

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. 2017050975

STUDENT,

v.

OCEAN VIEW SCHOOL DISTRICT.

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on May 19, 2017, naming Ocean View School District. On May 30, 2017, District served its written response to the complaint on Student. On July 7, 2017, OAH continued the hearing for good cause to dates requested by the parties.

Administrative Law Judge Cole Dalton heard this matter in Oxnard, California, on October 3, 4, 5, 10, 11, and 12, 2017.

Sundee Johnson, Attorney at Law, represented District. Superintendent Craig Helmstedter attended each day of hearing on behalf of District.

Andrea Marcus and Monique Fierro, Attorneys at Law, represented Student. Student's educational rights holder, Grandmother, attended each day of hearing.

At the parties' request, the matter was continued until November 9, 2017, to permit the parties to file written closing arguments. Upon receipt of closing arguments, the record was closed and the matter submitted for decision on November 9, 2017.

## ISSUES<sup>1</sup>

1. Did District deny Student a free appropriate public education, significantly impeding Grandmother's opportunity to participate in the decision-making process, by failing to inform Grandmother prior to January 31, 2017, that the cognitive testing in the June 6, 2013 and April 30, 2015 assessments could not be relied upon because the assessments did not consider Student's ethnicity, and thereafter, failing to immediately provide Grandmother with non-redacted copies of the assessments pursuant to her request?

2. Did District deny Student a FAPE by significantly impeding Grandmother's opportunity to participate in the decision-making process by failing to conduct appropriate assessments which informed Grandmother of Student's needs,

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<sup>1</sup> At hearing, Student withdrew issues identified in the Order Following Prehearing Conference as Issues: 3(a) alleging failure to assess for autism; 4, 5, 7(a), 8(a), and 9(a), alleging failure to consider a continuum of placement options; and 9(b) alleging denial of Grandmother's participation. OAH dismissed claims identified in Student's complaint as Issues 1, 2, and 3 at the prehearing conference on the ground the issues were outside of OAH jurisdiction. The remaining issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) To the extent Student's closing brief argued issues concerning prior written notice during all time frames, and the appropriateness of inclusion and behavior support during the 2016–2017 school year, those issues were not pled in the due process hearing request, and are not addressed in this decision. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

specifically:

- a. Failing to appropriately assess Student's cognition levels as part of the June 6, 2013 assessments; and
- b. Failing to appropriately assess Student's cognition levels as part of the April 30, 2015 assessments?
3. Did District deny Student a FAPE since October 2015 by failing to assess bullying and Student's general anxiety?
4. Did District deny Student a FAPE between October 3, 2016, and the date the complaint was filed, by implementing a communication protocol regarding Grandmother's communications with District staff?
5. Did District deny Student a FAPE at the January 12, 2017 IEP team meeting by failing to address Grandmother's concerns and the concerns of Student's doctors thereby significantly impeding Grandmother's opportunity to participate in the decision-making process?
6. Did District deny Student a FAPE at the January 31, 2017 IEP team meeting by failing to address Grandmother's concerns and the concerns of Student's doctors thereby significantly impeding Grandmother's opportunity to participate in the decision-making process?
7. Did District deny Student a FAPE in May 2017, by unilaterally withdrawing its request for a due process hearing in OAH case number 2017040773 which it was obligated to file under California Education Code section 56346(f), and thereafter failed to refile?

Student seeks an order that District fund an independent psychoeducational assessment and compensatory education according to proof.

## SUMMARY OF DECISION

Student failed to demonstrate District made specific misrepresentations or

withheld information, such that the two-year statute of limitations tolled for claims related to June 2013 and April 2015 assessments. The evidence demonstrated that Student was aware of the facts underlying Student's claims before the statute ran. Student did not prove District should have assessed for bullying and general anxiety since October 2015. The weight of the evidence showed that Student was not bullied and exhibited few instances of anxiety or nervousness in school. Although Student experienced meltdowns outside of school, the evidence did not demonstrate that these meltdowns impacted his ability to access his educational program.

The weight of the evidence showed District did not impede Grandmother's right to participate in the development of Student's individualized educational program. District's communication protocols did not impede Grandmother's participation, as evidenced by the four IEP team meetings and numerous letters, telephone calls, and daily communication logs, which occurred after implementation of the protocols on October 3, 2016. The communication protocols did not deny Student a FAPE; the protocols allowed Student to more quickly transition into his classroom and attend instruction. The evidence demonstrated Grandmother fully participated in the two IEP's held in January 2017; she was an unrelenting advocate for Student, who brought outside providers to the IEP's, asked questions, presented concerns, and obtained changes to Student's IEP's.

Finally, Student failed to show District was required to obtain an order from OAH determining that its March 28, 2017 IEP offered Student a FAPE in light of Student's move to another school district prior to the 2017 – 2018 school year.

## FACTUAL FINDINGS

1. Student was a seven-year old male, attending second grade in Hueneme Elementary School District, at the time of hearing. He lived with his Grandmother within District boundaries and attended kindergarten through first grade

in District from June 2013 through March 2017.

2. Student experienced prenatal substance exposure, was delivered two months premature, and spent two months in the neonatal intensive care unit. Grandmother became Student's legal guardian in 2012. Student's mother passed away when he was three years, nine months old.

3. Tri-Counties Regional Center referred Student for a speech and language evaluation, which Seaside Therapy conducted on April 6, 2012. Student had deficits in expressive and receptive language, intelligibility, cognition, and adaptive behavior. Student began receiving Early Start services through Tri-Counties on May 4, 2012.

## 2013 – 2014 SCHOOL YEAR

### June 6, 2013 Initial Assessment

4. On June 6, 2013, District conducted Student's initial assessments for special education. Student was two years and 11 months old. Speech language pathologist Maria Castells and school psychologist Kathleen Nolan conducted the assessments. Neither testified at hearing.

5. Grandmother agreed to District conducting assessments of Student's development, including cognition. She participated in the assessment process by providing historical information on Student's development and abilities through interviews with assessors.

6. District's assessment included observations, caretaker interviews, review of records, and administration of the Developmental Profile 3 and Preschool Language Scale-4. The Developmental Profile assessed Student's mastery in physical, adaptive behavior, social emotional, cognitive, and communication domains.

7. Student had difficulty with attention. He required frequent prompts and breaks to maintain focus. He loved being around other children but had difficulty

interacting with them. Peers had difficulty understanding Student's speech.

8. Student scored in the low average range for adaptive behavior and below average in all other domains. The Developmental Profile assessed intellectual abilities and pre-academic skills but did not render an intelligence quotient.

9. Student generally communicated using single word utterances, pointing, and gestures. He demonstrated the emergence of two to three word utterances. Student used 50–75 vocabulary words to express wants and needs. He demonstrated delays in receptive and expressive language and intelligibility.

#### June 10, 2013 Initial Individualized Education Program

10. District developed Student's initial individualized education program on June 10, 2013, before he turned three years old. Grandmother attended, and excused the general education teacher's attendance. All other required team members attended the meeting. Grandmother received copies of unredacted assessment reports and parent rights.

11. Ms. Castells and Ms. Nolan reviewed their June 6, 2013 assessments with the IEP team. Grandmother expressed concerns in the areas of communication and Student's ability to learn. The team reviewed Student's present levels of performance in reading, writing, and math. Grandmother reported that Student counted to three on his own and could ask to be changed when soiled. Socially, Grandmother believed Student understood others' responses to him, expressed affection towards family members, and liked to help around the house. He enjoyed playing with cars, trucks, and Mickey Mouse.

12. District determined Student was eligible for special education due to speech language impairment. Grandmother agreed. The IEP team developed goals for speech intelligibility and expression, and a functional academics goal for Student to participate for up to 10 minutes at work centers, table-top activities, and speech

therapy. The team developed classroom accommodations for transitions, toileting, and feeding, and offered Student a picture schedule, repetitive directions, and visual prompts.

13. District offered full time placement in a special education preschool program, fully integrated with typically developing peers; speech and language services delivered in small group and individually; and nursing services for toileting. District offered extended school year placement with speech and language services. Grandmother agreed to all components of the IEP. She initialed the IEP indicating receipt and understanding of parent rights and assessment reports.

#### 2013 – 2014 SCHOOL YEAR

14. Grandmother ultimately declined services from District for the 2013 extended school year and 2013 – 2014 regular school year. In August 2013, Student began attending preschool at San Miguel School, located in another school district. Grandmother attended with Student, who had difficulty adjusting to the program. After several months, Grandmother pulled Student out of the program.

15. Though still not attending a District program, District offered Student speech and language services, pursuant to his initial IEP. Student attended four sessions, beginning February 21, 2014.

#### JUNE 6, 2014 IEP TEAM MEETING

16. On June 6, 2014, District held Student's annual IEP. District provided Grandmother with Student's June 5, 2014 Progress Report in speech and language. Student demonstrated progress by using five word utterances with two syllable words.

17. The team discussed Student's progress in speech and Grandmother's desire to continue speech services only. She had enrolled Student in Head Start for the fall of 2014. She expressed concern about Student's ability to follow directions, his

tendency to become overwhelmed, and his activity level. District shared strategies including “first – then” and use of visual schedules, to help Grandmother at home. Grandmother reported progress in the areas of counting, toileting, and self-care. She described ongoing grief counseling for the loss of Student’s mother.

18. The team developed new speech goals for sentence structure; following one and two-step directions; and answering who, what, and where questions. District offered speech and language services. Grandmother initialed the IEP document, acknowledging receipt and understanding of parent rights. She signed consent to implement the IEP at the end of the meeting.

#### 2014 – 2015 SCHOOL YEAR

19. In September 2014, Student attended preschool at Head Start for three and one-half hours per day throughout the 2014–2015 school year. Grandmother stayed in the classroom with him. He received speech and language services from District once a week, while attending a Head Start program.

20. Grandmother was usually present in class and during speech sessions. Grandmother’s presence created a distraction for Student, who directed his attention toward Grandmother when presented with a difficult or non-preferred task. Student received his last few sessions of speech therapy in a separate classroom at District’s Tierra Vista School, without Grandmother present. Student performed better working individually. However, Grandmother discontinued those sessions.

21. Grandmother demonstrated her knowledge of educational rights in several ways. She consented to implementation of portions of Student’s IEP’s, when she desired services. She asked to attend school with Student and did so during the 2013–2014 and 2014–2015 school years. She demonstrated control over Student’s program by removing Student from school and/or services, when she wanted to.

22. On April 24, 2015, District prepared, and Grandmother signed, a



triennial review assessment plan, and she acknowledged receipt of parent rights. The plan called for assessments in the areas of academics, social-emotional behavior, motor skills, speech and language, intellectual development, and health. District conducted assessments in preparation for Student's transition from preschool into kindergarten and as part of an early triennial review.

#### April 30, 2015 Assessments

23. Ms. Nolan and Ms. Castells prepared Student's April 30, 2015 Preschool to Kindergarten Transition Assessment report. They reviewed student records, observed Student in his preschool classroom, administered standardized assessments, and interviewed Grandmother. Student adjusted socially to his preschool program and liked going to school.

24. Ms. Nolan administered the Wechsler Preschool and Primary Scale of Intelligence, a nonverbal cognitive abilities assessment. At the time, District was aware of Student's African American heritage. Ms. Nolan did not complete the processing speed subtests because Student did not understand directions. Student demonstrated performance in the borderline range, with high-level abstract reasoning subtests falling in the below average range.

25. Ms. Nolan administered the Vineland Adaptive Behavior Scales, Second Edition, using input from Student's preschool teacher. Student's adaptive behavior, communication, and daily living skills standard scores fell within the low range. Socialization scores fell within the adequate range. Subtests within the socialization domain consisted of interpersonal relationships (adequate range), play and leisure time (adequate range), and coping skills (moderately low). Student's overall cognitive and adaptive behavior skills fell at least two standard deviations below the mean.

26. Student's pre-academic skills were significantly delayed compared to same-age peers. Visual-motor integration skills fell within the well below average

range. Student showed progress in expressive language, producing longer utterances. However, he demonstrated delays in grammar, sentence structure, and articulation, which affected intelligibility.

27. The assessment team recommended a change in eligibility to intellectual disability with a secondary eligibility as speech language impairment.

#### May 5, 2015 IEP Team Meeting

28. On May 5, 2015, District held Student's triennial and transition to kindergarten IEP team meeting. District provided Grandmother with unredacted assessments and parent rights. The IEP team reviewed the assessments and addressed Student's needs in academics, communication, fine motor skills, social-emotional, and behavior development.

29. Academically, Student could not identify letters and numbers, calling each "D" or "3." He could not count to 10, though he demonstrated an understanding of the function of money. Socially, Student loved to be around other children and volunteered to be the daily helper in class. Grandmother informed the team that Student was very affectionate with family members and loved dancing and music. He helped Grandmother at home by putting his toys away and helping with household chores.

30. The IEP team developed three new speech and language goals to address Student's needs in grammar, sentence structure, and articulation. The team continued the goal for reading comprehension. The team developed academic goals for identifying letters and numbers, counting, and penmanship.

31. The IEP offered placement in District's transitional kindergarten to second grade (TK-2) special day class with 200 minutes per month of speech and language services, for the 2015–2016 school year. The team determined that placement in general education would not be appropriate due to Student's

developmental and communication delays, which made it difficult to interact appropriately with typically developing peers. Student also required instruction by staff with specialized training to address developmental delays.

32. Grandmother provided input during the meeting and participated in the development of Student's IEP. She signed consent to implement the IEP at the end of the meeting. She initialed the document, indicating receipt and understanding of parent rights and receipt of assessment reports.

#### 2015 – 2016 SCHOOL YEAR

33. Student began attending Laguna Vista Elementary School on August 24, 2015. On August 25, 2015, Grandmother handwrote a letter to Student's teacher, Olivia Blaich, expressing concerns over Student's transition into kindergarten. Grandmother reported that Student cried for hours, begged not to go back to school, could not sleep, and asked for his mother at least 100 times. She cautioned that Student's transition was vital to her in order for him to continue in school. She explained that Mother's death caused Student stress, fear and insecurity, making school more stressful for him.

34. Ms. Blaich taught Student's kindergarten class until she went on leave on April 23, 2016. She taught the special day class at Laguna Vista for seven years. She held a bachelor of arts in urban learning and a master of arts in special education. Ms. Blaich earned a special education teaching credential, mild to moderate, with an autism authorization. She previously taught specialized academic instruction for two years in a resource setting at Los Angeles Unified School District.

35. Ms. Blaich's class had approximately 10 students, one special education teacher, one classroom aide and a one-on-one aide assigned to a particular student. Ms. Blaich described Student as quiet, a little shy, eager to please, sweet, kind, cooperative, and polite. Student did not get into trouble in her classroom. He seemed

to enjoy working and learning, whether during circle time or tabletop activities. He required redirection, but not because of work refusal. He always tried his hardest and did not give up on assignments.

36. On a typical day in Ms. Blaich's classroom, students would come in, put their things away, and have breakfast. She would then provide reading instruction, students went to recess, then came back inside for reading or writing instruction, followed by lunch, math, and a second recess. Sometimes in the afternoon, students would learn art, communication skills, social skills, or have physical education. Afterwards, students packed up and went home.

37. Student had a health care plan in place for the 2015–2016 school year to address toileting needs. The plan included, among other things, student and family training, communication with Student's health care provider, following a prescribed schedule, and maintaining a log of bowel movements and incontinence.

38. On October 8, 2015, Ms. Blaich sent a letter home regarding Student's behavior in the cafeteria. Grandmother had asked that Student not interact with specific classmates. Student had been moved away from the specific classmates. But Student continued to seek them out for interaction. He focused on one particular classmate, poking his arm, pushing him, and tapping on his head. Ms. Blaich did not believe Student intended to be aggressive but sought out interaction. Ms. Blaich also reported a urine smell from Student's shorts, though he was taken to the restroom eight times that day.

39. Grandmother wrote seven more letters to Ms. Blaich and school principal Antoinette Dodge between October 15, 2015, and April 6, 2016. The letters reiterated that Student had difficulty sleeping, begged not to go to school, and said he did not like school. Ms. Dodge worked for District for seven years as director of early education and school principal. She held a bachelor of arts in child development and a master of arts in educational administration.

40. Grandmother asked to volunteer in the classroom to help Student. She explained that his therapist recommended she volunteer to help Student feel more secure and less anxious. The therapist did not testify at hearing. Grandmother began reporting bullying on the playground in a letter dated January 19, 2016. She alleged that Student told their pastor that kids were laughing at Student and calling him names. Ms. Blaich investigated and did not find any evidence Student was being bullied.

41. On February 23, 2016, Grandmother sent District another letter reporting that Student awoke from his sleep yelling that student D hit him and that he woke up crying the entire week. Grandmother reported that Student told their pastor, his pediatrician Michelle Laba, and the whole family about being bullied. She demanded that the bullying stop.

42. On March 9, 2016, Ms. Blaich filled out a rating scale from Dr. Michelle Laba. The rating scale did not identify whether it was part of an overall assessment. Student presented no such assessment at hearing. Overall, Ms. Blaich's ratings showed that Student had difficulty with attention, organizational skills, and academics. He did not demonstrate problem behavior in the classroom. He did not lose his temper, elope, bully, feel inferior, guilty, unloved, or unhappy.

43. Ms. Blaich rated Student's relationship with peers and organizational skills as problematic. At hearing, she opined that Grandmother wanted Student to stay away from certain peers. But Student continued to seek those students out for interaction, which caused problems. Ms. Blaich noted, in the rating scales, that Student could not fully understand and participate in academic activities without close guidance and one-to-one assistance. He did not require a one-on-one aide, but he received instruction often in small groups and sometimes one-on-one.

44. On March 18, 2016, Grandmother wrote another letter to District summarizing Student's school year. She described the many telephone calls to various

staff members about her concerns and sought additional meetings. She again described Student's sleep patterns, anxiety, and nightmares of school. She described an incident of student M bumping his head into Student's chest several times. She met with Ms. Dodge regarding this incident. She claimed that students M, C, and D bullied Student and that on one day she witnessed them violently hitting other children in the cafeteria. She believed that, because of Student's speech delay, it sometimes took time for him to relate what happened. She reiterated that the grief therapist advised her to volunteer at school so she could help Student. She claimed Dr. Laba diagnosed Student with traumatic stress related to bullying. She claimed that family, friends, and neighbors witnessed Student begging to not return to school.

45. On April 6, 2016, Grandmother wrote a letter to District summarizing Student's anxiety returning to school after the spring break. If Student did not get better, Grandmother threatened to shorten his school day by picking him up early, or, alternatively, she would withdraw him from school for the remainder of the school year. Grandmother withdrew Student from school at least twice before he began attending Laguna Vista. Grandmother reiterated Student's grief from the loss of his mother, and the grief therapist's recommendation that Grandmother continue to volunteer at school to relieve Student's separation anxiety.

46. Student's April 13, 2016 progress report showed academic progress throughout the school year. Student met goals in reading, writing, and math. From a baseline of calling all numbers three, he met his goal to count and recognize numbers to 10. From a baseline of calling all letters "D," he learned the names and sounds of 18 of 26 letters of the alphabet.

47. District providers did not see evidence at school that Student suffered from traumatic stress, significant anxiety, or school avoidance behaviors. They saw Student as a child who continued to grow and develop socially in his school program. Neither Ms. Blach nor her aides heard anyone call Student names or bully him.

April 13, 2016 IEP Team Meeting

48. The IEP team met on April 13, 2016, for Student's annual review. Grandmother excused the general education teacher. All other required IEP team members were present at the meeting with Grandmother.

49. Grandmother presented her concern over Student's ability to communicate. The team reviewed Student's progress. Student continued to struggle with fine motor skills, which impacted his penmanship. Socially, Student enjoyed being around peers, sought attention from peers, but spent recess or free time playing on his own. School staff described Student as having a great attitude and being motivated to participate in school activities, taking pride in his work and aiming to please. The District team members believed that Student would have difficulty interacting appropriately with general education children because of developmental and communication delays.

50. The team discussed Student's progress in speech and language and provided new goals for language, comprehension, and collaboration. The team reviewed Student's progress in academics and developed new goals in reading, writing, and math.

51. District offered Student continued placement in a TK-2 special day class, with general education participation in recess, lunch, and assemblies. He continued to receive speech and language services for 200 minutes per month. Grandmother consented to implementation of the IEP and acknowledged receipt and understanding of parent rights.

52. On April 15, 2016, school nurse Maria Lopez wrote a letter for Student's doctor for input on a school plan for Student's toileting needs. She gave the letter to Grandmother because Grandmother did not allow direct communication between District staff and outside providers. Student's toileting plan involved taking him to the restroom 30 minutes after breakfast, recess, and lunch. But Student continued to

experience accidents two to four times per day, which was not common amongst other students in his class. Grandmother did not allow Student's doctors to provide District information about Student's toileting needs.

53. On April 22, 2016, Mireille Blanchard began teaching Student's TK-2 special day class. Ms. Blanchard held a bachelor of arts in studio arts, a post-baccalaureate degree for a pre-requisite credential program, and an educational specialist mild to moderate credential. Before becoming Student's teacher, she worked in Ventura Unified School District as a special education paraeducator.

54. Ms. Blanchard participated in weekly collaboration meetings with general education teachers to support her differentiation of instruction for the various students learning core curriculum in her class. At hearing, Ms. Blanchard was a credible witness. She provided straight-forward, thoughtful responses, without over-reaching.

55. On May 2, 2017, Grandmother wrote a letter to District requesting that it discontinue nursing services for toileting. She did not want any providers to be alone with Student in the bathroom.

56. Student became comfortable with Ms. Blanchard within two weeks of her taking over his TK-2 class. He showed continued progress through the remainder of the school year. Student's June 10, 2016 progress report showed steady progress in speech and language skills and some progress toward newly introduced academic goals.

## 2016 – 2017 SCHOOL YEAR

57. The school year started on August 22, 2016. By September 7, 2016, Grandmother provided three letters from outside providers and met with Ms. Dodge to request a classroom aide for Student because he did not feel safe at school. In her September 7, 2016 letter, Grandmother requested an expedited IEP team meeting regarding the need for an aide.



58. On September 9, 2016, Grandmother wrote another letter to the school, Ms. Dodge, and Ms. Blanchard alleging that student G hit Student in the stomach during recess the previous day, September 8, 2016. Grandmother reiterated that Student did not feel safe at school. Ms. Dodge investigated the incident and student G admitted he was trying to get Student's attention. Ms. Dodge admonished the child and no further incidents occurred between them.

59. On September 14, 2016, Grandmother produced a letter from Student's grief counselor Teri McHugh stating Grandmother's request for a class aide because of the incident on September 8, 2016.

60. Throughout the 2016–2017 school year, Student attended Ms. Blanchard's TK-2 class. Ms. Blanchard instructed 10 to 11 children, with the help of an instructional aide and a one-on-one aide assigned to a student. The class often had fewer than 10 students as two of the children mainstreamed into general education for portions of their school day.

61. Students typically transitioned into the classroom, made breakfast choices, did a warm up exercise in English language arts or reading; went to recess; practiced writing mid-morning; went to lunch; then did math, physical education, or GLAD curriculum (a combination of social studies and science); then had a ten minute transition period before leaving class.

62. Ms. Blanchard provided a sensory friendly classroom. She used mindfulness and environmental techniques, including sensory breaks, turning lights off, practicing emotional regulation, deep breathing and counting, use of water beads and sand art.

63. Student was positive, good natured, respectful, and on task. Student felt comfortable with Ms. Blanchard and she loved being his teacher. She observed Student and others seeking each other out in class and on the playground. Student did not express fear of others or of coming to school. Student was relaxed and

comfortable in school. He came into class on only a few occasions with his hood on his head, biting his thumb. That was a sign for Ms. Blanchard that Student felt nervous or needed help transitioning into class. Once she checked in with him, he transitioned into class within minutes and fully participated.

64. At hearing, Grandmother claimed that Student was often late to school because he did not want to go. But during the school year, when dropping Student off late, Grandmother explained to Ms. Blanchard and Ms. Dodge that Student had medical appointments. When absent or late, Student explained to his speech therapist Bonnie Armstrong that he had stomach issues or doctor appointments. He never said he was afraid to come to school and did not exhibit signs of anxiety about school attendance or peer interaction. Ms. Armstrong held a bachelor of arts in psychology, a master of science in communicative disorders. She had 18 years experience as a speech therapist.

#### SEPTEMBER 19, 2016 IEP TEAM MEETING

65. On September 19, 2016, District held the IEP team meeting requested by Grandmother to discuss Student's need for aide support. Grandmother, her friend, school counselor Ms. Acosta, and all required District staff attended.

66. The team discussed the need for paraeducator support. School psychologist Cindy Vokoun prepared a paraeducator rubric, which reviewed the four areas where aide support may be required: health and personal care, behavior, instruction, and inclusion. Ms. Vokoun worked as a school psychologist for District for several years. She was well respected by District staff who trusted her opinions and guidance. She passed away prior to hearing.

67. Ms. Vokoun explained the paraeducator rubric at the IEP team meeting. Student exhibited independence in the areas of behavior and instruction, with some teacher guidance or redirection. He required some support for toileting, but did not

require an aide.

68. District offered school counseling and a classroom aide in an effort to address Grandmother's concerns. The aide would watch Student during unstructured time. Ms. Acosta provided Grandmother with a consent form for counseling, which would include support for coping skills, self-advocacy, and someone to report to when Student felt unsafe. District offered counseling services because Grandmother reported that Student would be anxious or have meltdowns at home. To address this concern, District offered counseling at the end of the school day so Student could have time to decompress before going home.

69. Grandmother repeated that Student's doctor, therapist, and neighbor knew Student felt stressed out at school and required several hours to decompress once home. She did not consent to counseling services.

70. Ms. Blanchard explained her observations of Student during the school day. He worked well with others and appeared happy and calm. In preparation of the paraprofessional rubric, Ms. Vokoun conducted a 45-minute classroom observation, which corroborated Ms. Blanchard's observations of Student.

71. Grandmother presented the IEP team with a letter from a regional center recommending a smaller specialized classroom placement for Student. The team discussed placement options, including Dwire School. Grandmother believed a transition to Dwire would be detrimental to Student. She reiterated Student's stress and stated that it took him a long time to communicate what happened to him and he lacked the verbal skills to express himself. Eventually, Grandmother agreed to aide support. She initialed the IEP indicating her consent, and receipt and understanding of parent rights.

72. On September 20, 2016, Grandmother wrote a letter to the school alleging that student A threw dirt, small sticks, and rocks into Student's clothing and

hair during recess the day before. She objected to what she perceived as ongoing bullying and that others looked at Student differently due to him being "half black." Ms. Dodge investigated the incident with Student A but found no evidence it occurred. Student was in the office that day due to an incontinence incident, after recess and lunch. Ms. Dodge did not see any dirt or sticks in his hair.

73. On September 27, 2016, Grandmother wrote two letters to District. The first addressed to the school, Ms. Dodge, and Ms. Blanchard, asking that one-on-one aide support (referring to the classroom aide) be added to Student's IEP. Grandmother advised them that she applied to volunteer in the classroom and on the playground in order to monitor and help Student. She wanted the school to watch G, C and D, calling them aggressive.

74. Grandmother addressed the second letter only to Ms. Blanchard. She wanted to make an appointment to correct unspecified IEP team meeting summary notes. She claimed that someone from the Special Education Local Plan Area advised her to call another IEP team meeting if she could not get the notes changed. Grandmother also asked Ms. Blanchard to keep an eye on G because Student worried that he would be hit again.

#### COMMUNICATION PROTOCOLS

75. On September 30, 2016, District Superintendent Craig Helmstedter, Ed.D., telephoned Grandmother to initiate communication protocols. The communication protocols began October 3, 2016, and called for Dr. Helmstedter's office to act as the communication hub. Grandmother was required to drop Student off in the school office and a staff member would escort him to and from class. The school office would continue its contact with Grandmother regarding Student's toileting and changing needs. The protocols did not prevent Grandmother from coming to the school office or attending school events.

76. Dr. Helmstedter held the position of superintendent for eight years, after being an assistant superintendent for six years. He previously worked as a school principal, teacher, and instructional aide. He had a bachelor of arts in liberal arts, a master of arts in educational administration, and an education doctorate in organizational leadership. He also had a multiple-subjects teaching credential and a clear administrative services credential.

77. Over the course of Student's first grade year, Dr. Helmstedter fielded concerns from classroom instructional aides, Ms. Blanchard, and Ms. Dodge regarding Grandmother's many letters and conversations about Student. They asked for support. Dr. Helmstedter described District providers as anxious and overwhelmed by interactions with Grandmother. Staff engaged in repetitive meetings and conversations with Grandmother. Such conversations resulted in additional letters from Grandmother, which inaccurately described the conversations. This in turn required staff to continually correct misunderstandings.

78. Additionally, several times each week Grandmother brought Student to his classroom and engaged Ms. Blanchard in lengthy conversations. Grandmother interfered with Ms. Blanchard's attention to her students during breakfast and sometimes at the beginning of instruction.

#### OCTOBER 22, 2016 OCCUPATIONAL THERAPY ASSESSMENT REPORT

79. Krista Minnis conducted an occupational therapy evaluation in October 2016. Ms. Minnis held a bachelor of science, a national certification, and a California state license in occupational therapy. She worked as an occupational therapist for over 20 years. For the past 10 years, she worked for the Ventura County Office of Education conducting assessments, developing IEP's, providing consultation and training for educational staff and parents, and direct treatment for students.

80. Ms. Minnis conducted clinical observations, record review, and

standardized testing in the areas of visual-motor integration and sensory processing. Ms. Blanchard and Grandmother participated in sensory processing rating scales. Ms. Minnis found that home and school forms were generally consistent. However, Grandmother reported that Student tended to fall down, something he did not do at school. She also reported that, in stores like Walmart, the sound and lighting would cause Student to cry and they would have to leave.

81. At school, Student sometimes hummed during class, became distracted by noises like the printer, and would get upset if bumped into in a line. Student did not exhibit signs of anxiety or withdrawal and did not cry. He played with peers and handled frustration without outbursts or aggression, frequently worked as part of a team, and could occasionally solve peer conflict without adult intervention.

82. Student demonstrated sensory processing and motor coordination needs. Ms. Minnis recommended consultation and accommodations to address sensory processing issues, including: movement breaks; heavy work to help with attention, focus and self-regulation; access to noise reducing headphones; a quiet work environment; fidget toys; access to weighted lap pads and vests; and warning before loud noises, such as fire alarms.

83. Ms. Minnis sought Grandmother's consent to collaborate with Student's private occupational therapist, which Grandmother did not provide.

#### OCTOBER 24, 2016 IEP TEAM MEETING

84. On October 24, 2016, Grandmother provided District with another letter from Ms. McHugh, requesting a class aide to reduce anxiety due to another recent, but unspecified, bullying incident at school. Ms. McHugh did not testify. The signature on this letter differs from the last letter and letters from Ms. McHugh vary in formatting, calling into question their authenticity.

85. Also on October 24, 2016, the IEP team met to discuss Ms. Minnis'

occupational therapy assessment. All required District team members attended the meeting. Grandmother and regional center case carrier Arturo Velarde appeared on behalf of Student.

86. Grandmother was happy with the results of Ms. Minnis' assessment. The team added direct occupational therapy services for 120 minutes per month, consultation services for staff, and accommodations to Student's IEP. Grandmother approved a new goal addressing Student's fine motor skills in the area of penmanship. The team added accommodations for sensory needs consistent with Ms. Minnis' report.

87. Grandmother again sought a one-on-one aide for Student and a change of placement to Dwire School. The team reviewed Student's current aide supervision plan, which had been working well. Ms. Vokoun described Dwire School students as working on functional academics below Student's level.

88. The District team members believed that Student's least restrictive environment was Laguna Vista. Grandmother thought that District recommended a change in placement at the last meeting. Grandmother stated concerns that she could not reach Ms. Blanchard because of the communication protocols. The team agreed to contact Dr. Helmstedter to develop a communication log.

89. Grandmother continued to decline counseling, despite her ongoing concerns that Student experienced stress, anxiety, and bullying throughout his school day. She consented to implementation of the IEP without counseling, noting issues with the communication protocols and her belief that District team members recommended Student be placed at Dwire School during the September 19, 2016 IEP team meeting.

90. On October 31, 2016, Ms. Dodge sent Grandmother an invitation to an awards assembly, honoring Student as "Character Kid of the Month." Student's report card for the first trimester of the school year demonstrated that he followed school

rules, completed class and homework, showed responsibility, worked well in groups, and worked independently in class. Student demonstrated below standards work in foundational skills and writing.

91. On November 2, 2016, Grandmother hand-delivered an October 25, 2016 letter to Dr. Helmstedter's office. In the letter, Grandmother stated her erroneous belief that the communication protocols would end at the next IEP team meeting, that she was not allowed to attend school events, that she could not provide information to Ms. Minnis about Student's sensory needs, and that District approved a placement referral to Dwire School. She reported some confusion over the release of information that would allow Ms. Minnis to communicate with Student's outside occupational therapist at Eastman Therapy Services.

92. On November 4, 2016, Dr. Helmstedter responded to Grandmother's latest letter. He explained the communication protocols had a positive effect on Student's performance at school and would remain in effect. He provided Grandmother with a completed release of information so that school and outside providers could communicate about Student's needs. He explained communication facilitation between Grandmother and the occupational therapist. He described access to special events. Finally, he clarified that Grandmother requested an observation at Dwire School. Dwire School's principal allowed District's school psychologist to observe the placement. The principal allowed Grandmother to observe the placement at a later date. District and Grandmother saw the placement as too restrictive for Student, who functioned at a higher level. At the October 24, 2016 IEP, District offered continued placement at Laguna Vista and Grandmother agreed.

93. After staff implemented the communication protocols and staff transitioned Student from the office in and out of class, Student's day became easier. Student demonstrated he could enter class, put his backpack away, and begin his school day much more quickly than when Grandmother brought him to class. Student



had no meltdowns and showed no signs that he feared attending school.

94. Sometime in November 2016, when responding to a request for Student's records, Ms. Vokoun noted that assessments erroneously contained intelligence quotients. She notified Dr. Helmstedter. Based upon advice of legal counsel, District redacted cognitive testing information, and placed the unredacted assessments in a manila envelope, held at District offices. District had originally provided Grandmother with Student's unredacted assessment results before learning of the error.

95. On December 12, 2016, Grandmother hand-delivered a letter dated December 5, 2016, to Dr. Helmstedter expressing her concerns over the perceived limitations of the communication protocols. She worried that she could not call Dr. Helmstedter every day. She requested another IEP team meeting to discuss changing placement to a smaller setting to address Student's sensory needs. She continued to refuse to sign District's release to allow District to communicate with outside providers. At the time Grandmother delivered her letter to Dr. Helmstedter, an IEP team meeting was already scheduled for January 12, 2017.

96. On December 16, 2017, Dr. Helmstedter provided a detailed and lengthy response to Grandmother's letter. Dr. Helmstedter detailed each of the many telephone messages, letters, assessments, and IEP team meetings in which District addressed Grandmother's concerns.

#### January 12, 2017 IEP Team Meeting

97. The IEP team met on January 12, 2017, at Grandmother's request to discuss placement and services. Grandmother attended the meeting with TriCounties Regional Center case carrier Arturo Velarde, Dr. Laba and all required District team members. Grandmother recorded the meeting.

98. Grandmother requested a smaller class size for Student due to his

ongoing anxiety, alleged bullying, and recent diagnosis of sensory integration disorder through Eastman. Dr. Laba described her observations of Student who, after school, exhibited sensory seeking behaviors such as asking to be tickled, rolling on the floor, and running down the hall. She explained that Student held things together during school but had meltdowns afterward. Grandmother alleged a classmate kicked Student in the leg in the cafeteria, causing him to fall over. She claimed she kept Student home from school because he could not walk.

99. Mr. Velarde reported that Tri-Counties would provide in home behavior intervention services to help Grandmother with Student's behaviors in the home and community. He discussed bullying claims, which he believed, based upon Grandmother's reports. Grandmother stated that she thought District provided Student with a one-on-one aide, not a classroom aide. District had clarified provision of a classroom aide several times since offering the service on September 27, 2016.

100. The team explained Student's supervision at school, during lunch and recess. Ms. Blanchard described Student's academic and social progress. Ms. Armstrong, Ms. Dodge, and Ms. Blanchard saw Student in school as being completely opposite of what Grandmother reported outside of school. Nonetheless, the team agreed to pursue different placement options with the Ventura County Office of Education.

101. Grandmother spent a significant amount of time at the meeting expressing concern about Student's anxiety, stress, and grief over the loss of his mother, and her own anxiety regarding the communication protocols. She insisted that the IEP team note in the IEP document that she would be part of the team that searched for a new school for Student. District team members explained several times the procedure on school search referrals. Ms. Volkoun would review potential placements and arrange site visits.

102. Grandmother repeated her concern that the private and District

occupational therapists should communicate. However, she refused to sign District's release of information to enable such communication. She did not provide District with an authorization from Eastman that would allow such communication.

103. District continued to offer school counseling to address any school anxiety issues Student had while on campus. Grandmother declined. Ms. Blanchard described the sensory strategies used in her classroom, including natural lighting, dimmed lighting, sensory breaks, calm music, visual timers, deep breathing, positive rewards, and weighted backpacks.

104. On January 16, 2017, Grandmother wrote to Mr. Helmstedter reporting that M hit or kicked Student, causing him to fall over. She used the incident to support her complaint that she could not communicate to Ms. Dodge in emergencies because of the communication protocols. She repeated Student's issues with anxiety, sleep, and feeling unsafe. She requested a copy of District's policy on bullying and harassment. She reported she was disappointed that Ms. Blanchard investigated the incident and did not believe that Student was injured. She requested another referral to Ventura County Department of Education to look for a smaller class environment. She repeated prior similar complaints about inadequate communication and again sought termination of communication protocols. She informed Dr. Helmstedter that she would be removing Student from Laguna Vista as soon as possible. She claimed that Student begged her to walk him to class every day and to eat lunch with him. She claimed Student did not understand the communication protocol and it further intensified his not wanting to come to school.

105. On January 20, 2017, Grandmother wrote again to Mr. Helmstedter requesting another IEP team meeting for a placement referral. She repeated her request that she be included in all decisions regarding choosing schools and arranging site visits.

106. On January 25, 2017, Dr. Helmstedter wrote to Grandmother about a

voice mail message she left him on January 17, 2017, and a communication log note, which indicated that Student waited 10–15 minutes in the school office before staff walked him to class. Mr. Helmstedter investigated the issue and determined that Student was recently late or absent from school four out of six days. He explained that staff had to be in class by 8:40 a.m. and, when Student arrived late to school, staff had to stop working with other children to go to the office and escort Student to his classroom. Office staff reported that Student waited no longer than three to five minutes for an escort. Dr. Helmstedter restated the need for the communication protocols, given the significant discrepancy between what staff reported and what Grandmother believed to be true.

107. Mr. Helmstedter found that Student was late to school 16 times between the beginning of school and January 12, 2017. On three of those days, he was more than 30 minutes late. On January 23, 2017, Student was more than 30 minutes late. He had nine absences. District classified Student as a chronic absentee. Mr. Helmstedter urged Grandmother to bring Student to school on time every day, so that he would not miss out on instruction.

108. Because of the attendance issues, Dr. Helmstedter arranged for someone to wait for Student in the office, even if he was late. He directed Ms. Dodge to initiate School Attendance and Review Board processes, as required by board policy. He required a doctor's note for tardies over 30 minutes and any full day absences. Finally, he suggested the IEP team assist Grandmother in working with Mr. Velarde regarding in-home behavior services.

109. On January 25, 2017, classmate M wanted a book that Student had and could not communicate appropriately to Student. Out of frustration, M bit Student. Student cried when he got bit. Ms. Blanchard separated the students, called administration, filed a report, and District notified Grandmother. The bite caused redness on Student's arm which was gone by the time he left school that day.

110. The next day, when Student returned to school, he did not express fear of the classmate who bit him. Student never told Ms. Blanchard he feared M or any other children at school. He never said he did not want to go to school. He never used the term “jiggly,” which Grandmother said was the term he used to communicate feeling nervous or anxious.

111. On January 26, 2017, Grandmother wrote to Dr. Helmstedter about the biting incident. She categorized this as the fourth bullying incident and wanted to ensure that it would not happen again. She wanted to speak to M’s parents. She repeated she wanted another IEP team meeting to discuss school safety and placement. Her letter was supported by a doctor’s report of a bite mark. Grandmother left the letter, along with a packet of documents, for Dr. Helmstedter at District offices.

112. The documents left by Grandmother included a release signed by her on January 5, 2017, purporting to authorize Ventura County Health Care Agency to release information regarding Student’s IEP, occupational therapy plan, diagnosis, and recommendations. The document did not authorize Eastman therapists to disclose any information to District.

113. On January 30, 2017, Grandmother produced another letter from Ms. McHugh repeating Grandmother’s concerns for Student’s wellbeing. The letter requested home hospital instruction.

114. On January 30, 2017, Dr. Helmstedter wrote to Grandmother, acknowledging receipt of various letters and other documents on January 26, 2017. Dr. Helmstedter addressed Grandmother’s communications, which he characterized as inaccurate, and which he had previously clarified. School staff did not see incidents of bullying, but isolated incidents of student disagreements. He reiterated protocols for changing placement. Dr. Helmstedter reiterated the date of the new IEP, which had already been agreed upon by Grandmother. He clarified the Eastman release did not authorize District personnel to discuss information regarding Student and asked again

that Grandmother sign the form he previously provided to her. Finally, Dr. Helmstedter asked that she discuss the need for further assessments with the IEP team.

115. Grandmother produced another letter dated January 31, 2017, from Ms. McHugh recommending that Student be taught at home, so he could learn in a safe environment.

116. On January 31, 2017, Dr. Daniel Lu, a pediatrician, wrote a letter recommending home hospital instruction for February and March 2017, due to Grandmother's report that Student suffered many episodes of bullying, causing him to feel unsafe. On February 1, 2017, District sent Grandmother a form for home hospital instruction, which Dr. Lu signed that same day. Dr. Lu ordered home hospital instruction due to sensory integration disorder and post-traumatic stress disorder.

#### January 31, 2017 IEP Team Meeting

117. On January 31, 2017, District held an addendum IEP team meeting to discuss placement options. Grandmother attended the meeting with Student's advocate Dr. Sarah Palangka and Mr. Velarde. Required District team members attended with District counsel, Sundee Johnson. Grandmother recorded the meeting.

118. District recently sent redacted assessments to Grandmother in response to a records request. Student's advocate requested non-redacted copies of the prior assessments. The team discussed an alternate placement with Ventura at Sunkist School, which District team members believed was too restrictive. Grandmother requested an inter-district transfer to Pleasant Valley Elementary School District. District previously agreed to release Student, but Pleasant Valley did not agree to enroll him on an inter-district permit.

119. Ms. Blanchard reported on Student's progress during the school year. Student moved from the kindergarten to first grade instructional group in writing and English language arts to the first to second grade instructional group because of

improvements in letter recognition, reading, and writing. She never observed Student having a meltdown in school.

120. Ms. Blanchard opined at hearing that home hospital instruction was not an appropriate placement for Student. Student demonstrated the ability to advocate for himself, even asking to use the bathroom. In class, he volunteered to lead peers teaching peers. He was not afraid to work with his classmates. He sought out friends, and was sought out, to play with during unstructured times. Ms. Blanchard was concerned Student's social emotional and academic growth would recede with home hospital instruction.

121. Ms. Blanchard observed Student play with A, G, C, and D throughout the 2016–2017 school year. She did not observe Student having difficulties with these students in spite of isolated incidents that may have occurred between them. She talked to the instructional aide on yard duty that year, and the aide did not observe difficulties between these students.

122. At the January 31, 2017 IEP team meeting, Grandmother again told the IEP team that Student did not feel safe and would not return to Laguna Vista. Mr. Velarde reported that behavior services in the home did not begin because Grandmother cancelled the appointment and he needed to meet with Student's educational lawyer. Dr. Palangka requested a smaller school setting but did not recommend a particular placement. Grandmother reported that Student had numerous disabilities that required a number of appointments, which is why he was often late to class or needed to leave school.

123. The team discussed Grandmother's request for home hospital instruction. The school nurse explained the process of referral could take six to eight weeks. Ms. Lopez believed changing placement would create more stress for Student. Dr. Palangka and Grandmother believed that Laguna did not meet Student's needs. They informed District they would continue to pursue a change of placement and

inter-district transfer. Grandmother again claimed that the communication protocols changed Student's routine and caused a negative emotional effect on him.

124. District offered continued placement in Student's special day class at Laguna Vista, with 200 minutes per month of speech and language services, 120 minutes per month of occupational therapy services, intensive individual services (one-on-one aide) for 45 minutes per day (during morning and lunch recess) through the end of the school year, group counseling for one hour per month group and individual counseling for one hour per month.

125. Grandmother rejected District's offer of FAPE. Dr. Palangka requested discontinuing the communication protocol. Ms. Johnson agreed to look into that and what behaviors needed to change in order for the protocols to be lifted.

126. Sometime in January, Ms. Dodge became the point of contact for Grandmother with regard to communication protocols. District wanted to provide Grandmother with a greater sense of being able to contact the school and enable Student's return to school.

127. Throughout February and March 2017, Grandmother continued her contact with District, repeating allegations of bullying and complaints about communication protocols. She expressed concern over how long it took to set up home hospital instruction and did not want instruction to take place in District offices.

128. On March 1, 2017, Dr. Helmstedter sent Grandmother redacted copies of Student's April 6, 2012 Initial Developmental Assessment, the June 6, 2013 Preschool Evaluation, and the April 30, 2015 Preschool to Kindergarten Transition Assessment in response to a student record request. The redacted information consisted of test scores and other intellectual functioning information that was erroneously included in the reports, based upon advice of counsel.

129. Assistant Superintendent Maria Elena Plaza was in charge of home hospital instruction. Ms. Plaza left several telephone messages for Grandmother to set



up home hospital instruction. On March 24, 2017, she sent Grandmother an email. On March 27, 2017, Grandmother emailed back indicating that instruction could start that afternoon.

130. District sent providers to Grandmother's home that afternoon. District scheduled services for one and a half hours a day, Monday through Friday, to include make-up sessions from time missed while District obtained providers. District's teacher and instructional assistant arrived at Student's home to begin instruction. Ms. Plaza, went to the home to make sure services were underway.

131. Grandmother claimed that District appeared at her home unannounced and insisted on videotaping instruction. Grandmother interrupted instruction to administer an asthma treatment. She returned to tell providers Student had an anxiety attack and could not continue with services.

#### March 28, 2017 IEP Team Meeting

132. District held Student's annual IEP team meeting on March 28, 2017. All necessary District team members attended the meeting. Grandmother attended with Mr. Velarde and family friend Teri Hernandez. The team reviewed Student's progress, new goals, accommodations, placement and services.

133. Student made progress in reading, writing, and math. Ms. Blanchard reported Student could write a five-sentence opinion piece, which she described using Student's writing sample. Although Student had difficulty writing, she based his progress toward the writing goal on content, not the quality of his writing.

134. Until he began home-hospital instruction, Student participated in activities with peers, followed school rules, and enjoyed being at school. He sought out his friends at school. He took pride in his work, exhibited on task behavior, and was well liked by staff and peers. Student demonstrated the ability to adapt to changes in class routine. Student's communication developed such that he asked to

use the bathroom. He talked about how he felt.

135. The team developed accommodations addressing Student's sensory, writing, cognitive, and attention needs. Ms. Lopez reviewed Student's health plan for toileting.

136. District offered placement in a special day class with 200 minutes per month of speech and language in a small group setting; 120 minutes per month of occupational therapy in a small group setting; and 30 minutes per week of counseling; and extended school year services. Grandmother did not sign the IEP.

137. Home hospital instruction did not continue. Student's counsel and District communicated throughout March and April 2017 regarding video recording Student's instruction. District would not allow recording out of concern for Student's and providers' rights of privacy.

138. Student's residence changed to another school district on August 5, 2017.

#### DR. MICHELLE LABA

139. Dr. Laba became Student's pediatrician when he was six months old. She worked as a pediatrician for over 20 years. She had a bachelor of arts in biology, a master of science in clinical nutrition, and a doctor of medicine with high honors in pediatrics. She was licensed to practice medicine in California, and held a certification from the American Board of Pediatrics. She testified at hearing regarding Student's medical diagnoses.

140. She described Student's diagnoses as mild intellectual disability, trouble sleeping, prenatal exposure, anxiety, inattentiveness, and sensory integration disorder. During office visits, Student told her if he was angry, sad, or scared. He could speak in full sentences and explain his emotions. Student often told her he did not like going to school, he did not feel safe, and people were not nice to him. She described Student

as a concrete thinker who had the skill to tell her what he felt in the moment. She did not believe he made up stories about what happened to him at school. Student could “turn on a dime” where he went from being happy to not wanting to participate in a clinic visit. He sometimes rolled around on the floor during visits.

141. Dr. Laba diagnosed Student with sensory integration disorder, based upon observations and history. From a medical perspective, she saw Student as having both a need for sensory input and sensory aversion. Sometimes Student was overstimulated by tactile or auditory input. Dr. Laba opined that Student, consistent with sensory integration disorder, would be able to get through the school day without incident, but have meltdowns, as described by Grandmother, after leaving school. She opined Student’s difficulty with transitions, sleeping, and meltdowns afterschool all related to sensory integration disorder. Dr. Laba recommended that TriCounties provide services to help Student transition at home and in the community.

142. She also opined Student required either a trained aide or teacher skilled in sensory integration to see cues in Student’s behavior as to when he needed intervention. Dr. Laba explained that Student could not ask for interventions, such as noise reducing headphones, when he needed them. However, based upon her review of Ms. Minnis occupational therapy assessment, she believed Ms. Minnis had sufficient knowledge about sensory integration to address Student’s needs.

143. Dr. Laba opined that Student was late to school because of his fear of going to school and being bullied. She did not believe that school modifications provided Student with a safe learning environment. She opined that Student had increased anxiety, which affected his school performance but did not say how.

144. In contrast, Ms. Minnis described Student accessing fidget toys to self regulate in the classroom. She did not observe him using lap pads or weighted vests; rolling around on the floor; or running frantically. Ms. Minnis’ opinions were given more weight, because she had direct interactions and observations with Student

throughout the 2016–2017 school year. Dr. Laba’s opinions were limited to what she knew of Student outside the school setting.

#### DR. GARY KATZ

145. Dr. Gary Katz conducted a private assessment of Student in August and September 2017, in preparation for testifying at hearing. Dr. Katz had a bachelor of arts in psychology, and a master of science and doctorate in clinical psychology. He taught psychology as an associate professor at California State University Northridge for almost 20 years and is well credentialed.

146. Dr. Katz did not observe Student at any school and never spoke to any of Student’s providers from District. He had no basis of knowledge on how Ms. Blanchard taught her class or measured Student’s progress. For these reasons, his opinions on how Student performed at school were given little weight.

147. He determined that Student had mild intellectual disability and adjustment disorder related to the death of his mother. However, Dr. Katz did not diagnose Student with generalized anxiety disorder.

148. Both Dr. Laba and Dr. Katz opined that Student was late to school due to attendance anxiety resulting from the reported bullying. However, their opinions relied on the reports of Grandmother. Historically, Grandmother reported to District that Student was late due to his numerous doctor visits and work with outside providers. These reports continued through the time of the January 31, 2017 IEP team meeting, as evidenced by the recording of the meeting.

#### GRANDMOTHER

149. Grandmother had difficulty at hearing recounting details of events throughout her testimony. She often contradicted herself and required redirection through reference to documentary evidence and leading questions.

150. Grandmother described Student as having difficulties communicating with her, because of his "I.Q. and speech impairment." She testified that, "sometimes it will take him hours to process a sentence, much less give immediate responses to anything." At other times, she claimed Student related bullying incidents without delay and in detail.

151. Although Grandmother requested and attended several IEP team meetings with District, she claimed at hearing she did not know she could request an IEP team meeting at any time. She denied understanding parent rights, although she received them in written form numerous times, and acknowledged her receipt and understanding. Her denials lacked credibility because her overall hearing testimony and the documentary evidence demonstrated that she historically had the knowledge and ability to ask for, and fully participate in, assessments, services, meetings, site visits, inter-district transfers, home hospital instruction, a change in placement, and help from regional center and SELPA.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>2</sup>

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)<sup>3</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are:

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<sup>2</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>3</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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

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

designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’...” (*Endrew F. v. Douglas School Dist. RE-1* (2017) 137 S.Ct. 988, 1000 (*Endrew*)). The Supreme Court in *Endrew* 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).)

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

## ISSUES 1 AND 2: FAILURE TO PROVIDE UNREDACTED, APPROPRIATE ASSESSMENTS

6. Student contends that District failed to appropriately assess his cognitive functioning as part of its June 6, 2013 initial preschool assessment and April 30, 2015 triennial assessment, because District conducted intelligence tests on an African American student. Student further contends District provided redacted assessments to Grandmother, preventing her from participating in the development of Student's IEP's, until it gave her unredacted copies of the assessment reports on January 31, 2017.

7. District contends Student's assessment claims fall outside of the statute of limitations and Student did not prove an exception, which would toll application of the statute. District further contends that it provided unredacted assessments to Grandmother when it reviewed assessments at IEP team meetings in June 2013 and May 2015; that it did not redact assessments until November 2016; and that testing it did conduct, did not result in a FAPE violation.

### Legal Authority

#### STATUTE OF LIMITATIONS

8. The IDEA's statute of limitations is two years after the parents or local educational agency "knew or should have known" about the actions forming the basis of a complaint. (20 U.S.C. § 1415(f)(3)(C); *Avila v. Spokane School District 81* (9th Cir. 2017) 852 F.3d 936, 937.) Under California law, as permitted by IDEA, title 20 United States Code section 1415(f)(c)(3) and 34 Code of Federal Regulations 300.511(e), any request for a due process hearing shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (l).)

9. In California, a claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent



knows that the education provided is inadequate. (*M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09-4624, 10-04223 SI) 2012 WL 398773, \*\* 17-19, aff'd in part and reversed on other grounds at *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842; *M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See, *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039; see also, *Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F. Supp. 851, 861 [interpreting then Ed. Code, § 56505, subd. (j)].) In *Miller*, the court held the cause of action accrued when parents received notice of their procedural rights in connection with a school district's assessment of their child, even if the assessment's findings were later found to be incorrect. (*Id.*, at p. 860.)

10. Both federal and state law establish exceptions to the statute of limitations where the parent was prevented from filing a request for due process due to: (1) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or (2) the local educational agency's withholding of information from the parent that was required to be provided to the parent. (20 U.S.C. § 1415(f) (3)(D); Ed. Code, § 56505, subd. (l).)

#### LARRY P. INJUNCTION

11. In *Larry P. v. Riles* the Ninth Circuit Court of Appeals enjoined California schools from using standardized intelligence tests for the purpose of identifying African- American students for special education and services. (*Larry P. v. Riles* (9th Cir. 1974) 502 F.2d 963 (*Larry P.*) The court based its prohibition on the disproportionate number of African-American students found eligible for special education services under the eligibility category of mental retardation based on intelligence testing. In 1984, the court expanded the original *Larry P.* injunction, banning the use of I.Q.

testing on African-American students for any purpose. (*Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969 (*Larry P. II*))

12. Thereafter, in *Crawford v. Honig* (9th Cir. 1994) 37 F3d 485, the Court held that the *Larry P.* injunction would not prevent the use of I.Q. testing for purposes other than the identification of African-American students as special education students, particularly where the parent consents to I.Q. testing.

13. The California Department of Education issued a statewide directive prohibiting the use of intelligence tests to assess African-American students who have been referred for special education services. (CDE, *Larry P.* Directive, 1986.) CDE issued another directive providing guidance on redaction of I.Q. testing results already contained within student files. (CDE, *Larry P.* Directive, 1987.) CDE required that all prior records of I.Q. scores, or information from I.Q. tests, should be removed from African American student records and permanently sealed, before such students were either re-evaluated for special education or transferred to a new district. Prior to sealing student records, school districts were to redact all I.Q. scores and references to information from I.Q. tests, notifying parents of the redactions and reasons for them.

14. Furthermore, the IDEA and the Education Code prohibit the use of discriminatory testing and evaluation materials. (34 C.F.R. § 300.532(a)(1)(i); Ed. Code, § 56320, subd. (a).)

#### Analysis

15. Student argues District deliberately misrepresented that its June 2013 and April 2015 assessments were appropriate and withheld information that the assessments violated the *Larry P.* mandate against using cognitive testing of African American students to determine eligibility and for segregating Student in a special day class placement. Student further argues that Grandmother could not have known the basis for her claims until she received unredacted copies of the assessments on March

1, 2017.

#### JUNE 6, 2013 INITIAL ASSESSMENT

16. Student failed to demonstrate that District made any specific misrepresentations or withheld information it was statutorily required to provide in relation to the June 6, 2013 assessment. District held an IEP team meeting for Student on June 10, 2013, to discuss assessment results. District provided Grandmother with a full, unredacted copy of the assessment at the meeting. District incorporated assessment results within the present levels of performance in the IEP. Grandmother was aware of the assessment results and participated in a discussion about the results and Student's educational program at the June 10, 2013 IEP team meeting.

17. The assessment did not contain an intelligence quotient. Rather, District administered the Developmental Profile, which assessed, more generally, cognitive functioning and ability. Assessments results and Student's eligibility were not based on an I.Q. score, but on Student's personal history and development, adaptive behavior, communication, and social emotional development. Further, the IEP team determined Student eligible for services due to speech language impairment. District offered placement in a special day class with instruction in the general education core curriculum. As such, District did not violate *Larry P.* mandates.

18. The fact that District later redacted certain information regarding intellectual functioning from the June 2013 assessment report, based upon District's broad interpretation of the *Larry P.* injunction, is not relevant to the analysis of District's statutory obligations at the June 10, 2013 IEP team meeting. District provided Grandmother with a copy of her parental rights at the June 10, 2013 IEP team meeting, and asked her if she had any questions. She had no questions. The team reviewed the assessment, considered Grandmother's concerns, and discussed Student's program.

19. Moreover, the intellectual functioning information in the June 2013

assessment was consistent with TriCounties' assessments obtained before Student's initial IEP, private assessments obtained afterwards, and testimony offered by Student's experts at the hearing. If Student had reason to dispute the assessment results reported by District at the June 20, 2013 IEP meeting, he had a basis of knowledge of that claim at the time of that meeting.

20. Student offered no credible evidence that District made any specific misrepresentations that it had resolved the issues forming the basis of Student's complaint, or withheld any information at the June 10, 2013 IEP team meeting that it was statutorily required to provide, which deterred Student from filing a request for due process within the statutory period. Student did not meet his burden of proof that the statute of limitations tolled claims pertaining to the June 2013 assessment. Therefore, Student's claims in Issues 1 and 2 relating to the June 2013 assessment are time barred.

#### APRIL 30, 2015 ASSESSMENT

21. District's April 30, 2015 assessment included the Wechsler Preschool and Primary Scale of Intelligence, a nonverbal cognitive abilities assessment, resulting in an intelligence quotient, which was not in compliance with the *Larry P.* injunction.

22. District provided Grandmother with parent rights as part of the assessment process and at annual IEP team meetings on June 6, 2014, and May 5, 2015. Grandmother received an unredacted copy of the April 2015 assessment at the May 5 2015 IEP team meeting, which the team then reviewed. Grandmother attended the meeting and actively participated in it. The IEP team changed Student's primary eligibility for special education to intellectual disability, maintaining speech language impairment as a secondary eligibility category.

23. It was not until October 2016 that District discovered its mistake in administering the Wechsler to Student and including an intelligence quotient in its

April 2015 assessment report. After discovering the mistake, in November 2016, District promptly followed CDE's 1986 *Larry P.* guidelines by redacting assessments in Student's cumulative file, placing unredacted assessments in a sealed envelope maintained separately from Student's cumulative file, and notifying Grandmother.

24. By November 2016, Student's educational program had been in place for one and a half years. During this time, Grandmother did not question Student's eligibility as a child with intellectual disability. She did not contest Student's placement in a special day class where Student learned modified general education core curriculum.

25. The weight of the evidence demonstrated that Grandmother had knowledge of District's standardized intelligence test results and parent rights at the time of the May 5, 2015 IEP team meeting. Student's pediatrician Dr. Laba, who attended his January 12, 2017 IEP team meeting and did not dispute Student's eligibility or classroom placement. Grandmother sought a placement in a similar class on a smaller campus at Student's January 31, 2017 IEP, which she attended with Dr. Palangka.

26. Student contends that knowledge of the facts forming the basis of his legal claim was not sufficient to put Grandmother on notice of a legal claim because she was not an expert. Since she was not an expert in either special education or the law, Student argues, Grandmother did not have a basis of knowledge of that the April 2015 assessment should not have been relied on to change his eligibility and offer continued placement in a special day class.

27. However, Grandmother's receipt of redacted copies of the April 2015 assessment in November 2016, with an explanation for the redactions put her on notice of an error in the assessment. District explained the assessment error again during the January 31, 2017 IEP team meeting that Grandmother attended with Dr. Pelangka. Even if this was Grandmother's first notice of a problem with the

assessment, it put Grandmother on notice of the basis for a legal claim well before the statute of limitations ran. Student subsequently retained legal counsel in March 2017, before the statute ran.

28. The weight of the evidence demonstrated that Student's claims in Issues 1 and 2, pertaining to the April 2015 assessment, are barred by the statute of limitations. Grandmother was aware of the facts that would support a legal claim well before the statute of limitations ran. Grandmother had unredacted and redacted copies of the assessments at all relevant times. She was fully informed and an active participant in the IEP process and was fully aware of what the IEP team relied upon and for what purposes the information was used in the development of Student's IEP's. Therefore, Grandmother knew or had reason to know of the facts underlying the basis for the claims asserted in Issues 1 and 2. Student presented no evidence that District failed to provide Grandmother with information that it was statutorily required to provide. As such, Student's claim in Issues 1 and 2 are barred by the statute of limitations.

#### Procedural Violations

29. Assuming, arguendo, the statute of limitations was tolled due to District's *Larry P.* violation, Student did not demonstrate District's inappropriate I.Q. assessment resulted in a denial of FAPE.

30. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Procedural violations of the IDEA only constitute a denial of FAPE if the violation: (1) impeded the student'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 *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) A procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

31. In his closing brief, Student argues that Grandmother did not know she should not have relied upon District's assessments as a basis for District's offer of placement and services and, on that basis, her claims in Issues 1 and 2 remain viable. The argument lacks merit for several reasons. Student offered no evidence proving that Student's May 5, 2015 IEP offered an inappropriate placement or services because of the inclusion of the intelligence quotient, which is the basis of her claim in Issue 2. Even without the use of the intelligence quotient rendered in the April 2015 assessment, District would have offered the same placement and services, based upon Student's progress in his special day class, and continued needs in adaptive behavior, communication, and social-emotional development.

32. Further, *Larry P.* prevented the use of I.Q. testing for the purpose of identifying African American student for special education because of the disproportionate number of such students being qualified for placement in classes for the educable mentally retarded. Once placed in what the court called "dead-end" classes, students did not have access to general education core curriculum. (*Larry P. II, supra*, 793 F.2d 969,983.) In lieu of I.Q. tests, alternate means of assessment must be used to determine eligibility and placement of African American children, including personal history and development, adaptive behavior, classroom performance, academic achievement, and ability testing targeting specific skill areas.

33. Here, April 2015 testing included Student's personal history and development, adaptive behavior, and ability testing targeting specific skill areas. Student's testing results were consistent with Regional Center assessments, prior

District testing, and Dr. Katz' assessment. District offered, and Grandmother accepted, Student's continued placement in a special day class teaching general education core curriculum. Student presented no evidence, and did not argue, that he should not be found eligible under the intellectual disability category. Moreover, Grandmother did not allege that the May 5, 2015 IEP failed to offer Student a FAPE.

34. Grandmother actively participated in the development of each of Student's IEP's and had almost daily ongoing communication with District providers on Student's progress. She sought and received additional services for Student, such as aide support and counseling, with input from District and Student's outside providers.

35. Student did not demonstrate that District's reliance on the April 2015 assessment to offer placement and services in its May 5, 2015 IEP resulted in a loss of educational opportunity or significantly restricted parental participation. Student did not offer evidence to prove that District would or should have offered anything different if the intelligence quotient was not included in the April 2015 report. Similarly, Student failed how District's explanation of the assessment results at the May 5, 2015 IEP team meeting, or any other relevant time, significantly impeded Grandmother's ability to participate in the development of his IEP's. As such, even assuming Student's claims in Issues 1 and 2 are not barred by the statute of limitations, Student failed to demonstrate a denial of FAPE resulting from District's use of standardized tests of intelligence.

### ISSUE 3: FAILURE TO ASSESS FOR GENERAL ANXIETY AND BULLYING SINCE OCTOBER 2015

36. Student contends that he endured ongoing bullying, which resulted in school anxiety and avoidance since October 2015 and that District should have assessed Student to address the anxiety and bullying, as a result. District contends



that, though Student was involved in some incidents with classmates, he was not bullied and did not exhibit anxiety at school, which impacted his access to education, such that no assessments were warranted.

## Legal Authority

### DUTY TO ASSESS

37. School district evaluations<sup>4</sup> of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

38. 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).) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21.) Such notice may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior. (*Id.* at p. 13.)

39. A school district's failure to conduct appropriate assessments or to

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<sup>4</sup> An assessment under California law is equivalent to an evaluation under federal law. (Ed. Code, § 56303.)

assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 Fed.3d 1025, 1031-1033; *Timothy O. v. Paso Robles Unified School Dist.*, *supra*, 822 F.3d at pp.1120-21.)

## BULLYING

40. In a 2013 joint letter providing guidance on the IDEA, the U.S. Office of Special Education and Rehabilitative Services and the Office of Special Education Programs described bullying as the use of real or perceived power over a target where the aggression is repeated, or has the potential to be repeated, over time. Acts of bullying include physical, verbal, emotional, or social behaviors ranging from blatant aggression to subtle and covert behaviors. (*Dear Colleague Letter*, (OSERS/OSEP August 20, 2013) 61 IDELR 263; 113 LRP 33753 (*Dear Colleague 2013*).)

41. The California Education Code defines bullying as “any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils ... directed toward one or more pupils” that causes or is “reasonably predicted” to cause a reasonable student to experience one or more of the following: (a) fear of harm to his or her person or property; (b) a substantially detrimental effect on his or her physical or mental health; (c) a substantial interference with his or her academic performance; or (d) a substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school. (Ed. Code, § 48900, subd. (r).) A “reasonable student” is a pupil, including an exceptional needs pupil, who exercises average care, skill, and judgement in conduct for a person of his or her age, and with his or her special needs. (Ed. Code, § 48900, subd. (r)(3).)

42. The bullying of a student with a disability that results in the student not receiving meaningful educational benefit may constitute a denial of a FAPE under the IDEA. (*Dear Colleague 2013*, *supra* at p. 2.)

## Analysis

43. Student argues that District failed to conduct any assessment to understand his internalization of anxiety based on his perception of bullying. Whether bullying actually occurred, he argues, does not matter.

44. At hearing, Student consumed a substantial amount of time eliciting testimony and offering multiple exhibits concerning four incidents of alleged bullying. What began as Grandmother's concern for Student's grief over the death of his mother became concern over anxiety related to alleged bullying. Bullying became the gravamen of Grandmother's many letters regarding Student's alleged school anxiety. Many of Grandmother's letters simply reiterated one or more of the four incidents. The four incidents consisted of Student being socked in the stomach by G on September 8, 2016; having dirt and sticks poured on his head by A on September 19, 2016; being kicked in the cafeteria by M on January 5, 2017; and being bitten on the arm by M on January 25, 2017. District investigated each incident.

45. Student did not establish that he suffered either repeated aggression or severe or pervasive aggression falling within the definition of bullying. Moreover, Student failed to establish that any such incident interfered with his access to education. As such, Student did not prove that District had a duty under the IDEA to assess Student for any suspected need related to the four bullying incidents.

46. The weight of the evidence demonstrated that the four incidents of bullying did not impact Student's ability to access his education or make educational progress at school. Student, without Grandmother's presence in class, transitioned quickly into his school day, actively participated in instruction, engaged in positive social interaction with adults and peers, and made progress in his modified general education curriculum. He played with the students who Grandmother alleged bullied him. Student did not exhibit symptoms of anxiety while interacting with classmates who allegedly bullied him. He showed no signs of anxiety on the playground and only

few instances of nervousness in class.

47. District providers did not see signs that Student was being bullied. Ms. Dodge, Ms. Blanchard, Ms. Blaich, and Ms. Armstrong provided thoughtful and credible descriptions of Student's school behaviors. They showed concern for Student's development and were attentive to Grandmother's concerns. They did not hear other children call Student names. Student never told them he was afraid to come to school and he did not exhibit signs of school fear or anxiety. Student did not describe any incidents to them that could be construed to fall within the legal definition of bullying.

48. Grandmother and Dr. Laba established that Student could tell them how he felt and describe the events that occurred during his school day. District staff working with Student agreed that Student could communicate how he felt. Yet Student never told staff that he feared either coming to school or being around any of the other students at school. He did not express fear of being attacked while at school. When Ms. Dodge and Ms. Blanchard investigated alleged incidents, he was able to communicate what did and did not happen.

49. Student also contends District should have assessed for general anxiety. However, the weight of the evidence demonstrated that Student did not exhibit behaviors indicative of general anxiety at school. Student sometimes came into class with his hood over his head and his thumb in his mouth, which Ms. Blanchard took as a sign of nervousness. But he demonstrated these behaviors on few occasions and transitioned into his school day as he did on most other days.

50. District staff described Student as happy, playful, and thoughtful. The evidence demonstrated Student's progress in social emotional development over time. Where Student once played alone, he grew to have a group of friends who sought each other out for class activities and on the playground.

51. Outside providers, including Dr. Katz and Dr. Laba, were aware of

Student's mother's death and Grandmother's reports that Student suffered from anxiety as a result. However, neither Dr. Katz nor Dr. Laba diagnosed Student with a generalized anxiety disorder.

52. Dr. Laba attended the January 12, 2017 and addressed Student's frenetic behaviors outside of school as being related to his sensory processing issues, which District already assessed. Dr. Laba discussed additional services District could provide, such as counseling and aide support District, which already offered. She suggested a smaller school setting, which District researched for Grandmother. She did not recommend that District assess Student for anxiety.

53. Student failed to demonstrate, by a preponderance of the evidence, that he exhibited anxiety at school, whether due to bullying or not, or that Grandmother requested an assessment in the area of anxiety or bullying, such that District should have specifically assessed in those areas. Student did not meet his burden of proof on Issue 3.

#### ISSUE 4: IMPLEMENTATION OF OCTOBER 3, 2016 COMMUNICATION PROTOCOLS

54. Student contends that District denied him a FAPE when it implemented communication protocols that limited Grandmother's communication with District staff. District contends that Grandmother's participation in the development of Student's IEP's was not limited by the communication protocols. Further, District contends it put protocols in place to better respond to Grandmother's communications, which were frequent and often inaccurate.

#### Legal Authority

55. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their

child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A parent is a required member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, § 56341, subd. (b)(1).) The team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c)(1)(B), 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 Board 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].)

#### Analysis

56. Student complains that by instituting a protocol for communication, District impeded Grandmother's right to parental participation. The evidence did not support Student's claim. Grandmother spent a significant amount of time on the school campus, talking to staff, communicating her concerns, and writing letters to staff throughout the 2016 – 2017 school year. Staff became overwhelmed with the amount of contact and the number of times they had to correct Grandmother's misperceptions of conversations.

57. Dr. Helmstedter provided a reasonable and credible explanation for implementation of communication protocols, consistent with input provided by Ms. Dodge, Ms. Blanchard, and the extensive evidence regarding Grandmother's interactions with District providers. In an effort to protect his staff while maintaining Grandmother's right to participate in Student's educational program, Dr. Helmstedter implemented communication protocols in October 2016. He collaborated with school staff to make sure that Grandmother and staff had an open channel of communication to meet Student's needs while preventing staff from being overburdened. The

protocols did not prevent Grandmother from voicing her concerns, as evidenced by use of a daily communication log and the several letters and telephone calls directed to Dr. Helmstedter's office.

58. Dr. Helmstedter provided detailed responses to each of Grandmother's concerns. The communication protocols reduced staff anxiety at school, and reduced Student's anxiety in the classroom, playground, and cafeteria. The weight of the evidence showed that Student's attention and involvement in school was impacted by the presence of his Grandmother. When Grandmother no longer brought Student into the classroom and lingered and no longer watched him in the cafeteria or playground, Student demonstrated improved communication and overall happiness at school, as credibly demonstrated by Ms. Blanchard, Ms. Dodge, Ms. Minnis, and Ms. Armstrong.

59. The protocols did not prevent Grandmother from being involved in the development of Student's IEP's, as evidenced by the four IEP's that occurred after initiation of the protocols. Grandmother continued to be an active participant in the development of Student's IEP's, attended parent-teacher conferences, was invited to school events, dropped Student off and picked him up on campus, and exchanged a daily communication log with Ms. Blanchard and the school.

60. Student failed to carry his burden of proof on Issue 4, as he did not demonstrate that District significantly impeded parental participation when it implemented communication protocols.

#### ISSUES 5 AND 6: DENIAL OF PARENTAL PARTICIPATION AT JANUARY 2017 IEP TEAM MEETINGS

61. Student contends that District denied parental participation in development of the January 12, 2017 and January 31, 2017 IEP team meetings when it failed to address concerns related by Grandmother and Student's doctors regarding anxiety related to bullying. District contends it heard and addressed concerns

regarding Student's program, but simply did not agree with how to proceed.

#### Legal Authority

62. The legal authorities in paragraph 55 are incorporated into the analysis of this issue.

63. Districts are required to consider parents' preferences. The IDEA does not require a school district to accept parents' choice of program, but it must consider suitable alternatives. (*Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.) While the IEP team should work toward reaching consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (App.A to 34 C.F.R. part 300, Notice of Interpretation, 64 Fed.Reg. 12473 (Mar. 12, 1999).)

64. A school district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 1115, 1131.) School officials and staff do not predetermine an IEP simply by meeting to review and discuss a child's evaluation and programming in advance of an IEP team meeting. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693 fn.3.) The test is whether the school district comes to the IEP team meeting with an open mind and several options, and discusses and considers the parents' placement recommendations or concerns before the IEP team makes a final recommendation. (*Hanson v. Smith* (D. Md. 2002) 212 F.Supp.2d 474, *Doyle v. Arlington County School Board* (E.D. Va. 1992) 806 F.Supp. 1253, 1262.)

#### Analysis

##### JANUARY 12, 2017 IEP TEAM MEETING

65. Grandmother attended the January 12, 2017 IEP team meeting with Student's pediatrician Dr. Laba and TriCounties coordinator Mr. Velarde. They voiced



concern over Student's anxiety and meltdowns, experienced at home or in the community. Grandmother requested placement in a smaller class to address Student's anxiety, bullying, and recent diagnosis of sensory integration disorder. Dr. Laba credibly described Student's behaviors she observed on several occasions during doctor visits.

66. District team members did not dispute that Student exhibited different behaviors outside of school. They simply disagreed that behaviors outside of school warranted a change in Student's school placement.

67. The IEP meeting recording evidenced Grandmother's significant participation in the discussions at the meeting. She spoke before, during, and after Dr. Laba presented her opinions. She reiterated Student's grief over the loss of his mother, his anxiety, and her own anxiety regarding communication protocols implemented by Dr. Helmstedter. Dr. Laba repeatedly insisted that she should be part of the District team that researched potential school settings. The team discussed District's offer of counseling to allow Student to transition into and out of school to help alleviate behaviors that occurred after school. The team extensively discussed helping look for a new placement, occupational therapy strategies to address sensory needs.

#### JANUARY 31, 2017 IEP TEAM MEETING

68. Grandmother attended the January 31, 2017 IEP team meeting with Dr. Palangka and Mr. Velarde. Grandmother requested both a smaller class size, and home hospital instruction. Student's closing brief summarizes the IEP team meeting in ways that take comments out of context, and skew what took place. Grandmother's recording of the meeting provided persuasive evidence that District listened to Grandmother's concerns and made changes to the IEP in response to those concerns.

69. District worked with Grandmother on her request for an inter-district transfer to Pleasant Valley School District, which Pleasant Valley declined. District

described the process for referral to home hospital instruction. The District team described Student's progress at Laguna Vista. In order to alleviate Grandmother's concerns, District again offered counseling services and added aide supervision for Student during lunch and recess to the offer of FAPE. Ultimately, Grandmother did not consent to the IEP, opting to place Student on home hospital instruction and seek placement elsewhere.

70. Student failed to carry his burden of proof on Issues 5 and 6. The weight of the evidence demonstrated that District listened to Grandmother's concerns and adapted Student's IEP to address those concerns.

#### ISSUE 7: DISTRICT'S FAILURE TO OBTAIN A DECLARATION OF FAPE ON ITS MARCH 28, 2017 IEP

71. Student contends that under the recent decision in *I.R. ex rel. E.N. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164 (*I.R.*), District was required to obtain a decision, as a result of a due process hearing, that its March 28, 2017 IEP offered Student a FAPE. District contends it was not required to file a separate complaint because Student's complaint put the March 28, 2017 IEP at issue, that Student withdrew that issue the first day of hearing, and that Student had, by that time, moved outside of District's attendance boundaries.

#### Legal Authority

72. School districts are required to initiate a due process hearing if the school district determines that a portion of an IEP to which a parent does not consent is necessary to provide a child with a FAPE. (Ed. Code, § 56346, subd. (f).) *I.R.* held that Education Code section 56346, subdivision (f), requires a school district to "expeditiously" request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE.

The court explained, "If, in the school district's judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime." (*I.R. , supra*, 805 F.3d at pp. 1169-1170.)

#### Analysis

73. Student's complaint alleged that District denied Student a FAPE, for various reasons, in its March 28, 2017 IEP. Student withdrew the entire issue on the first day of hearing.

74. Grandmother removed Student from school on February 1, 2017, seeking home hospital instruction. Thereafter, Grandmother refused to return Student to school. She sought inter-district transfers, to no avail. Eventually, Grandmother moved outside of District's attendance boundaries on August 5, 2017.

75. Only five months elapsed between District's March 28, 2017 FAPE offer, and Student's move to a new school district. Under these circumstances, Student did not demonstrate that District failed to act with reasonable promptness when it decided not to refile its complaint.

76. Student failed to prove that District was required to obtain a determination from OAH that its March 28, 2017 IEP offered Student a FAPE within this limited timeframe. Therefore, Student did not prevail on Issue 7.

#### ORDER

All Students claims for relief are denied.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues.

## RIGHT TO APPEAL

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

DATED: November 27, 2017

\_\_\_\_\_  
/s/

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings