student would suffer debilitating anxiety on a campus of 4000 students, with no special education support. Other than stating Student's sensory needs and anxiety required a small educational environment, she did not provide a clear basis for her opinion. The Hope teachers reported that Student's anxiety did not prevent Student from

participating in class, completing his assignments, attending to his work, engaging in groups, and socializing. The accommodations (rocking chair for sensory needs, preferential seating, visual support for schedules and tasks, and comprehension checks) enabled Student to access and benefit from his education, as confirmed by his superior grades and academic testing.

20. Dr. Peterson did not indicate how Student's support needs required special education status and could not be met in general education. She did not discuss District's intended support of Student at Logan's Institute of Community Leaders, which had fewer students than Hope, along with a Section 504 plan, accommodations and supports in the general education setting, social skills groups, counseling, and study skills class. Dr. Peterson cared for Student's well-being and admired the family's consistent dedication in supporting Student. However, Dr. Peterson advised Parents about a private high school long before District assessed Student in spring 2015, thereby indicating her own preference as to Student's placement, which affected her credibility. Dr. Peterson's testimony that District erred in its eligibility determination was unconvincing.

21. Student argues that District underestimated Student's social pragmatic struggles, especially his poor inferencing capabilities. Ms. Burke opined that a large school environment, like Logan's 4,000 student body, would cause Student serious anxiety because of his difficulty interpreting social situations and his sensory issues. He would then quietly withdraw or "shut down." She strongly disagreed with District's finding that Student had developed coping mechanisms for his inferencing deficit, as confirmed by assessments, class observation, and clinical interaction.

22. Ms. Burke demonstrated genuine concern for Student's personal and academic well-being. However, her testimony that Student should be special education eligible was not persuasive. Ms. Burke provided Student with speech and language

services for seven years, participated in Student's annual individualized service plan meetings, and conducted some assessments for 2015. Student scored within the average range on the Oral and Written Language Scales, which measured expressive and receptive language skills, and on the Receptive One-Word Picture Vocabulary Test (Fourth Edition), which assessed receptive vocabulary. Her other assessments (Social Language Development Test – Elementary, Oral and Written Language Scales, and on the Receptive One-Word Picture Vocabulary Test) were not in accordance with the publishers' protocols. Student was outside the tests' normed age group and the assessment results were invalid. Ms. Burke's evaluation would not have been deemed legally appropriate if performed by a school district.

23. Much of Ms. Burke's characterization of Student's deficits contrasted with descriptions of Student's capabilities in the Hope individualized service plans. In the March 2014 service plan, Student was found to have made great strides in language arts and was performing at or above grade level in social studies, science, and math. Student got along with all his classmates and greatly enjoyed sports. Student set a great example of being focused and working quietly, though he required occasional reminders to slow down and check his work. Generally, the service plan team was pleased to see the extent of Student's growth academically, socially, and in his self-confidence.

24. Hope's May 2015 service plan said that Student was independently managing his schedule, transitions, and assignments. He was fully adjusted to the routine of middle school and consistently completed assignments on time without needing reminders. Student remained focused and on task for extended periods of time, working quietly. Student asked for help when unsure and benefited from frequent check-ins to assess comprehension. He was well-liked by his peers and interacted with his classmates during instruction and at recess. He cooperatively worked on

assignments in groups, while maintaining a positive attitude. Ms. Loveall's teacher interviews and classroom observations confirmed Student's ability to manage his sensory needs, successfully cope with any pragmatic challenges and participate in groups, socially interact with peers, and access and succeed in his academics.

25. Student argues that District minimized and did not address Mother's views regarding Student's social pragmatics, sensory needs, and anxiety. Here, though, the evidence demonstrates that District assessors and IEP team members carefully considered and thoroughly responded to Mother's concerns. Ms. Loveall interviewed Mother and had her and Mr. Kiyuna complete the Gilliam and behavior assessment scales. Mother and teacher saw the same concerns, such as anxiety, withdrawal, or communication, but at school these characteristics were not to a degree where Student could not learn. Though Mother reported Student was deeply hampered by anxiety, such anxiety was not intense or debilitating in school. Student's accommodations enabled him to access his education at school, where he participated in groups and was part of the school community. When Mother told Ms. Short on June 10, 2015, that Student did not actually generalize his fine performance on the standardized tests, Ms. Short offered to do additional testing focusing on Student's social pragmatics. Student's standard scores were within the average range. Student could compensate for his perspective-taking difficulties, as indicated by his well-within-normal-range scores in all other social areas on earlier assessments. At the June 15 and July 30, 2015 IEP team meetings, District members responded to Mother's statements, answered her questions, and explained the bases for their finding that Student was no longer eligible. District also described how Student's needs would be addressed in general education. District listened and responded to Mother's expressions of concern.

26. Based on the information possessed by the IEP team at the June and July 2015 IEP team meeting, Student failed to meet his burden of demonstrating that District

denied Student a FAPE by not assessing him in all areas of suspected disability and finding him eligible for special education.

27. Although Student was diagnosed with autistic spectrum disorder, Student no longer presented an area of disability for which special education and related services were required. Student was not eligible for special education because his needs could have been met with accommodations and supports in the general education setting. Student did not meet his burden by a preponderance of the evidence that District denied Student a FAPE by failing to assess him in in all areas of disability and by not finding him eligible for special education at the June 2015 IEP. District correctly offered to exit Student from special education.

ISSUE 2: DID DISTRICT'S FAILURE TO FILE A REQUEST FOR DUE PROCESS RE ELIGIBILITY DENY STUDENT A FAPE?

28. Student contends that District was required to file a due process request with OAH and obtain an order allowing it to exit Student from special education. District did not do so and has therefore denied Student a FAPE. District asserts that it was not required to file a due process because special education law only mandates a school district to file in two situations, neither of which apply herein. Therefore, District claims that its failure to file did not cause Student to be denied a FAPE.

Applicable Law

29. Before a pupil may be found ineligible, or no longer eligible for special education, the local educational agency must assess the pupil in all areas related to the child's suspected disability. The IEP team or other qualified professionals must review existing data regarding the child and determine, with input from the parents, what additional data are needed to determine questions regarding whether the pupil remains a child with a disability, the present levels of academic performance and developmental

needs of the pupil, whether the pupil needs or continues to need special education and related services, or whether modifications to the IEP are required to enable the child to meet annual goals. (20 U.S.C. §§ 1414(c)(1)(A) & (B); Ed. Code, § 56381, subds. (b) & (c).) The personnel who assess the pupil shall prepare a written report that must address and analyze many factors, including the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) Upon completion of the assessment, the determination of whether the pupil is or remains a child with a disability must be made by an IEP team including qualified professionals and the parent of the child. (20 U.S.C. § 1414(b)(4)(A).)

30. If the local educational agency determines that there is a proposed special education program component to which the parent does not consent is necessary to provide a FAPE to a child, a due process hearing shall be initiated. (Ed. Code, § 56346, subd. (f); *I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164.) The local educational agency must act with reasonable promptness to override lack of consent by adjudicating differences with the Parents. (*I.R., supra*, at 805 F.3d at 1169-1170.)

31. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

Analysis of Issue 2

32. Student has not met his burden in demonstrating that District was legally required to file a request for due process and that its failure to do so resulted in a denial of FAPE. District has convincingly argued that special education law mandates a school district to file a due process request in only two circumstances, neither of which apply

here. The first involves a school district's obligation to file for due process seeking an order that its assessment was legally appropriate in response to a parental request for an independent evaluation. That situation is not applicable to this case.

33. The second circumstance also does not apply. The IDEA only requires a District to file for due process when it seeks to implement an element of FAPE to a student where the parents do not consent. In contrast to the findings in *I.R., supra*, 804 F.3d at 1169-1170, this case does not involve a school district's duty to file in order to implement an element of FAPE. District appropriately assessed Student in all areas of suspected need, presented its findings to the IEP team, and concluded Student was no longer eligible for special education services. District convincingly argued it did not offer Student a FAPE but, instead, offered to exit Student from special education. It was therefore not obligated under Education Code, section 56346, subdivision (f), to seek an order through due process to exit Student in the absence of parental consent. Student has cited to no authority that mandates otherwise. However, as discussed in Issues 4, 5 and 6, by not filing for an order exiting Student, District continued to owe other obligations to Student under the IDEA.

34. Student did not meet his burden in Issue 2 that District denied Student a FAPE by failing to file for due process for an order exiting Student from special education. District prevailed on Issue 2.

ISSUE 3: DID DISTRICT FAIL TO TIMELY CONVENE A LEGALLY APPROPRIATE IEP TEAM MEETING FOR THE 2015-2016 SCHOOL YEAR?

35. Student contends that District committed the procedural violation of not timely convening an IEP team meeting by June 17, 2015, in order to transition Student to high school for the 2015-2016 school year, thus denying Student a FAPE. Student claims that the June 15, 2015 team meeting did not include all mandatory team members and, thus, was not an appropriate IEP meeting that met the timeline

requirements. District responds that it timely convened the triennial IEP with all required team members as of June 15, 2015, and held a third meeting in July 2015 to review an additional assessment requested by Mother.

Applicable Law

36. An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: (i) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); (ii) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); (iii) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and (iv) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

37. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting,

expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

38. A required member of an IEP team includes the individual who can interpret evaluation or assessments result. (34 C.F.R. § 300.321(a)(5).) Typically, this is the person who conducted the assessment. A parent has the discretion to invite and include other individuals, who have knowledge or expertise regarding the child, including service providers, to the IEP team meeting. (34 C.F.R. § 300.321(a)(6).) A required member of the IEP team may be excused from attending an IEP team meeting if the parent, in writing, and the school district consent to the excusal and the excused IEP team member submits, in writing to the parent and the IEP team, its input into the IEP development prior to the meeting. (34 C.F.R. § 300.321(e)(2).)

Analysis of Issue 3

39. Student asserts that District failed to timely convene the June 15, 2015 IEP team meeting with all mandatory IEP team members in attendance and, thus, denied Parents an opportunity to participate. Mother invited Hope's pathologist Ms. Burke to the June 15, 2015 IEP team meeting, but Ms. Short did not attend. Student contends that Mother was unable to meaningfully participate in the June 15, 2015 meeting because Ms. Burke and Ms. Short had very different assessment results and opinions regarding Student's social pragmatics, and Ms. Short's absence deprived Mother of the opportunity to hear both speech therapists discuss their results at the same meeting. Student argues that Ms. Short's absence at the June 15, 2015 was a procedural violation which was not cured at the subsequent IEP team meeting of July 30, 2015.

40. Student's contentions in this regard are without merit. District's and

Parents' arrangement complied with federal regulations, which set forth two prerequisites for permitting the absence of a mandatory IEP team member.

41. First, the June 15, 2015 IEP team meeting was timely because it was opened and held before the deadline for Student's June 17, 2015 triennial IEP team meeting. An IEP team member may be excused from a meeting if the parent, in writing, and the school district agree. Here, no dispute exists that Mother and District agreed in writing to Ms. Short's absence from the June 15, 2015 IEP team meeting. Thus, her absence from the meeting did not result in the meeting being untimely. District and Mother struggled to find an IEP date that all could attend before the June 17, 2015 deadline. Mother had inflexible dates around a family wedding; Ms. Short also had certain dates that were unavailable because of family. Ms. Farrand and Mother exchanged numerous emails seeking a process where Mother could be advised of the assessment results and ask questions. Eventually, Parents and District agreed to hold two meetings. Mother and Ms. Short would telephonically meet on June 10, 2015, and all other team members would attend the IEP team meeting on June 15, 2015, except for Ms. Short. Mother worked with District in developing this arrangement and her agreement is clearly and unambiguously documented in her correspondence with District. Mother agreed in writing to Ms. Short's absence at the June 15, 2015 IEP team meeting.

42. Second, the excused team member must submit input to parent and the IEP team, in writing, before the IEP team meeting. Here, Ms. Short provided her speech and language evaluation report to Mother before their telephonic conference on June 10, 2015. Ms. Short presented and reviewed her assessments and conclusions with Mother. Mother stated that Student did not generalize the skills indicated by Student's good assessment scores. They agreed that Ms. Short would conduct an additional standardized test to further evaluate Student's social pragmatic communication.

43. The remaining required IEP team members attended the June 15, 2015 meeting. Mother was fully aware that Ms. Short would not attend, having previously agreed in writing to her absence. Mr. Kiyuna and Ms. Burke participated telephonically. Ms. Short had provided the team with a copy of her report. During the IEP, Ms. Burke stated her opinions, discussed her assessment of Student, and said why she disagreed with Ms. Short's evaluation and conclusions. Mother participated in the meeting, asked questions, and made comments. The IEP team scheduled the July 30, 2015 meeting to review Ms. Short's additional testing, not to cure any prior procedural insufficiency.

44. Student did not meet his burden of proving in Issue 3 that District committed any procedural violation relating to the timeliness of Student's June 17, 2015 triennial IEP team meeting.

ISSUES 4, 5, AND 6: DISTRICT'S FAILURE TO SCHEDULE IEP TEAM MEETINGS FOR STUDENT'S 10TH AND 11TH GRADES AND FAILURE TO DEVELOP INDIVIDUAL TRANSITION PLAN

45. Student contends that District denied Student a FAPE when it wrongfully failed to convene annual IEP team meetings for the school years of 2016-2017 and 2017-2018 and, therefore, also failed to timely offer Student his individualized transition plan. District responds that it was not obligated to convene IEP team meetings after District determined that Student was no longer eligible for special education. Further, District asserts that any such procedural violation could not have denied Student a FAPE because he was ineligible, was not entitled to FAPE, and could not be deemed eligible because of a procedural error.

Applicable Law

46. Absent a statutory exception, the IDEA mandates that a district offer a FAPE to *all* students who reside in it. States must ensure that "[a] free appropriate public

education is available to *all* children with disability residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A) (emphasis added).

47. A district must review a child's IEP at least once a year in order to determine whether the student's annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).) A parent's failure to cooperate in the development of the IEP does not negate this duty. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055; 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) [School districts "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (*Id.* at p. 5, citing *Target Range, supra*, 960 F.2d 1479, 1485).]

48. Parents of a child placed in private school with an existing IEP may choose to revoke consent in writing for the provision of special education and related services to their child. If they do this, and the child's district of residence gives prior written notice that it will not continue to provide special education and related services to the child, the district will not be considered to be in violation of the requirement to make FAPE available to the child and is not required to convene further IEP team meetings or develop further IEP's. (Ed. Code, § 56346, subd. (d); 34 C.F.R. § 300.300 (b)(4).) If the parents do not revoke consent in writing, the district in which the student resides must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher. ((20 U.S.C. § 1412(a)(3)(A) and (a)(4); *Dept. of Educ. v. M.F. ex rel. R.F.*, (D. Hawaii 2011) 840 F. Supp. 2d 1214, 1228-30, clarified on denial of reconsideration, (D. Hawaii 2012) 2012 WL 639141 [rejecting public agency's argument that the student's disenrollment from public education, without a written revocation of consent to special education services, excused the agency from preparing further IEP's until the parents subsequently requested services]; *Woods v. Northport Pub. School* (6th Cir. 2012) 487 F. App'x 968,

979-80 ["It is residency, rather than enrollment, that triggers a district's IDEA obligations."].) Upon receipt of an offer of a FAPE, parents of a child in private school have two options: (1) accept the offer of a FAPE and enroll their student in the public school, or (2) keep their child in private school and receive "proportional share" services, if any, provided to the student pursuant to 20 U.S.C. § 1412(a)(10) and 34 C.F.R. §§ 300.130–300.144. (*D.C. v. Wolfire* (D.D.C. 2014) 10 F. Supp. 3d 89, 92.)

49. An IEP team must develop an individualized transition plan for a special education child not later than the first IEP to be in effect when the child turns 16 years of age. (34 C.F.R. § 300.320(b).) Transition services are a coordinated set of activities that are (1) designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education; (2) based on the student's individual needs, (3) and includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a); 34 C.F.R. § 300.320(b)(1) and (2).)

50. In *Rowley, supra*, 458 U.S. at pp. 205-206, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City School Dist.* (2007), 550 U.S. 516, 524 [127 S. Ct. 1994] 2d 904 (2007).) A school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 238-239 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

51. Notwithstanding the importance of the IDEA's procedural safeguards, a procedural violation is not automatically a FAPE denial. A procedural violation results in liability for denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE;

(2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *Target Range, supra*, 960 F.2d at p. 1484.)

Analysis of Issues 4, 5, and 6

52. Student has demonstrated by a preponderance of the evidence that District's failure to convene IEP team meetings for Student's 10th and 11th grades, and to timely develop an individual transition plan, were procedural violations that denied him a FAPE. District's contention that it was not obligated to convene IEP's because it had determined Student was no longer eligible is contrary to its clear, unilateral obligation to convene an IEP team meeting, at least annually, for special education students.

53. District readily admits that it did not convene annual IEP team meetings by June 2016 for Student's 10th grade year of 2016-2017 and by June 2017 for Student's 11th grade year of 2017-2018. Mother's January 2016 email and May 2016 letter to Ms. Kappler plainly indicated Parents' expectation that Student was entitled to an IEP and that differences needed to be resolved. Mother's May 2017 letter noted that District had refused to offer an IEP, over the prior two years, and that Parents had no choice but to reenroll him at Moreau and seek reimbursement. Ms. Kappler responded to Mother with prior written notices indicating that District had determined Student was ineligible and, therefore, would not reimburse Parents for Moreau tuition.

54. District's position is puzzling. Though District's June 2015 IEP may have correctly determined that Student was no longer eligible, Parents did not consent to District's offer to exit Student from special education. Further, District did not obtain an OAH order permitting District to exit Student from special education without parental consent. Student remains a special education student as of the date of this decision and continues to be entitled to state and federal procedural protections afforded a special

education student.

55. Special education law carefully enumerates the processes that would relieve a school district of its unilateral obligation to provide procedural safeguards and services. For example, California requires written parental revocation of consent before a school district is relieved of its unilateral obligation to provide services to an existing special education student. (Ed. Code, § 56346, subd. d.) Since Parents did not consent to District's June 2015 IEP offer to exit Student from special education, or otherwise revoke Student's special education status, District was required to convene further IEP team meetings and develop further IEP's. (20 U.S.C. § 1412(a)(3)(A) and (a)(4).) District's obligation in this regard continued even though Parents unilaterally reenrolled Student at Moreau. (*Dept. of Educ. v. M.F. ex rel. R.F.*, *supra*, 840 F. Supp. 2d at pp.1228-30.) District was not relieved of its state and federal obligations to convene annual IEP team meetings and make offers for the following school year.

56. Therefore, Student has demonstrated that District was obligated to convene annual IEP team meetings by June 2016 and June 2017. Further, Student turned 16 years of age on March 9, 2017. He was therefore entitled to an individualized transition plan as part of his IEP beginning with the June 2016 IEP, which would have been for the year he turned 16 years of age. (34 C.F.R. § 300.320(b).) Since District admittedly did not convene annual IEP team meetings for the 2016-2017 and 2017-2018 school years, District violated its procedural obligations under state and federal law.

57. District's procedural errors do not automatically mean a FAPE denial. A procedural violation denies a child a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2).)

58. District contends that even if its failure to convene IEP team meetings for

two years was a procedural violation, such violation did not deny Student a FAPE since Student was no longer entitled to a FAPE. District previously found Student ineligible for special education. District claims that procedural violations cannot cause an otherwise ineligible student to be deemed eligible, citing *R.B., ex rel. F.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 937. Therefore, District argues its procedural violations did not deny the ineligible Student a FAPE. This is a misstatement of the law.

59. The *R.B.* court ruled that procedural violations in the assessment and IEP process could not cause an otherwise ineligible child to be declared eligible under special education law. However, the court was referring to students who were not otherwise eligible at the time of the procedural violation. Just a few pages after the portion cited by District, the *R.B.* court distinguishes its determination from where procedural violations denied a child a FAPE when the child had already been eligible under the IDEA. "In those cases involving flaws in the IEP [of an existing special education student], the child has already jumped through a significant hoop by establishing IDEA eligibility. Once the child qualifies for special education services, the district must then develop . . ." the child's proper IEP. The court noted that its case involved whether the student qualified for IDEA benefits in the first instance. (*Id.*, at p. 941.) Therefore, District's reliance on *R.B.* is misplaced.

60. District's argument effectively means that District could stop providing services and cease meeting IDEA procedural obligations, whenever its assessments determine that a child is no longer eligible, irrespective of parents' disagreement or the absence of an OAH order. Here, Student had an IEP since the age of three. Absent Parents' consent to exit Student from special education, or an OAH order permitting District to exit, Student remained entitled to procedural protections afforded all special education students, including the right to an annual IEP team meeting and a FAPE offer. To rule otherwise would improperly sanction District's unilateral removal of Student

from special education.

61. Parents wanted to resolve Student's IEP and questioned why District had not held an IEP team meeting for two years. The absence of IEP team meetings for the 2016-2017 and 2017-2018 school years meant that Parents had no opportunity to participate in the decision-making process, regarding the IEP placement and services, as well as Student's individualized transition plan. Therefore, District's procedural violations resulted in a denial of a FAPE. Further, District remains in a continuing procedural violation during the time when no procedurally proper IEP team meeting has been held. (See *Target Range, supra*, at pp. 1485-1487.)

62. Student met his burden of proof for Issues 4, 5, and 6, demonstrating District committed procedural violations that resulted in a denial of FAPE.

REMEDIES

1. Student prevailed on Issues 4, 5, and 6. Student asserted he was therefore entitled to unilateral private placement for both academic years. As a remedy, Student requests reimbursement of tuition for Moreau Catholic High School and transportation, which had been provided under his IEP.

APPLICABLE LAW

2. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra*, 557 U.S. 230, 244, n. 11.)

3. When a school district fails to provide a FAPE to a student with a disability,

the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id*; *Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496.) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p.1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

4. 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 did not make 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 *Burlington, supra*, 471 U.S. 359, 369-370 (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].)

5. Reimbursement may be reduced or denied if, at the most recent IEP team meeting the parents attended prior to removing the child, the parents did not inform the IEP team they were rejecting the proposed placement, and state their concerns and intent to enroll their child in a private school at public expense; or at least 10 business days prior to the removal of the child, the parents did not give written notice to the public agency of this information. (20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1).)

Remedies Analysis

6. Having been denied a FAPE for the school years 2016-2017 and 2017-2018, Parents were entitled to unilaterally place Student in a private school and seek reimbursement for the associated tuition and cost. Parents properly notified District of their unilateral placement. In May 2016, Mother informed Ms. Kappler in writing that she would reenroll Student at Moreau for his 10th grade. Similarly, Mother told District in writing in May 2017 that Parents intended to reenroll Student at Moreau for 11th grade, since there had not been an IEP for two years.

7. Though Moreau Catholic High School is not a certified non-public school or special education school, Student demonstrated he has benefited from his Moreau education, achieving outstanding grades and progressing from grade to grade, on track for a regular high school diploma. Therefore, Parents are entitled to be reimbursed tuition for the academic years when Student was denied a FAPE.

8. Public funds should not be used to provide religious training. Therefore, the Moreau tuition reimbursement shall be reduced by the percentage attributable to religious education. Each semester, one of Student's seven classes was a religion class. Additionally, he was required to attend one religious service a week during school hours. This computes to 15 percent of his education at Moreau that is solely associated to religious training.

9. For the 2016-2017 school year, Parents paid tuition of \$17,736 and, when reduced by 15 percent (\$2,660), leaves \$15,076 of tuition for District to reimburse Parents. Moreau tuition for 2017-2018 is \$18,180 and, when reduced by 15 percent (\$2,727), leaves \$15,453 of tuition, for District to reimburse Parents. However, Parents are in the process of paying the 2017-2018 tuition on a 12-month payment plan; the monthly payments began June 2017. Therefore, District is not obligated to reimburse Parents until they have made payment, which Parents can claim on a monthly basis with proof of payment.

10. Student is entitled to reimbursement for transportation as an associated cost of placement. In the last signed IEP, District provided reimbursement for one roundtrip between home and school per day. A roundtrip is 15.7 miles. When multiplied by the IRS mileage rate of \$0.535, Student is entitled to \$8.40 of transportation reimbursement per school day. Student has yet to miss a day of school since starting at Moreau, which has 175 school days per year. For the school year 2016-2017, Student is entitled to \$1,470 in transportation reimbursement. The 2017-2018 school year has not concluded. Therefore, Parents are entitled to reimbursement of \$8.40 per day of attendance. Parents may claim reimbursement for the days Student has attended this year, with proof of attendance, up to the date of this decision. Thereafter, Parents shall submit monthly reimbursement requests for each day of school attended, not to exceed a total of \$1,470 for the entire 2017-2018 academic year.

11. Student also requests tuition reimbursement for the 2015-2016 school year. However, Student has not demonstrated that District denied Student a FAPE for 9th grade and Student is therefore not entitled to reimbursement. Student also requests an order directing District to reimburse tuition for Student's 12th grade in 2018-2019. However, District is not required to convene an IEP team meeting until June 2018 for the 2018-2019 school year. Further, District may seek an OAH order allowing it to exit

Student from special education and relieving District of its obligation to meet its procedural obligations under state and federal law. Any reimbursement award regarding the 2018-2019 school year would be speculative and is therefore declined.

ORDER

1. District shall reimburse Parents up to \$15,076 for Moreau Catholic High School tuition for the 2016-2017 school year. Parents shall complete all requisite District reimbursement forms, with proof of payment, to collect the reimbursement. District shall reimburse Parents within 30 calendar days of their submission of proper documentation.

2. District shall reimburse Parents up to \$15,453 of Moreau Catholic High School tuition for the 2017-2018 school year. Student shall complete all requisite District reimbursement forms, with proof of payment, to collect the reimbursement. District shall reimburse Parents 85 percent, within 30 calendar days of their submission of proper documentation. For tuition yet to be paid for the 2017-2018 school year as of the date of this decision, Parents may hereafter submit monthly claims for reimbursement to District. District shall reimburse Parents 85 percent, within 30 calendar days of their submission of proper documentation.

3. District shall reimburse Parents \$8.40 per day of attendance at Moreau for transportation, not to exceed \$1,470, for the 2016-2017 school year. Parents shall complete all requisite District reimbursement forms, with proof of Student's attendance, to collect the reimbursement. District shall reimburse Parents within 30 calendar days of their submission of proper documentation.

4. District shall reimburse Parents \$8.40 per day of attendance at Moreau for transportation, not to exceed \$1,470, for the 2017-2018 school year. Parents shall complete all requisite District reimbursement forms, with proof of Student's attendance, to collect the reimbursement. District shall reimburse Parents within 30 calendar days of their submission of proper documentation. For school days in the 2017-2018 school

year occurring after the date of this decision, Parents may submit monthly claims for reimbursement, with proof of Student's daily attendance at Moreau. District shall reimburse Parents within 30 calendar days of their submission of proper documentation.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Issue 4, 5, and 6. District prevailed on Issue 1, Issue 2, and Issue 3.

RIGHT TO APPEAL THIS DECISION

This was a final administrative Decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: November 27, 2017

/s/
CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings