

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LODI UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017070105

DECISION

Lodi Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 20, 2017, naming Student. On July 5, 2017, Student filed a due process hearing request with OAH naming District.¹ OAH consolidated the matters on July 11, 2017. Student's case was designated the primary case, such that the date of the filing of the Student's Complaint governed the timelines.²

Administrative Law Judge Elsa H. Jones heard this matter in Lodi, California, on August 29, 30, and 31, 2017, and on September 13, 2017. Student's case was presented

¹ District filed its response to Student's complaint on July 14, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189.)

² During the hearing, parties settled District's Case, OAH Case No. 2017061238, which District subsequently withdrew with prejudice, and the matter proceeded as to Student's issues only.

by advocate Alfonso Padron, who appeared on all days of hearing.³ Student's mother appeared on all hearing days. A Spanish interpreter was present on all hearing days to interpret the proceedings for Mother.

District was represented by Colleen R. Villarreal and Kyle A. Raney, Attorneys at Law, who appeared on all hearing days. Paul Warren, District's Special Education Administrator, appeared on all hearing days.

Sworn testimony and documentary evidence were received at the hearing. At the parties' request, OAH continued the matter until October, 16, 2017, at 5:00 p.m. for the parties to file written closing arguments. The parties timely filed their written closing arguments on October 16, 2017, at which time the record was closed and the matter was submitted for decision.⁴

³ In its closing brief, District asserts, for the first time, that Mr. Padron was improperly engaging in the practice of law without a license by representing Parents at the hearing. District's assertion is based on an opinion the California Attorney General issued on September 28, 2017, after the due process hearing in this matter was concluded, which stated that "a nonlawyer may not engage in the practice of law in special education due process hearings." (100 Ops. Cal. Atty. Gen. __ (Sept. 28, 2017) at p. 9.) District did not seek any remedy from OAH with respect to its assertion. Given the procedural status of this case, i.e., the hearing was concluded, the parties settled District's case, and Student has withdrawn one of his proposed remedies based on the settlement, OAH will not take any action regarding District's contention in this case at this time. District may pursue its assertion in any other appropriate forum.

⁴ Student's closing brief was signed by Mother. On October 23, 2017, after the closing briefs were filed, District filed a "Motion to Strike," directed at portions of Student's closing brief. Student filed no opposition to the motion. In large part, District's

ISSUES⁵

1. Did District fail to provide Student a free appropriate public education during the 2015-2016 and 2016-2017 school years by:

motion consisted of criticisms that the arguments in Student's brief were unsupported or lacked foundation. As such, the "Motion to Strike" is primarily a reply brief to Student's brief, which District did not request or receive permission to file. To that extent, the "Motion to Strike" is improper, and its contents have not influenced the outcome of this Decision. The "Motion to Strike" also characterizes Student's closing brief as a declaration from Mother, and thus constitutes evidence that was not presented at hearing. However, while Student's closing brief purports to be a declaration from Mother, it contains none of the appropriate statutory language, such as having been executed under penalty of perjury, so as to give it the legal and evidentiary effect of a declaration. Thus, the ALJ does not deem Student's closing brief to constitute evidence. Rather, in view of the recent California Attorney General opinion regarding the role of advocates further discussed above, the ALJ deems Mother's introduction to the closing brief simply as a representation that Mother herself, and not her advocate, is presenting the closing brief. District's Motion to Strike is denied.

⁵ For purposes of grammar and clarity, the issues have been restated from the manner in which they appeared in the Amended Order Following Prehearing Conference. At hearing, the ALJ, with the consent of Student, deleted Issue 1d, which alleged the failure of District to provide Student with educational benefit, because that issue was encompassed by the overarching issue as to whether District deprived Student of a FAPE. Also, as the parties settled District's case and as part of the settlement, Student withdrew its request for an independent psychoeducational assessment as a remedy in Student's case.

- a. failing to develop measurable baselines and goals for academic and functional goals in Student's individualized education programs;
 - b. failing to modify Student's IEP to include specialized instruction when scores have been low; and
 - c. failing to provide a credentialed teacher instead of a paraeducator?
2. Did District fail to allow Parents the opportunity to participate in the decision making process regarding the provision of a FAPE to Student by:
- a. not allowing Mother the opportunity to participate in the scheduled IEP team meeting on August 15, 2016;
 - b. attempting to intimidate and harass Mother; and
 - c. proposing to change Student's placement without prior written notice or without the opportunity for Parents' participation?
3. Did District deny Parents' participation by denying Mother's requests for psychoeducational assessments to identify Student's additional needs?

SUMMARY OF DECISION

Student is an elementary school student eligible for special education and related services due to visual and auditory processing deficits. He made steady, real progress over the 2015-2016 and 2016-2017 school years, but he is not at grade level in reading or math, and Parents are concerned about his progress.

This Decision finds that District did not deprive Student of a FAPE on either the procedural or substantive grounds alleged by Student. In addition and in particular, District did not prevent Parents from participating in the decision making process regarding Student's educational program on the grounds alleged. Student's resource services were sufficient, his paraeducators were properly overseen by his credentialed teachers, and his baselines and goals were measurable and measured. Parents participated in all IEP meetings, and were not subject to harassment or intimidation by

District. Indeed, during the 2015-2016 school year, when Parents and District were considering whether to change Student's placement to a special day class, District acceded to Mother's wishes not to change his placement. Finally, Student did not demonstrate that Parents made any requests for psychoeducational assessments during the relevant time period to which District did not respond.

FINDINGS OF FACT

JURISDICTION AND BACKGROUND

1. Student is an 11-year-old boy who lived with Parents within the District boundaries and attended Lawrence Elementary School, his school of residence, at all relevant times. At the time of the hearing, Student attended the fifth grade at Lawrence. Student is an English Language Learner.

2. Student was retained in first grade due to academic difficulties. In spring 2014, when Student was seven years old and in the process of repeating first grade at Lawrence, Mother requested District to assess Student. District did so, and on August 8, 2014, when Student was in second grade, District convened Student's initial IEP team meeting. At that time, the team found him eligible for special education under the category of specific learning disability. The IEP team at the August 8, 2014 meeting placed him in a general education classroom at Lawrence with resource specialist support, and he remained in this placement through the time of the hearing.

IEP TEAM MEETING OF AUGUST 21, 2015

3. District convened Student's annual IEP team meeting on August 21, 2015, when Student was 9 years old and in the third grade. The team included Jaime Kite-Polinsky (Vice-Principal at Lawrence); Mother; Mother's daughter; Lelia Daliva (special education teacher); Summer Lange (general education teacher); Karla Potter (former general education teacher); and Jill Bratton (reading intervention specialist.) The meeting

was interpreted into Spanish by Mother's daughter.

4. Student remained eligible for special education as a student with a specific learning disability. Student's weaknesses in processing speed, short-term auditory memory, and phonological processing interfered with his progress in basic reading skills, reading fluency, reading comprehension, and math calculation.

5. The team discussed Student's present levels of performance, and compared his performance during the 2014-2015 school year with his performance at the beginning of the 2015-2016 school year. The team discussed Student's scores on the Dynamic Indicators of Basic Early Literacy Skills Next scores. At the end of his second grade year (the 2014-2015 school year), Student's fluency was 20 words correct per minute, with a goal of 87; his accuracy was 71 percent, with a goal of 97 percent; his retell was 18, quality of 2 out of 4, with a goal of 27, quality of 2 out of 4. At the beginning of third grade (the 2015-2016 school year), his fluency was 17 words correct per minute, with a goal of 70 words correct per minute. His accuracy was 65 percent, with a goal of 95 percent. The team recommended Student continue practicing reading aloud and discussing what he read with an adult. Mother was very concerned about Student's reading progress. She asked why he was not tested more often. District members of the team explained that Dynamic Indicators testing was done three times a year, and reading benchmarks were ascertained at the end of the stories and at the end of the year. Mother intended her inquiries into the frequencies of these assessments to be requests for psychoeducational evaluations. Since Mother asked her question during the team's discussion of Student's Dynamic Indicators scores, District members of the team believed Mother was only asking about the Dynamic Indicators assessments and how District measured Student's present levels of performance in class. There was no evidence that, notwithstanding District staff's response to Mother's inquiry by explaining the Dynamic Indicators assessments and scores, Mother made any attempt at any time

to clarify that her inquiry was not directed at the Dynamic Indicators data but, rather, she was requesting a psychoeducational assessment.

6. The team discussed Student's reading services and programs during the 2014-2015 school year and the beginning of the 2015-2016 school year. During the 2014-2015 school year, Student received supplemental, small group reading instruction with the assistance of a paraeducator. Student often quickly finished when reading himself, skipped words in the text, and struggled to read words when called on. He was making progress with sounding out the words and with reading fluency. Sometimes he had difficulty focusing and staying on task. At hearing, Ms. Potter noted that attention could be an issue with second graders. Mother recalled asking why Student was not evaluated if he had problems with attention. Mother's question was not documented. No other witness testified that Mother asked this question.

7. The team discussed Student's work in Scholastic System 44 at the start of the 2015-2016 school year. Ms. Bratton, the reading intervention teacher, was Student's instructor in the program. Ms. Bratton testified at hearing. She has been a credentialed general education teacher since 1982, and employed by District as a teacher since 2005. She has been an intervention teacher since 2011 at Lawrence, and was trained to instruct students in System 44, BURST, and other reading programs. She is not a credentialed special education teacher.

8. System 44 is a computer based, supplemental, multi-sensory, small group reading instruction program, which was offered only to District students with low Lexile scores.⁶ The program included Student working on System 44 materials on the computer individually for one-half hour, as well as Ms. Bratton providing small group

⁶ Lexile scores are computer generated scores that measure a Student's reading comprehension level.

instruction to him in a small group consisting of six children. System 44 also had an individual reading component. Student's most recent Lexile score in System 44 was "beginning reader."

9. The IEP team recorded Student's progress on his reading goals from the 2014-2015 school year. His reading comprehension goal provided that, when given an appropriate text, Student would restate five details or facts from a passage with 90 percent accuracy in nine out of 10 trials, as measured by teacher-charted records. Student's ability to use picture cues and visual aids to assist in comprehension of a short text constituted the baseline for this goal. Student made some progress on this goal. He was able to restate details from stories he read in the BURST group, during which he worked with the paraeducator.⁷ Student made progress in sounding out words and with reading fluency, but he sometimes had difficulty focusing and staying on task.

10. Student's previous reading fluency goal provided that Student would read 50 words correct per minute as measured by student work samples and teacher-charted records, with 90 percent accuracy in nine out of 10 trials. The baseline for this goal was Student's ability to read 12 words correct per minute as measured by Dynamic Indicators at the beginning of second grade. Student made progress on this goal, although he did not meet it. By the last reporting period for the goal, Student's fluency was 17 words correct per minute, with 65 percent accuracy. Student's performance represented progress from the goal's baseline, but it was a decline from his progress on the goal at the second quarter reporting period, which was 26 words correct per minute,

⁷ BURST is a reading program connected with the Dynamic Indicators reading system. BURST focuses on phonics, fluency, and phonemic awareness. The program involves bursts of activities, for five or 10 minutes at a time, with progress monitoring every nine days.

with 72 percent accuracy, and at the third quarter reporting period at the end of the 2014-2015 school year, which was 20 words correct per minute with 71 percent accuracy.

11. The team discussed Student's present levels of performance in math. Student had been working on counting by 5's and understanding arrays. He obtained an overall 30 percent score on his most recent math assessment from the beginning of the year. His teacher stated he struggled with double-digit addition and subtraction, and that his new goal should address double-digit addition and subtraction.

12. The team recorded Student's progress on his math goal from the previous year. The goal required that, when given 20, three-digit addition and subtraction number sentences with regrouping, Student would calculate the correct answers with 90 percent accuracy in nine out of 10 trials as measured by teacher-made tests. Student's baseline for the goal was his ability to perform single-digit addition correctly with 95 percent accuracy. By the first reporting period of the goal, Student could do single-digit math word problems with little help. By the second reporting period for the goal, Student had worked on adding two, three-digit numbers. He could accurately calculate sums when both numbers had the same place value. He was taught to use place value zeros for problems such as $300 + 5$. By the end of the school year, he had learned how to add and subtract with regrouping.

13. No team member expressed any concerns regarding Student's gross and fine motor development, health, vocational, or adaptive/daily living skills. Mother gave Student's former teacher ratings scales to complete as part of an attention deficit hyperactivity disorder evaluation of Student that was in process by outside evaluators not related to District.

14. After concluding the discussion of Student's present levels, the team developed goals in reading fluency and math calculation. Ms. Daliva, Student's resource

specialist teacher, and Ms. Potter, Student's second grade general education teacher, affirmed these were Student's areas of the need at the time of this IEP. Ms. Daliva, who testified at hearing, has been a teacher since 2004, and employed by District as a resource specialist teacher since July 2004. She received her bachelor of science degree from San Jose State University, and her master of arts degree in elementary education from California State University, Stanislaus. She earned her clear multiple subject teaching credential in 2003, and her clear level II education specialist instruction credential (mild/moderate) in 2008.

15. Student's new reading fluency goal required that he read a third grade text at a fluency of 50 words correct per minute with 80 percent accuracy in eight out of 10 trials, as measured by student work samples or teacher-charted records. The baseline for this goal was Student's beginning-of-the-year Dynamic Indicators reading score of 17 words correct per minute, with 65 percent accuracy. The goal designated the individuals responsible for implementing it.

16. Student's new math calculation goal required him to solve two-digit addition and subtraction problems with and without regrouping, with 80 percent accuracy, as measured by student work samples and teacher-charted records. His baseline for the goal was Student's ability to perform single-digit addition and subtraction with 90 percent accuracy and little assistance. The goal designated the individuals who were responsible for implementing it. Ms. Daliva believed that the reading fluency and math calculation goals were attainable by Student and offered Student educational benefit.

17. The team determined that Student would continue with his general education placement, with resource specialist services. The resource services would be provided in the general education or resource specialist classroom for 45 minutes daily, on an individual or group basis. The resource services would be provided by the

resource teacher or a paraeducator. The paraeducator worked under the supervision of Ms. Daliva. Sometimes, if the general education teacher taught Student a concept which the paraeducator retaught Student, the general education teacher would supervise the paraeducator along with Ms. Daliva. Ms. Daliva communicated either daily or weekly with the paraeducator regarding Student's progress, provided the paraeducator with materials for reteaching Student, and reviewed the materials with the paraeducator. Ms. Daliva believed that Student's goals and resource services were sufficient for him to obtain educational benefit. Ms. Bratton also asserted that Student's goals and resource services were sufficient for Student to obtain educational benefit. She noted that his resource services were in addition to his System 44 instruction and BURST instruction, which the IEP referenced in the accommodations.

18. Student's accommodations included providing visual aids or picture cues when teaching or presenting new information, asking Student to re-read a text if he made mistakes, and asking him if the text made sense; providing reading material at Student's instructional or independent level, as applicable; providing a personal word list or spelling dictionary to use when Student wrote; and checking often for understanding. The accommodations also included continuing with the interventions that had been successful for Student, such as System 44, Systematic Instruction in Phonics and Phonemic Awareness and Sight Words, and BURST.

19. Student would participate in the California Assessment of Student Performance and Progress testing with specified supports. He would take the California English Language Development Test without accommodations. Parents would be informed of Student's progress quarterly by way of a progress summary report and a report card.

20. Mother consented to the August 21, 2015 IEP. District prepared a copy of the IEP translated into Spanish, and Ms. Daliva believed that it was sent to Mother.

Mother denied that she received any such IEP.

IEP TEAM MEETING OF MARCH 4, 2016

21. During the 2015-2016 school year, Student was absent from approximately November 24 until Christmas. He came back for a week or two, and then was absent for a week. Mother was concerned about Student's reading level and requested an IEP team meeting, which District convened on March 4, 2016. The IEP team included Mr. Villafana (Lawrence's principal), Rosie Rocha (paraeducator), Ms. Lange; Ms. Daliva; and Ms. Bratton. Ms. Rocha was the Spanish interpreter during the meeting. Ms. Daliva was the note-taker for the meeting. As note-taker, it was Ms. Daliva's practice to go over the notes with the IEP team at the end of the meeting, and Mother was able to correct the notes then if they were incorrect.

22. Mother requested that she receive a daily note stating what work Student needed to complete, because she has him complete his work at home. She advised that the pediatrician had been testing Student regarding his attention. She wanted to know why his academic goals were not being met. His pediatrician had suggested that Student should be in a small group. Mother inquired as to whether Student asked for help or clarification on directions, and a teacher member of the team responded that he did not do so often.

23. Ms. Lange, Ms. Bratton, and Ms. Daliva each reported on Student's present levels of performance. Student was reading books at his level, and was given extra time for reading work. Ms. Bratton stated Student had started at series 1.1 and was at series 4.4 in System 44.⁸ His processing was slow, due to his disability, and he needed more

⁸ The IEP notes state Student started at series 4.1, but that was not what Ms. Bratton reported at the meeting. Rather, Ms. Bratton reported Student started at series 1.1.

repetition. She recommended that Student log onto System 44 at home for extra practice. At hearing, Ms. Bratton elaborated that most students by that time in the school year were at series 7 or 8. Ms. Bratton attributed part of Student's inability to keep pace with the other students to his lengthy absence in the middle of the school year.

24. Ms. Daliva believed that Student was making progress at his own pace. Ms. Daliva provided Mother with the Dynamic Indicators benchmark, Dynamic Indicators survey results, and System 44 progress reports. She also gave Mother the school's website links, and a release of information form so the school could communicate with Student's doctor. Ms. Daliva also served as a resource for Mother outside of IEP meetings, and had many conversations with Mother whenever Mother had a question or concern.

25. In response to Mother's concerns about Student's progress and whether Student should be in a small group, Student's general education teacher suggested that the team explore whether Student should be placed in a special day class. District agreed to arrange for Mother to visit a special day class, if she desired. The team agreed to meet again during the middle of the fourth quarter to review Student's progress. The IEP team concluded Student's goals and services continued to be appropriate. At hearing, Ms. Bratton and Ms. Daliva reaffirmed this conclusion.

26. Mother consented to the IEP amendment. At hearing, Mother contended that Ms. Rocha did not explain that by placing her initials on the consent part of the IEP, Mother was consenting to the IEP amendment. Mother did not agree that the goals and services continued to be adequate, but she signed the IEP amendment, and she signed the amendment because Ms. Rocha told her to sign it. Ms. Daliva was not aware that anybody at the meeting pressured Mother to sign the IEP amendment, and asserted that nobody would do that. After signing her consent to the IEP, Mother went to school

and told Mr. Villafana that she was not in agreement with the IEP. She signed a document saying she was not in agreement with the IEP, and gave it to Mr. Villafana.

27. Mother's testimony that she was pressured to sign her consent to the IEP and did not know what she was signing was not persuasive, as compared to Ms. Daliva's testimony. First, Student did not call Mother to testify until toward the end of the hearing, long after Ms. Rocha testified. When Ms. Rocha testified, neither Student nor District asked her about this topic, as it was newly introduced by Mother's testimony. Second, Mother generally testified in response to leading questions by Mr. Padron. Mother often struggled to answer questions posed to her by District's counsel or the ALJ. Ms. Daliva, on the other hand, answered all questions posed to her in a straightforward manner. Finally, Mother's assertions that she did not know what she was signing was not consistent with the evidence that Mother had attended all of Student's IEPs, that this IEP team meeting had been interpreted for her, and that she had requested, participated in, and asked questions at this IEP team meeting.

STUDENT'S THIRD-GRADE SCHOOL YEAR (2015-2016)

28. Student attended Lawrence during the 2015-2016 school year in Ms. Lange's third grade general education class. He received his resource specialist services in his IEP from Ms. Daliva and a paraeducator. One of the paraeducators was Carmela Hoffman, a bi-lingual Spanish/English paraeducator who worked with Student occasionally during several school years. Ms. Hoffman was a high school graduate who had been a paraeducator at Lawrence for 25 years. She received her training from District. She worked with Student under the supervision of his teachers, and performed the tasks the teachers assigned her. The paraeducators who worked with Student reviewed the material taught by Student's general education teacher, and helped Student solidify his understanding and maintain his information or skills. The paraeducators who worked with Student were supervised by Ms. Daliva, but might also

receive materials from the general education teacher. The paraeducators did not engage in the initial presentation of material to Student, rather, they retaught or reviewed material that Student's teachers had already presented to him.

29. Student received reading intervention services by use of programs such as System 44, Systematic Phonics Instruction, and BURST. Ms. Bratton provided the small group reading portion of the System 44 program. Student's progress was affected by his absence of several weeks in the middle of the school year. Ms. Bratton noticed that Student lost momentum and motivation in his System 44 program, and that he had difficulty catching up to his classmates in the program.

PARTIES CONSIDER SPECIAL DAY CLASS PLACEMENT

30. Lawrence did not have a special day class that would be appropriate for Student. Shortly after the March 4, 2016 IEP team meeting, Mother, accompanied by her daughter, Ms. Daliva, and Mr. Villafana, visited a special day class at Needham Elementary, another District school, to show Mother an example of a special day class program that Student might attend. At some point after the visit, Mother told Ms. Daliva and Mr. Villafana she liked the special day class. Mr. Villafana told Mother that District would start to make arrangements to have Student placed in a special day class. District never sent Mother any prior written notice concerning Student's possible change of placement to a special day class.

31. At Mr. Villafana's instruction, Ms. Daliva prepared an IEP amendment regarding Student's placement in a special day class. The amendment, dated June 14, 2016, placed Student in a mild-moderate special day class for the 2016-2017 school year, with transportation. The amendment did not specify the school site at which Student would attend the special day class. The amendment stated that Student would participate in special education 95 percent of the time, with the remaining five percent of the day allotted to general education/mainstreaming. The amendment also changed

Student's curriculum from a diploma track to a certificate of completion track. Student's goals would be the same as those in the August 21, 2015 IEP.⁹

32. District staff requested Mother come to school to sign the amendment. Mother came to school with her daughter, who served as the interpreter, and staff presented her with the amendment to sign. Mother's daughter interpreted the amendment for Mother. In reviewing the amendment, Mother learned that Student would be placed in a special day class at another school, not Needham, the school Mother had observed. Mother did not want to sign the amendment, as she believed District had made a unilateral decision to change Student's placement without consulting her. Staff telephoned Mr. Villafana, and Mother discussed her concerns with him. Mother decided not to sign the amendment, because she did not like the school to which Student was to be transferred, and she did not like that District had developed an IEP amendment and made a decision to transfer Student to another placement without her participation. Accordingly, District immediately dropped the matter, and did not again propose at any relevant time that Student attend a special day class. Student remained in a general education placement at Lawrence.

SCHEDULED IEP TEAM MEETING OF AUGUST 15, 2016

33. In late July or early August 2016, District sent Mother a notice of the

⁹ Portions of the IEP amendment were unclear in several respects. The amendment stated that Student would attend Lawrence, but also stated that he could not attend Lawrence because it did not have a special day class. The IEP amendment also included the same services page from Student's August 21, 2015 IEP, stating that Student would receive 45 minutes per day of specialized academic instruction in the form of resource services provided by the resource teacher or a paraeducator, which did not make sense if Student were in a special day class.

annual IEP team meeting for Student, to be held on August 15, 2016. The meeting notice listed some of the individuals who were invited to the meeting, but did not list District's counsel as an invitee. On August 3, 2016, Mother returned to the school a Spanish version of a form by which she notified District that she would attend the meeting. There was a space on the form for Mother to fill in the name of anybody who would accompany her who had knowledge and experience with Student. Mother did not fill in that part of the form, and did not advise District that she was inviting anybody to the meeting. Specifically, Mother did not advise District that she was inviting an advocate, Mr. Padron, to the meeting. Mother's reason for not advising District that she had invited Mr. Padron was that she had, in the past, asked if she could bring an interpreter to the meeting or other family members to the meeting, and District had always given permission. Therefore, Mother did not think it was necessary to notify District that she was bringing Mr. Padron to the meeting.

34. On August 15, 2016, Mr. Padron arrived for the IEP team meeting before Mother arrived. District staff members began to gather for the meeting also. Ms. Kort, a District program specialist at the time, was surprised by Mr. Padron's presence, because Mother gave no indication that she would be accompanied at the meeting by an advocate. If a parent brought an advocate or an attorney to the meeting, District protocol was to have an attorney present, but this was not a hard-and-fast rule. Ms. Kort decided to call Mr. Warren, District's Special Education Coordinator, to determine whether she should re-schedule the meeting so that District's counsel could be present, or go ahead with the meeting without Mr. Padron's participation. Prior to making the telephone call, she tried to explain the situation to Mr. Padron. The facts were disputed as to whether Ms. Kort became emotionally elevated. Mother testified that Ms. Kort became agitated, but all other witnesses who testified observed that Ms. Kort was calm. The facts were undisputed that the advocate was emotionally elevated and speaking

loudly. Both he and Mother expressed their desire that the IEP team meeting proceed immediately. When Ms. Kort called Mr. Warren, he deferred to Ms. Kort's judgment whether she believed that a productive IEP team meeting could be held, and, if not, he gave her permission to table the meeting so that District's counsel could be present. Ms. Kort explained to Mother and Mr. Padron that the meeting could be held without Mr. Padron, or could be rescheduled to a mutually convenient time when Parents' advocate and District's counsel could be present. Ms. Kort ultimately decided to reschedule the meeting because of the advocate's agitation. Ms. Daliva attempted to write a note to give to Mother documenting why the meeting was being rescheduled, but Ms. Kort did not permit Ms. Daliva to finish the note or give it to Mother. Mother testified that Ms. Kort actually grabbed the note and tore it in half, but no other witness corroborated this testimony.

IEP TEAM MEETING OF SEPTEMBER 8, 2016

35. After the events of August 15, 2016, District staff conferred with Mother regarding rescheduling the annual IEP team meeting to a date that would be agreeable to Parents and District. The parties agreed that District would re-schedule Student's annual IEP team meeting from August 15, 2016, to September 8, 2016.¹⁰

36. The IEP team at the September 8, 2016 IEP meeting included Laura Rodriguez (school psychologist); Ms. Kite-Polinsky; Martha Galvan; Ms. Hoffman (paraeducator and Spanish interpreter); Parents, Mr. Padron; Ms. Bratton; Ms. Daliva; District's counsel; and Mr. Warren. Student's father reads and understands English.

¹⁰ Since the meeting was initially scheduled to occur on August 15, 2016, the IEP documents bear that date. Therefore, even though the re-scheduled meeting actually occurred on September 8, 2016, this Decision refers to the IEP document that resulted from the meeting as the IEP of August 15, 2016, to avoid confusion.

37. Mr. Warren was the note-taker. At the outset of the meeting, the team discussed the events of August 15, 2016. Parents and their advocate asked that the notes include a brief description of the events of August 15, 2016. Mr. Warren wrote in the IEP notes that due to Parents bringing an advocate to the last meeting without providing prior notice, the IEP meeting was tabled so that District's counsel could participate in the meeting. Mr. Warren took care in drafting the description of the events, with input from the parties. The notes stated that, on August 15, Parents came to school to attend their son's annual IEP, and brought an advocate to represent them at the meeting. Parent did not provide District with prior notice or include the advocate on the meeting notice. District's Program Specialist informed Parent that the meeting would be tabled until District had representation also. The advocate requested that the meeting be held. The program specialist explained two options to Parent. One option was to hold the meeting without an advocate or attorney. The other option was to continue the meeting so that both the advocate and District's attorney could be present. Prior to leaving, the advocate requested a copy of the meeting notice. The resource teacher later contacted Parent to set a continued date for the IEP team meeting.

38. At hearing, Mother testified that Ms. Kort had not offered the option of proceeding without Mr. Padron. However, Parents and their advocate never objected to Mr. Warren's notes pertaining to the events of August 15, 2016, which stated that Ms. Kort offered such an option. Mr. Warren's testimony regarding his care in drafting the notes, and in obtaining Parents' approval of the accuracy of the notes at the meeting, are more persuasive than Mother's belated denial that the notes were accurate.

39. The IEP team discussed Student's strengths, Parents' concerns, and Student's present levels of performance. Student liked to participate when pulled out in a small group. He was strongest in math, compared to his other academic subjects. He participated in math discussions and volunteered often in math. Parents were concerned

that Student's reading was below grade level, and that he would struggle in all subject areas as a result. Mother was unsure how the teacher could determine his reading level, and the classroom teacher reported that Student was reading and working at his reading level and reading assessments were performed regularly to monitor growth. The classroom teacher invited Mother to visit the classroom, and advised that Mother could have access to the assessment information upon request. Mr. Padron reported that the family would be expecting Student to make a grade level gain each year. The intervention teacher reported that Student made significant growth in reading last year.

40. Student's scores on the California statewide Smarter Balanced Assessments reflected he did not meet the standard overall in English Language Arts. His score in the Speaking and Listening subarea was at or near standard; his scores in other subareas were all below standard. On the California English Language Development Test, he was at the intermediate level in listening, speaking, and writing, but at the beginning level in reading.

41. The IEP included Student's most recent scores on a variety of assessments, including an analysis of the scores. Student was using Scholastic System 44-Next Generation for reading instruction. His most recent System 44 Lexile score was 71, which corresponded to kindergarten level. His System 44 Lexile score near the end of the prior school year, on May 19, 2016, also corresponded to kindergarten level. Student was at the "developing decoder" stage and receiving computer instruction to improve his comprehension and decoding. He received resource specialist push-in services during his reading period. He was able to work independently during his computer work, but required some help during independent reading time or teacher-led instruction. His Dynamic Indicators assessment scores from August 2016 reflected that first grade was the most appropriate instructional reading level. District administered the Dynamic Indicators assessment for several grade levels to determine the most appropriate

instructional reading level. Ms. Bratton noted that based on the Systematic Phonics Instruction placement test, Student lacked automaticity of phonics and sight words. Ms. Daliva reported Student needed to think awhile before he attempted to read phonics words.

42. District administered to Student the CORE Phonics survey, a screening test for basic phonics and phonemic awareness skills. Student's scores reflected that he was fluent in naming both uppercase and lowercase letters. He knew a majority of his consonant sounds. He had some understanding of short and long vowel sounds. His areas of weakness included consonant blends with short vowels, and r-controlled vowels.¹¹ Student read too fast at times, and he also changed sounds, transposed sounds, and deleted sounds.

43. In math, Student had recently been working on inequalities. Student appeared to understand the preliminary review topics which the class was studying, as evidenced by his participation in small group discussions. Student received 30 minutes of math instruction in a small pull-out group, taught by the resource specialist teacher, after the initial teaching by the general education teacher. Student's score on the overall math portion of the Smarter Balanced Assessments did not meet the standard, and he scored below standard on all math subareas.

44. In writing, Student could write up to one paragraph on a topic. He received his writing instruction from his general education teacher in third grade, where the standard was to write multiple paragraphs on one topic, including an introductory paragraph, two or three body paragraphs, and a concluding paragraph.

45. The team reviewed Student's final grades from his third grade report card. His reading grades on his report card for the fourth quarter of third grade improved

¹¹ R-controlled vowels are those in words such as "bird," "sir," and "word."

from 1 (standards not met) to 2 (standards nearly met) in reading comprehension and writing strategies. His fourth quarter grades were 1 in spelling, vocabulary, grammar, and fluency. His fourth quarter words correct per minute fluency was 30. His final report card grade in math was 1. His final report card grade in writing was 1.

46. Student had a satisfactory attitude towards his school work, and an excellent attitude towards his teacher and classmates. He regularly completed and turned in his homework, and participated during class discussions. Student was punctual and had good attendance. He came prepared for class, followed directions, and worked independently, but needed prompting. His rate of task completion had improved.

47. The IEP team found no concerns with Student's communication development, gross-fine motor development, health, or adaptive/daily living skills. His teachers had no concerns regarding his social emotional/behavioral status. Parents reported that Mother tried to motivate Student, and the advocate stated that Student had esteem issues. Student had commented to Mother that a teacher had said to him, "Are you blind?"

48. The team discussed Student's progress on his previous goals. His baseline for his reading fluency goal in the August 2015 IEP was established with reference to his fluency score at the beginning of third grade, which was 17 words correct per minute, with 65 percent accuracy. His fluency score at the beginning of fourth grade, at a third grade level, was 31 words correct per minute with 79 percent accuracy. He did not meet the annual goal of reading a third grade level text at a fluency of 50 words correct per minute with 80 percent accuracy in eight out of 10 trials, but he made progress compared to his baseline. Ms. Daliva measured Student's progress on this goal by tracking his Dynamic Indicators scores. She believed he was making appropriate progress at meeting state standards at his own rate. Ms. Bratton considered Student's progress on this goal to be appropriate for his skills level over one year's time. She also

commented that his reading comprehension improved during the year.

49. Student's baseline for his math calculation goal in his August 2015 IEP was his ability to perform single-digit addition and subtraction with 90 percent accuracy with little assistance. His goal required him to do two-digit addition and subtraction with and without regrouping, with 80 percent accuracy. He surpassed the goal. By August 15, 2016, the final reporting period on the goal, Student was able to add and subtract double-digit numbers, with and without regrouping, with 95 percent accuracy. Ms. Daliva determined Student's progress on this goal using assessments, work samples, conversations with Student's general education teachers, and by talking to the paraeducators.

50. The team determined that Student's areas of need were reading (fluency/phonics) and math (calculation/word problems).

51. The team developed goals in reading and math, with related short-term objectives. The baseline for the reading fluency goal was based upon Student's System 44 and Dynamic Indicators assessment scores. Student read at kindergarten level as measured by System 44 diagnostic tests, and at a rate of 45 words correct per minute with 88 percent accuracy, as measured by Dynamic Indicators scores. The baseline noted that second grade proficiency for the Dynamic Indicators system was at least 87 words correct per minute, at or above 97 percent accuracy. Student's goal tracked the Dynamic Indicators second grade proficiency mark. It required Student to read a second-grade level English text with a fluency rate of 87 words correct per minute with 97 percent accuracy, in 4 out of 5 trials, over a two week period, as measured by teacher-administered diagnostic tests. Ms. Bratton considered this goal appropriate, because it changed Student's reading level goal in fluency from third grade to second grade. In her opinion, he would make more progress and become a more fluent reader if he used a simpler text. His reading assessments had shown that a second grade reading level was

a more attainable goal for Student.

52. The baselines for Student's four reading goals in phonics specifically referred to Student's performance on the various tasks on the CORE Phonics survey. One of the goals required Student to name five out of five English long vowel sounds in isolation with 90 percent accuracy in nine out of 10 trials, as measured by teacher-charted records over a two-week period. The baseline for this goal stated Student could name two out of five long vowel sounds. At hearing, Ms. Daliva explained that "in isolation" meant that Student would be shown a vowel and asked to identify the long vowel sound that vowel made. Another reading goal in phonics focused on short vowel sounds, and required Student to name five out of five English short vowel sounds in isolation, with 90 percent accuracy in trials, as measured by teacher-charted records over a two-week period. The baseline for this goal stated that Student was able to name three out of five short vowel sounds. A third reading goal in phonics required Student to read 15 out of 15 English words containing consonant blends and short vowel sounds, with 90 percent accuracy in nine out of 10 trials, as measured by teacher-charted records over a two-week period. The baseline for this goal stated that Student was able to read seven out of 15 English words containing consonant blends and short vowel sounds. The fourth reading goal in phonics required Student to read English words containing 15 r-controlled vowels with 90 percent accuracy in nine out of 10 trials, as measured by teacher-charted records over a two-week period. The baseline for this goal was Student's ability to read four out of 15 r-controlled vowels as measured by the CORE Phonics Survey.

53. The team also developed two math goals for Student. The first math goal addressed multiplication, and was developed from a baseline that Student was able to do six single-digit, random multiplication facts with 100 percent accuracy in one minute, as measured by student work samples. The goal required Student to multiply and divide

a three-digit number by a single-digit number, as measured by Student work samples and teacher-charted records, with 80 percent accuracy in four out of five trials, over a two week period. The second math goal addressed word problems. The baseline for the goal noted that, through teacher observation, Student could follow along in a small group setting and identify math key words and main details, 100 percent of the time in 10 out of 10 trials, with teacher-led instruction. The goal required Student, when give 10 math word problems in English, to independently use a variety of methods to explain math reasoning, by underlining, highlighting, and/or circling key math terms such as "more than," "in addition," "less than," etc., with 80 percent accuracy in nine out of 10 trials as measured by student work samples and teacher-charted observations, over a two week period. Each goal listed the individuals responsible for implementing it.

54. The team agreed upon accommodations and supports to include visual aids or picture cues; asking Student to reread a text, as necessary, and providing positive, corrective feedback; providing reading material at Student's instructional or independent level, as appropriate; providing a personal word list or spelling dictionary for use when writing; checking for understanding throughout instruction; and using positive language when checking for understanding. Mr. Padron asked that positive language be used when giving feedback and checking for understanding, and the supports and accommodations were drafted to incorporate his request.

55. Parents and their advocate requested an assistive technology device such as a tablet. They were advised that an assistive technology assessment would be required to consider use of such a device for FAPE purposes. Parents requested an assistive technology assessment, and the IEP team agreed to the assessment. The team also discussed conducting triennial evaluations somewhat earlier than when they were due, so they would be given prior to the end of the school year, rather than at the beginning of the next school year. Such a revised testing schedule would avoid the risk

that Student's scores would be affected by any regression that occurred during the summer break. Parents were receptive to this idea.

56. The resource specialist teacher proposed an increase in specialized academic instruction in the resource specialist program to 90 minutes per day, including push-in and pull-out services. The resource specialist teacher described the implementation of services, including the role and participation of the paraeducator. Parents and their advocate did not object to the manner of delivery of services, and, indeed, Parents had never objected to the manner of delivery of services at any of the subject IEP team meetings. The IEP offered specialized academic instruction for 90 minutes per week. Push-in and pull-out services would be provided by the resource specialist program on an individual or group basis to address academic needs in reading and math. Thirty of the 90 minutes would be push-in resource services. Another 30 minutes would consist of pull-out reading intervention, and 30 minutes would be pull-out math services, which included reteaching the math lesson. The IEP also offered specialized academic instruction focusing on reading and math in special education summer school. District described the purpose of special education summer school with respect to regression and recoupment of academic skills.

57. The IEP offered Student placement in the general education English language mainstream classroom at Lawrence, and he would be outside the regular classroom and in extracurricular and non-academic activities 17 percent of the time. The IEP explained that Student would not participate in the regular class, or extracurricular or nonacademic activities during his pull-out resource specialist services. Pull-out services would not occur during core direct instruction in reading, or during initial math instruction. Parents would be notified of Student's progress quarterly by a progress summary report and a report card.

58. The team discussed statewide assessments, such as the California Modified

Assessment and the Smarter Balanced Assessments. Parents chose the Smarter Balanced Assessments. The IEP provided that Student would take the Smarter Balanced Assessments in English and Math with supports specified in the IEP, including having some items read aloud, and Student taking the tests at a more beneficial time. Student would take the California English Language Development Test with accommodations in listening, speaking, reading, and writing.

59. Parents and Mr. Padron participated in the meeting. They asked questions during the discussion of present levels of performance and the assessment scores. Various District personnel answered their questions, explained the reading interventions and programs they had implemented and were implementing, the program assessment measures and results, and reinforcers and incentives used in the classroom. In response to a question from Mr. Padron, the resource teacher explained how she arrived at the baseline and drafted the third reading goal in phonics. The team discussed whether the services in the IEP were sufficient to permit Student to benefit and make progress on his goals, and determined they were. At hearing, Ms. Rodriguez commented that the goals were appropriate for Student's present levels, and they were understandable and measurable. Ms. Bratton stated the reading goals were able to be measured by testing. She commented that they were appropriate, as they covered material in Student's reading intervention programs, reflected appropriate growth in a year's time from the baseline, and were measureable. Ms. Daliva also affirmed the IEP team's decision that the goals were appropriate. These three witnesses also affirmed that the type and level of services were appropriate for Student to make growth. The increase in resource specialist program services would be beneficial in view of the increase in the number of goals.

60. Father requested that the IEP team meet earlier than the next annual IEP team meeting if Student was struggling, and the IEP team agreed. Mr. Padron informed

the team that he needed to be copied on all documents and correspondence provided to Parents, and the IEP team agreed.

61. Mother consented to the IEP. She added a note to the consent section of the IEP that she had attended the meeting on August 15, 2016, but it was postponed to another date. At hearing, Mother asserted that she was not in agreement with the goals, because Student was not meeting them and could not read.

62. After the meeting, District sent to Parents a copy of the IEP translated into Spanish.

IEP TEAM MEETING OF DECEMBER 16, 2016

63. On December 16, 2016, District convened an IEP team meeting to discuss the results of Student's assistive technology assessment. The IEP team included Parents, Ms. Daliva, Ms. Hoffman, Ms. Galvan, Ms. Lievelt (District program specialist), and Mr. Villafana. Mother's daughter interpreted the meeting for Mother. The team reviewed the assistive technology report, which recommended the use of an iPad to assist with reading mechanics and reading comprehension. The team agreed to add assistive technology devices, to consist of an iPad and possibly a keyboard, to Student's IEP, and offered assistive technology consultation services of 30 minutes per month as an accommodation. The assistive technology specialist would consult with staff on issues of text-to-speech, word prediction, and access to the electronic curriculum. Parents consented to the IEP.

STUDENT'S PROGRESS DURING 2016-2017 SCHOOL YEAR

64. Student received the services in his IEP during the 2016-2017 school year. He was enrolled in Ms. Galvan's fourth grade general education class. Ms. Galvan has been employed by District since 1995. She received her master's degree in education from California State University, Sacramento in 1980, and received her

bilingual/bicultural multiple subject credential that same year. Ms. Galvan did not have a special education credential, but special education students were enrolled in her general education classes occasionally. Ms. Galvan testified at hearing.

65. Student's school day began with Ms. Galvan teaching reading using System 44 for an hour and a half. Ms. Galvan started the session with whole class instruction, during which the class read the story together and learned the vocabulary. Then, the students divided into smaller groups, and Ms. Galvan engaged in small group instruction. At this time, the small groups re-read the story, and answered questions about the story, with Ms. Galvan's assistance. The students also worked independently on the computer using the System 44 program. Ms. pushed into Ms. Galvan's class to teach core curriculum for 30 minutes, and sat next to Student during the System 44 instruction. Student was pulled out after lunch for 30 minutes for Systems Phonics Instruction reading intervention services. Student was also pulled out for resource services for 30 minutes per day to be retaught math with two other students.

66. Ms. Galvan believed Student improved greatly in reading throughout the school year, based on his reading scores, his ability to complete his social studies and science projects, and his ability to read independently. He volunteered to read in class. She also noted his Lexile scores on his report card during the 2016-2017 school year showed progress. His Lexile scores measured his reading comprehension in the System 44 program based upon his ability to read a passage at his Lexile score grade level and answer questions regarding the passage. His Lexile score at the beginning of the year was 79 (kindergarten level). It increased to 188 (first grade level) in the first quarter, and to 320 (mid-second grade level) in the second quarter. Student scored 261 (second-grade level) in the third quarter, and 281 (second grade level) in the fourth quarter. Thus, Student increased from a kindergarten level to a second grade level in reading during the school year. She attributed his drop from 320 to 261 between the second

and third quarters to the fact that the reading passages and the questions he had to answer regarding the reading passages grew more difficult and complex as his reading level increased to mid-second grade level in the second quarter. However, his overall increase in his reading level demonstrated that he had progressed during the year.

67. Student's 2016-2017 report card also listed his Phonics Inventory scores. He obtained a score of 15 in the fall quarter, a score of 6 in the winter quarter, and a score of 7 in the spring quarter. The Phonics Inventory assessed reading of vocabulary words, and the words corresponded to Student's reading level. Thus, Student received a 15 when he was at a kindergarten or first grade reading level, but as his reading level improved, the words became more difficult (e.g, multi-syllabic). His Phonics Inventory score decreased because he could not read the words as easily as when he was at a lower reading level. However, Ms. Galvan considered Student to have progressed, in that his scores demonstrated an ability to read more complex words.

68. Student's grades in core academic areas rose or remained the same during the course of the year, but, with one exception, they all declined in the last quarter. In reading, he received a grade of 2 during the first three quarters of the school year, and a grade of 1 at the end of the school year. Student's grades in writing were identical to his reading grades for each quarter and the end of the school year. Ms. Galvan noted that these grades were not cumulative, and she considered Student to have progressed, even though his reading and writing grades may have declined during the last quarter. As with his Lexile and Phonics Inventory scores, Ms. Galvan attributed the decline to the fact that, as his reading level rose during the year, the material and assignments became more difficult, and he obtained the earlier grades when he was working at a lower reading level with easier material and assignments. In math, Student's grades were 1's in each quarter. Ms. Galvan attributed Student's low math grades to the difficulty he had in reading.

69. Student's science grade was 3 (standards met) in the first and second quarters; he reached a grade of 4 in the third quarter (standards exceeded); and a grade of 3 in the fourth quarter. Student's grades in Listening and Speaking were 2 in the first quarter, 3 in the second and third quarters, and 2 by the end of the year. His Social Science grade was 3 for each of the first three quarters, and then 2 in the final quarter. In English Language Development, his grades were 3's throughout the year. At the end of the year, his teacher's comments on his report card stated that he made some progress in comprehension and phonics in the System 44 program. He did not meet grade level standards in math. She suggested that reading each day and continuing to practice his multiplication facts over the summer would help him be successful in the next school year. Student was promoted to fifth grade.

70. Student's progress reports on his annual goals for the 2016-2017 school year covered the first three quarters of the year, and were prepared by Ms. Daliva. There was no evidence at the time of the hearing as to his progress on the goals for the entire year. The progress reports showed that he made progress on his reading fluency goal. By the third quarterly progress report, he read at a rate of 55 words correct per minute, with 92 percent accuracy. His progress on his first phonics goal fluctuated. His first and second quarterly progress reports showed he could name five out of five long vowel sounds, but his third quarterly progress report showed he could name only one of five long vowel sounds. Ms. Daliva did not consider it unusual for a Student's progress to fluctuate between reporting periods. Ms. Bratton posited that Student may just have had a bad day when he was evaluated for his third quarterly progress report.

71. Student made better progress on his second phonics goal. His first and second quarterly progress reports showed he could name five out of five short vowel sounds; his third quarterly progress report showed he could name four out of five short vowel sounds. Despite the fluctuation in progress, he ultimately made progress,

compared to his baseline of being able to name only three out of five short vowel sounds. He was on his way to meeting the annual goal. He made definite progress on his third phonics goal. His quarterly progress reports showed consistent progress on this goal, and by the time of his third quarterly progress report, he was able to read 11 out of 15 English words containing consonant blends and short vowel sounds, as compared to his baseline ability to read 7 out of 15 such words. He was on his way to meeting the annual goal. His progress on the fourth phonics goal also fluctuated. By the time of the second quarterly progress report, he had met the goal with at least 80 percent to 90 percent accuracy. By the third quarterly progress report, his progress had declined somewhat. He could read 10 out of 15 words containing r-controlled vowels. This result, however, was well above his baseline of 4 out of 15 r-controlled vowels, and he was on his way to meeting the goal. Ms. Daliva measured Student's progress on his reading goals by a variety of survey measures, including Dynamic Indicators, the CORE Phonics Survey, mastery tests in the Systematic Phonics Instruction program, and by talking to his general education teacher about his phonics skills in System 44.

72. Ms. Daliva measured Student's progress on his math goals using benchmark tests given in the general education classroom, math assignments, and math assessments. Student made steady progress on his first math goal. He learned his multiplication facts during the first and second reporting periods, and by the third reporting period, with help and step-by-step instruction, he could multiply and divide a three-digit number by a single digit number. This reflected progress compared to his baseline, when he was only able to perform single digit multiplication. Student's progress on his second math goal, which involved independently identifying key math terms in word problems, was not consistent. At the time of the second quarterly progress report, Student was able to name and apply a math operation in a word problem, when the problem contained no more than two steps. At the time of the third

quarterly progress report, Student struggled to identify math terms, such as “more than,” without receiving help. Ms. Galvan attributed Student’s difficulty in making progress on this goal to his difficulty in reading. Ms. Daliva believed that Student progressed on all of his goals at his own pace.

TRIENNIAL ASSESSMENT

73. In furtherance of the IEP team recommendation to complete Student’s triennial psychoeducational assessment before the end of the school year, on March 1, 2017, District sent an assessment plan to Parents to obtain their consent to the assessment. Parents did not consent to the assessment plan. Therefore, on March 15, 2017, District sent another assessment plan to Parents, which was identical to the first, except for the date. Parents did not consent to the assessment plan. Instead, by letter of March 16, 2017, Parents requested an independent assessment. This was their first request to District for an independent psychoeducational assessment. On April 24, 2017, District emailed Parents a prior written notice in English, declining Parents’ request for an independent assessment. On April 27, 2017, District emailed Parents the same prior written notice translated into Spanish.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA¹²

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement the IDEA

¹² All of the paragraphs in this Introduction are incorporated by reference into the analysis of all of the issues discussed below.

and its regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.;¹³ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living and higher education; 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 IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In 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. The IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v.*

¹³ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise stated.

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, the *Rowley* court decided that the FAPE requirement of the IDEA was met when a child received access to an education that was reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The Supreme Court recently decided the case of *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ___ [137 S. Ct. 988] (*Endrew F.*) and clarified the *Rowley* standard. *Endrew F.* provides that an IEP must be reasonably calculated to enable “progress appropriate in light of the child’s circumstances.” (137 S.Ct. at 999.) The Court recognized that this required crafting an IEP that required a prospective judgment, and that judicial review of an IEP must recognize that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Ibid.*) Additionally, the Court stated, “for a child fully integrated in the regular classroom, an IEP typically

should, as *Rowley* put it, 'be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" (*Id.* at 999 [citing *Rowley, supra*, 458 U.S. at 203-204].)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 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].) In the issues remaining in this case, Student is the petitioning party and has the burden of persuasion as to his issues.

STUDENT'S ISSUE 1A: FAILING TO DEVELOP MEASURABLE BASELINES AND GOALS IN THE IEPs OF AUGUST 21, 2015 AND AUGUST 15, 2016.

6. Student contends that the goals in the August 21, 2015 IEP lacked a clear description of present levels of performance.¹⁴ With respect to the August 15, 2016 IEP,

¹⁴ Student's closing brief did not provide any specific references as to why the baselines and goals that were developed by the IEP team at the August 21, 2015 IEP were not measurable. Rather, Student's closing brief specifically referred to the goals from the 2014 IEP, for which progress was reported at the August 21, 2015 IEP team meeting. The goals in the 2014 IEP, however, were not at issue in this action, as was discussed in the Amended Order Following Prehearing Conference, etc., issued on

Student does not specifically mention any goal except for goal number 3, which was the second reading phonics goal. Student contends that the meaning of the goal was not clear, that it was unclear how the baseline was measured and who interpreted the CORE Phonics Survey. Student also contends that the goals in the August 15, 2016 IEP were unclear as to how, how often, and by whom the goals would be measured. District contends that the District developed measurable baselines and goals in the subject IEPs.

Applicable Law

7. An IEP shall include a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum, and, when appropriate, benchmarks or short-term objectives, that are based upon the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports of the child's progress will be issued to the parent. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R.

August 25, 2017. Student's closing brief also generally criticized "all the goals in the 2015 IEP" for not having any short-term instructional objectives, but that topic was not at issue in this action, and Student offered no evidence on that topic at hearing. The law does not require that the goals of a child such as Student, who was on a standard general education curriculum and did not take alternative assessments, have short-term benchmarks or objectives. (34 C.F.R. § 300.320(a)(2)(ii).) Student also contended in his closing brief that the descriptions of Student's progress in District's progress reports lacked specificity, but the contents of the progress reports were also not at issue in this action. Therefore, these issues will not be discussed in this Decision. (Ed. Code, § 56502, subd. (i).) Student may be able to file another due process complaint to address these issues. (Ed. Code, § 56509).

§ 300.320.) No information need be included in an IEP beyond what is statutorily required. (71 Fed. Reg. 46,661 (Aug. 14, 2006).) In general, annual goals should reflect what a student with a disability can reasonably be expected to accomplish within a calendar year while the student participates in a special education program. (Office of Special Education and Rehabilitative Services, *Letter to Butler*, 213 IDELR 118 (March 25, 1988).)

8. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.* (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

9. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483 (*Target Range*)). Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial

of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

Analysis

10. The baselines for all goals were appropriately based on Student's present levels of performance, as demonstrated by assessment or teacher observation. Student presented no evidence that the baselines were inaccurate. With respect to goal number 3 (the second phonics/reading goal) in the August 15, 2016 IEP, the IEP notes described the CORE Phonics Survey and Student's scores in detail. The IEP document did not directly state who interpreted the CORE Phonics Survey, but there is no requirement that it do so. Parents and their advocate were at the IEP meeting and Student did not establish they did not understand the results of the CORE Phonics Survey or asked questions about what the phrase "English short vowel sounds in isolation," meant. Parents were free to ask about these or other matters at the IEP meeting, or at any other time. At hearing, Ms. Daliva explained what "English long vowel sounds in isolation" meant.

11. There was no evidence that the baselines for Student's goals in the August 21, 2015, IEP and August 15, 2016 IEP were not measurable or were not properly measured. All of Student's goals in both IEPs were measurable on their face. Ms. Daliva testified without contradiction that she measured Student's progress on all of his reading goals by using various assessments such as Core Phonics, and Dynamic Indicators, as well as by conferring with his teachers on his progress, and that she measured his progress on his math goals by class assessments and by conferring with

his teachers on his progress. Contrary to the Student's contention, all of the goals in the August 21, 2015 IEP and the August 15, 2016 IEP specified how, and how often, the goals would be measured, and, in addition, contained all other legally required information. Student presented no evidence that Student's progress on any of his goals was not properly measured.

12. District did not deny Student a FAPE on this ground.

STUDENT'S ISSUE 1B: FAILING TO INCREASE SPECIALIZED ACADEMIC INSTRUCTION

13. Student contends that Student had made only de minimis progress during the 2015-2016 school years, he had not met any of his goals, he was performing below grade level, and District failed to provide additional specialized educational instruction to remedy these deficiencies. District contends that the subject IEPs provided for Student to receive specialized academic instruction, and that the District appropriately modified the amount of Student's specialized educational instruction Student received as his needs evolved.

Applicable Law

14. Legal Conclusion 8 is incorporated by this reference.

15. Resource specialist programs are designed for students with special needs who have an IEP and who are assigned to a regular classroom for the majority of a school day. (Ed. Code, § 56362, subd. (a)(1).) Resource specialist programs include a resource specialist who provides instruction and services to such students, as well as information and assistance to individuals with special needs and their parents; coordinates a student's special education services with the regular school programs; monitors a student's progress regularly; and participates in the review and revision of IEPs. (Ed. Code, § 56362, subds. (a)(2)-(5).)

16. For a school district's offer of special education services to a student with a

disability to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to enable progress appropriate in light of the child's circumstances. (*Andrew F., supra*, 137 S. Ct. at 999; *Rowley, supra*, 458 U.S. at 209.) To meet the level of educational benefit contemplated by the IDEA, the school district's program must result in more than minimal academic advancement. (*Andrew F., supra*, 137 S.Ct. at 999; *Amanda J. v. Clark County School Dist., et al.* (9th Cir. 1996) 267 F.3d 877, 890.) At the same time, an IEP is not required to aim for grade-level progress if that is not a reasonable prospect for a child, but his educational program must be appropriately ambitious in light of his circumstances. (*Andrew F., supra*, 137 S.Ct. at 1001.)

17. Educational benefit in a particular program is measured by the degree to which Student is making progress on the goals set forth in the IEP. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467.)

Analysis

18. Student's August 21, 2015 IEP offered Student 45 minutes per day of specialized academic instruction provided by the resource specialist teacher or the paraeducator. The evidence was uncontradicted that Student received this amount of specialized academic instruction, and Student made progress during the 2015-2016 school year. The baseline for Student's reading goal in the August 21, 2015 IEP for his third grade year was 17 words correct per minute, with 65 percent accuracy. He did not meet the goal, which required him to meet a third-grade level text at a fluency of 50 words correct per minute with 80 percent accuracy. However, he made progress such that, by the final reporting period, he was reading 31 words correct per minute in a third grade level text with 79 percent accuracy, which was well above his baseline.

19. Student surpassed his math goal in the August 21, 2015 IEP. Student's

baseline for this goal was his ability to perform single-digit addition and subtraction with 90 percent accuracy and little assistance. By the time of the final reporting period, Student was able to add and subtract double-digit numbers, with and without regrouping, with 95 percent accuracy.

20. Student's final report card grades also reflected some progress. His reading grades improved from 1 to 2 in reading comprehension and writing strategies. His final report card grade in math was a 1. He was promoted to fourth grade.

21. Student did not present any evidence that the amount of specialized academic instruction Student received was inadequate, or any evidence as to the amount of specialized academic instruction Student should have received during the 2015-2016 school year. Both Ms. Daliva and Ms. Bratton affirmed, without contradiction, that the amount of specialized academic instruction Student received was appropriate, and that he made progress on his goals.

22. At the September 8, 2016 IEP team meeting to develop the IEP dated August 21, 2016, the IEP team increased the number of Student's goals from two to seven, and his resource specialist services increased from 45 minutes per day to 90 minutes per day, because of the increase in the number of goals. The evidence was uncontradicted that Student received these services. His progress on his goals during the fourth progress reporting period was not available as of the time of the hearing, but the evidence reflected that Student made progress on most of his goals through the third progress reporting period. Student was on his way to meeting all of his annual reading goals. He made steady progress on one of his math goals, but did not make much progress on his second math goal. The evidence was uncontradicted that his reading and phonics assessment scores showed progress. He was reading at a kindergarten level at the beginning of the school year and by the end of the school year he was reading at a second grade level. Ms. Galvan's testimony demonstrated that

Student's report card grades in reading and writing reflected that he was reading more difficult material, and therefore showed progress. Student was promoted to fifth grade.

23. Again, Student did not present any evidence that the amount of specialized academic instruction that Student received in conformity with his IEP was insufficient. Nor did Student present any evidence as to the amount of specialized academic instruction Student should have received.

24. The levels of specialized academic instruction offered in Student's IEPs of August 21, 2015, and August 15, 2016, were reasonably calculated to enable Student to receive meaningful educational benefit and to make progress appropriate in light of Student's circumstances. District did not deny Student a FAPE on this ground.

STUDENT'S ISSUE 1C: FAILING TO PROVIDE A CREDENTIALLED TEACHER

25. Student contends that District used paraeducators instead of a credentialed teacher to provide instruction to Student.¹⁵ District contends that Student's

¹⁵ In support of this contention, Student's closing brief cited only IDEA sections that refer to the requirement of "highly qualified teachers." (20 U.S.C. §§ 1401 (10); 1412 (14).) However, on December 10, 2015, 20 U.S.C. § 1401 (10) was repealed, and 20 U.S.C. §1412 (14) was amended as a result of the passage of the Every Student Succeeds Act of 2015 (Pub.L. No. 114-95 (Dec. 10, 2015).) This Act eliminated the requirement of "highly qualified teachers," and instead required teachers to meet state certification requirements. The amended title 20 United States Code section 1412 (14) therefore refers to state certification requirements, not to "highly qualified teachers." Additionally, an individual student has no right of action under the IDEA for the failure of a school district staff person to meet the applicable requirements under the Every Student Succeeds Act. (20 U.S.C. § 1412(14)(E).) The former version of title 20 United States Code section 1412 (14)(E) similarly provided that a student has no right of action under the

specialized academic instruction was provided by a credentialed teacher or by a paraeducator under the supervision of a credentialed teacher, in accordance with the law.

Applicable Law

26. As stated in Legal Conclusion 2, above, the definition of a FAPE includes the requirement that special education and related services meet state educational standards. California law requires that resource specialist programs be under the direction of a resource specialist who is a credentialed special education teacher, or who has a clinical services credential with a special class authorization, who has three or more years of teaching experience, including both regular and special education teaching experience, and who has demonstrated the competencies for a resource specialist. (Ed. Code, § 56362, subd. (b).) At least 80 percent of resource specialists within a local plan area shall be provided with an instructional aide. (Ed. Code, § 56362, subd. (f).) Therefore, the law does not require that special education instruction be provided only by special education credentialed teachers. Rather the law provides that a resource specialist program be under the direction of a specially trained teacher, and that the use of instructional aides to assist in a resource specialist program is permitted.

Analysis

27. Student's special education services during the 2015-2016 and 2016-2017

IDEA for the failure of a school district staff person to be "highly qualified." Thus, the law Student cited is outdated with respect to the aspects of his claims that relate to post-December 10, 2015 events. Moreover, the law Student cited grants him no right of action under the IDEA in a special education due process hearing such as this one, and the amended law similarly provides that he has no such right of action.

school years were provided by Ms. Daliva, a credentialed and experienced special education teacher. She was assisted by paraeducators, who worked under her supervision. That some of Student's resource services would be provided by paraeducators was specified in the IEPs of August 21, 2015 and August 15, 2016. The services of the paraeducators were also mentioned or discussed in the notes sections of these IEPs. At no time during these IEPs did Parents or their advocate express concern as to the manner in which District delivered instruction to Student. At hearing, Mother asserted that she did not know that paraeducators were providing services to Student, but the contents of the IEPs, all of which Mother attended, and all of which were interpreted for Mother, are more persuasive than Mother's testimony on this issue.

28. The paraeducators provided their services in conformity with the law. The paraeducators did not provide any initial instruction to Student, rather, they engaged in reteaching or reviewing material Student had already been taught by Ms. Daliva or Student's general education teacher. Ms. Daliva supervised them, conferred with the paraeducators regularly regarding their work with Student, and, along with the general education teachers, provided them materials for use with Student. District did not deprive Student of a FAPE by having paraeducators assist Ms. Daliva in providing Student's resource specialist services.

STUDENT'S ISSUE 2A: PARENTAL PARTICIPATION AT AUGUST 15, 2016 IEP MEETING

29. Student contends that District cancelled the August 15, 2016 IEP team meeting, thereby denying Mother's participation in the meeting. District contends that District briefly continued the August 15, 2016 IEP team meeting to September 8, 2016, and that Parents and their advocate meaningfully participated in the September 8, 2016 IEP team meeting.

Applicable Law

30. Legal Conclusion 9 is incorporated by this reference.

31. The IEP team must include the following people, unless their presence is waived by parents: the parents, not less than one regular education teacher of the child if the child will be participating in the regular education environment, one special education teacher or provider for the child, and a representative of the local educational agency who is qualified to provide or supervise the provision of specially designed instruction, and who is knowledgeable about the general education curriculum and the availability of resources of the local educational agency. The IEP team may also include, at the discretion of the parent or the local educational agency, other individuals who have knowledge of the child, including related services personnel, and, when appropriate, the child. (20 U.S.C. § 1414(d)(B)(i)-(vii).) If the school district intends to bring an attorney to the IEP meeting, it must so state in the IEP meeting notice. (34 C.F.R. § 300.321(a)(6); 34 C.F.R. § 300.322(a)(i).

32. A parent's right to be involved in the development of their child's educational program is one of the most important procedural safeguards. (*Amanda J. v. Clark County School Dist., et al., supra*, 267 F.3d 877, 892-895.) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d 1479, 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ., supra*, 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns were considered by the IEP team has participated in the IEP process in a meaningful way].)

Analysis

33. District did not deprive Student of a FAPE by postponing the IEP meeting. District had sent an IEP notice scheduling Student's annual IEP team meeting for August 15, 2016. The meeting notice did not state that District had invited its attorney to the meeting. Mother returned the notice and checked the box stating she would attend, without stating that she was bringing an advocate. As a result, Ms. Kort was surprised when she arrived for the meeting and learned that Mother had brought an advocate, Mr. Padron, to the meeting. Furthermore, as District had not given notice that its attorney would be present at the meeting, Mother's conduct meant that District could not legally have an attorney at the meeting unless the meeting was rescheduled.

34. District had a protocol that its attorney be present at an IEP team meeting when Student had representation at the meeting, but this was not a hard-and-fast policy. Faced with this situation, Ms. Kort decided to consult with Mr. Warren, District's Special Education Administrator, regarding how to proceed. As Ms. Kort attempted to explain the situation and the procedures to Mother and her advocate, including that she wished to call Mr. Warren, the evidence was undisputed that Mr. Padron became emotionally agitated. The weight of the evidence demonstrated that Ms. Kort was calm. As a result of the advocate's behavior, Ms. Kort, after consulting with Mr. Warren, gave Mother the option of continuing the meeting without the advocate, or of postponing the meeting, not only so that District could have its attorney present, but also so that the meeting could be productive.

35. Contrary to Student's contention, the evidence did not demonstrate that the meeting was cancelled, such that Parent was denied the opportunity to participate in Student's annual IEP. Rather, the meeting was postponed due largely to the conduct of Mother and Mr. Padron. The meeting was timely rescheduled to take place approximately three weeks later, on September 8, 2016, which was a mutually agreeable

date. The IEP team at the meeting included Mr. Padron and Parents, as well as District's counsel. An interpreter was present. Parents and Mr. Padron actively and meaningfully participated in the meeting. For example, they asked questions during the discussion of present levels and assessment scores, and District staff responded. Parents shared their concerns regarding Student's struggles with reading, and Student's teacher discussed how she measured his reading progress. Mr. Padron asked a question about the baseline of proposed goal number 4, and the resource teacher responded. Mr. Padron made suggestions about the wording of the accommodations, and District staff included those suggestions in the accommodations. Parents and Mr. Padron requested District to provide Student an assistive technology device, and District responded by offering an assistive technology assessment. The meeting was peaceful and productive. District sent Parents a Spanish-language copy of the IEP after the meeting.

36. Under these circumstances, District did not deprive Student of a FAPE by briefly postponing the IEP team meeting from August 15, 2016 to September 8, 2016.

STUDENT'S ISSUE 2B: DENIAL OF PARENTAL PARTICIPATION BY ATTEMPTING TO INTIMIDATE AND HARASS PARENT

37. Student contends that Ms. Kort's conduct on August 15, 2016, was oppressing and harassing, so as to prevent Parents from participating in the decision making process regarding the provision of a FAPE to Student.¹⁶ District contends that Ms. Kort acted appropriately and District did not intimidate or harass Parents so as to

¹⁶ In his closing brief, Student cites Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) in support of his position that harassment is prohibited. OAH has no jurisdiction to adjudicate any claims under those statutes, and therefore those statutes will not be considered in this Decision.

prevent them from participating in the decision making process regarding the provision of a FAPE to Student.

Applicable Law

38. Legal Conclusion 32 is incorporated by this reference.

Analysis

39. There was no evidence that District attempted to intimidate or harass Parent by reason of the events that occurred on August 15, 2016. Ms. Kort and other District personnel were prepared to hold the scheduled IEP meeting. Ms. Kort was surprised by the appearance of Mr. Padron, as she had not had notice of the advocate's participation. She was concerned that the presence of the advocate would require the presence of District's counsel, and she consulted Mr. Warren, her supervisor, to find out how to proceed. As she attempted to explain the situation to Mother and Mr. Padron, Mr. Padron became emotionally elevated. After speaking with Mr. Warren, Ms. Kort attempted to salvage the situation by offering Mother the option of proceeding with the meeting without Mr. Padron present, or of rescheduling the meeting to a convenient date for all participants. Mother and Mr. Padron rejected both options, and insisted that the IEP meeting go forward as scheduled.

40. Mother's version of the incident, that Ms. Kort lost her temper and grabbed a paper out of Ms. Daliva's hand and ripped it, was not supported by any other witness.

41. The fact that District and Mother had a dispute over how to proceed to have a meaningful IEP meeting does not mean that District was trying to intimidate or harass Parent. Rather, the evidence showed that Ms. Kort was primarily concerned with the issue of how to handle an unexpected situation in an appropriate manner so as to protect the rights and interests of District and yet not violate Parents' and Student's

rights and interests. Ms. Kort offered a compromise to attempt to resolve an uncomfortable and stressful set of circumstances, and the evidence reflected that she was the only person in the room who did so. Her conduct ultimately resulted in a productive IEP meeting only a few weeks later, on a date agreed to by all parties. None of these facts, or any other evidence presented regarding the events of August 15, 2016, reflected any attempt or intention on the part of District to harass or intimidate Mother.

42. Student did not meet his burden of demonstrating that District harassed or intimidated Parents, or that Parents were deprived of their right to participate in the decision making process regarding Student's educational program on this ground.

STUDENT'S ISSUE 2C: DENIAL OF PARENTAL PARTICIPATION BY PROPOSAL TO CHANGE STUDENT'S PLACEMENT

43. Student contends that District unilaterally decided to change Student's placement for the 2016-2017 school year, and that District did not provide prior written notice regarding the proposed change. District contends that the proposal to change Student's placement to a special day class did not deprive Mother of the opportunity to participate in decision making regarding Student's education. District further contends that, assuming District was required to provide prior written notice under the circumstances, there was no denial of a FAPE because District honored Mother's refusal to consent to the change of placement and did not change the placement.

Applicable Law

44. Legal Conclusion 9 is incorporated by this reference.

45. The law does not require that an IEP team meeting be held to change a Student's placement as long as the change is documented in writing and the team is advised of the changes. (34 C.F.R. 324 (a)(4)(i), (ii).)

46. A school district must provide written notice to the parents of a pupil

whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action proposed or refused by the agency, (2) an explanation for the proposal or refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposal or refusal, (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards, (4) sources of assistance for parents to contact, (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's proposal or refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b).)

47. Prior written notice should be given regardless of whether a parent or the school district suggested the proposed change, and regardless of a parent's position as to the proposed change. (Office of Special Education Programs, *Letter to Lieberman*, 52 IDELR 18 (August 15, 2008).) An IEP may constitute part of the prior written notice so long as the documents the parent receives meet all the requirements in 34 Code of Federal Regulations part 300.503. (*Ibid.*) Verbal notice to the parents does not fulfill the prior written notice requirements of the IDEA. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, cert. den. (1994) 513 U.S. 965.)

Analysis

48. District did not unilaterally attempt to change Student's placement, as Student contends. At the March 4, 2016 IEP meeting, Mother had expressed concern as to Student's progress, and raised the question as to whether Student should be taught in a small group. In response to Mother's concerns, a teacher theorized that a special

day class might be an appropriate placement for Student. District offered Mother the opportunity to observe a special day class, and Mother observed a special day class program at Needham. Mother advised Ms. Daliva and Mr. Villafana that she liked the special day class program. Mr. Villafana advised Mother that he would begin to make arrangements for placement in a special day class. In June 2016, Ms. Daliva prepared an IEP amendment to change Student's placement to a special day class. No IEP team meeting was necessary to change Student's placement as long as all parties consented to the change. District presented Mother with the proposed IEP amendment, and Mother discussed the proposed amendment by telephone with Mr. Villafana. When Mother learned that the special day class Student would attend would not be located at Needham, where Mother had observed the special day class, Mother decided that she did not want Student's placement changed. Mother also did not like that the IEP amendment changing Student's placement was developed without her participation. Mother declined to sign the IEP amendment. District did not make any further efforts to change Student's placement.

49. Student is correct that District's conduct in presenting Mother with an amended IEP to change Student's placement to a special day class constituted a "proposal to change the placement" of Student, such that District was required to provide prior written notice to Parents. However, District did not unilaterally attempt to change Student's placement. District reasonably believed that Mother desired the change in placement to a special day class, based upon Mother's comments, and, when District learned that Mother did not wish to change Student's placement as provided by the proposed amended IEP, District dropped the issue entirely. Furthermore, under these circumstances, District's failure to provide prior written notice was a procedural violation that did not amount to a denial of a FAPE.

50. A procedural violation only constitutes a denial of FAPE if the violation (1)

impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. None of those circumstances applied here, because Mother decided not to sign the proposed amended IEP, and District never changed Student's placement. Consequently, District's failure to provide prior written notice did not impede his right to a FAPE or deprive him of educational benefit. Nor did District's failure to provide prior written notice significantly impede Parents' right to participate in the decision making process regarding Student's educational program. Indeed, when Mother decided that she did not want Student placed in a special day class at a school other than Lawrence or Needham, Mother decided not to sign the proposed IEP amendment. District completely acceded to her wishes, and Student remained in the resource specialist program at Lawrence. District did not make any other proposals to change Student's placement. In short, here Mother was the ultimate decision maker with respect to Student's placement. District's failure to provide her with prior written notice did not significantly impede Mother's rights to participate in decisions regarding Student's educational program in any way. District did not deprive Student of a FAPE on this ground.

STUDENT'S ISSUE 3: DENIAL OF PARENTAL PARTICIPATION BY DENYING PARENTS' REQUESTS FOR A PSYCHOEDUCATIONAL ASSESSMENT

51. Student contends that District denied parental participation by denying Mother's requests for a psychoeducational assessment. Student contends Mother's inquiry at the August 21, 2015 IEP team meeting regarding why he was not tested more often may have been misinterpreted by the interpreter; that Parent actually meant "Why isn't Student assessed more often?;" and that this question constituted a request for a psychoeducational assessment. District contends that District considered Mother's request as an inquiry regarding the procedures for Dynamic Indicators testing. District

further contends that, with the exception of Parents' request for an independent assessment by letter of March 16, 2017, Parents did not make any requests for a psychoeducational assessment since their initial request in 2014, at which time District assessed Student and found him eligible for special education.

Applicable Law

52. A school district must ensure that a reevaluation of each child with a disability is conducted if the school district determines that the educational or related services needs of the child warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. (20 U.S.C. § 1414(a)(2)(A)(i),(ii); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1).) A reevaluation conducted under 34 Code of Federal Regulations part 300.303(a) may occur not more than once a year, unless the parent and the school district agree otherwise, and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, §§ 56043, subd. (k).)

53. A school district's failure to assess a student in all areas of suspected disability, or to conduct appropriate assessments, is a procedural violation of the IDEA. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

54. Legal Conclusion 9 is incorporated by this reference.

Analysis

55. Student's allegation that Mother requested psychoeducational assessments and that District did not respond to them is not supported by credible evidence. First, Mother attended each IEP team meeting relevant to this issue. She participated in them, and they were all interpreted for her. Until the due process hearing, Mother never criticized the interpretations at any of Student's IEP meetings. Under these circumstances, Mother's belated and unsubstantiated assertion that

perhaps her inquiry about assessments was not properly interpreted is not persuasive.

56. Second, Student presented no objective evidence that Mother's inquiries at an IEP meeting regarding how often Student was tested in reading during the discussion about Dynamic Indicators assessments constituted a request for a psychoeducational assessment. District staff acted reasonably in not considering Mother's inquiries as a request for a psychoeducational assessment.

57. Third, at hearing, Mother recalled asking the team why Student was not evaluated if his teachers thought he had attention issues, but there were no IEP notes documenting Mother's question. Student provided no corroborating evidence that Mother asked such a question of District staff at any time.

58. Fourth, there was no evidence that Mother ever followed up, by letter or otherwise, on any of these alleged requests for a psychoeducational evaluation. Fifth, Mother's testimony as to her alleged requests for psychoeducational assessments is not persuasive, in that Mother repeatedly refused to consent to District's assessment plan regarding Student's triennial psychoeducational and other assessments. Mother's refusals to allow District to perform a psychoeducational assessment of Student during the 2016-2017 school year call into question Mother's unsupported allegations that she requested District to perform such an assessment in the recent past.

59. In summary, except for the independent assessment that Parents requested by letter of March 16, 2017, which was resolved by the settlement of District's case, there was no objective evidence that Mother, at any relevant time, requested that District perform a psychoeducational assessment of Student, or pay for an independent psychoeducational assessment of Student. Consequently, District did not deprive Student of a FAPE on this ground.

ORDER

All of the relief sought by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided in this matter.

RIGHT TO APPEAL

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

DATED: November 3, 2017

_____/s/_____

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings