

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN MARINO UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017040077

DECISION

Student filed a due process hearing request on April 3, 2017, with the Office of Administrative Hearings, State of California, and naming San Marino Unified School District. On May 16, 2017, OAH granted the parties' request for a continuance. Administrative Law Judge Robert G. Martin heard this matter in San Marino, California on August 29, 30, and 31, 2017, and September 1, 2017.

Mark Woodsmall and Max Goldman, Attorneys at Law, represented Student. Parents attended the hearing on behalf of Student. Student did not attend the hearing. Sundee Johnson, Attorney at Law, represented District. Special Education Director Abigail Cabrera attended the hearing on behalf of District.

At the parties' request, OAH continued the matter to September 28, 2017, for written closing arguments. The record closed on September 28, 2017, upon timely receipt of closing briefs from the parties.

ISSUES¹

(1) Did District deny Student a free appropriate public education by failing to appropriately assess him in all areas of known or suspected disability in his triennial assessment presented at Student's March 17, 2016 individualized education program team meeting, specifically, by failing to conduct a functional behavior assessment?

(2) Did District fail to offer Student a FAPE at Student's March 17, 2016, and March 24, 2016 IEP team meetings, by:

- a. Failing to offer Student an appropriate learning environment;
- b. Failing to offer Student research-based intervention;
- c. Failing to offer Student adequate speech and language therapy;
- d. Failing to provide Student a behavior support plan for the 2015-2016 and 2016-2017 school years;
- e. Failing to provide Student social skills support;
- f. Failing to provide Student a one-to-one aide; and
- g. Failing to provide Student appropriate extended school year services?

(3) Did District deny Student a FAPE by failing to offer Student any educational placement from March 2017 to the filing of the complaint?

(4) Did District violate the procedural requirements of the Individuals with Disabilities Education Act, and as a result deny Student a FAPE, by:

- a. Failing to timely convene Student's annual IEP team meeting in March 2017;

¹ At Student's request, issues 2, 3, 4.d, and 6.b set forth in the order following the prehearing conference in this matter were dismissed without prejudice on August 29, 2017. The remaining issues are re-numbered in this decision.

- b. Impeding Parents' right to participate in the IEP process during Student's March 17, 2016 and March 24, 2016 IEP team meetings by ignoring Parents' concerns and questions regarding Student's services and placement;
- c. Failing to consider the findings of Parents' private expert at the March 17, 2016 and March 24, 2016 IEP team meetings; and
- d. Failing to provide Parents appropriate prior written notice of District's refusal to provide Student speech and language services through a non-public agency?

SUMMARY OF DECISION

District denied Student a FAPE in its March 2016 IEP by failing to offer Student individual speech and language services necessary for Student to make progress on goals developed to address Student's newly-identified specific learning disability arising from his deficits in reading comprehension and written expression, and in auditory and cognitive processing. District also denied Student a FAPE by failing to timely convene Student's March 2017 annual IEP team meeting, and failing to make any offer of FAPE to Student for the 2017 extended school year or the 2017-2018 school year.

As a remedy, District shall reimburse Parents for Student's privately-obtained speech and language therapy and consultative services for the 2016-2017 school year and the 2017-2018 school year. Parents are also awarded costs of Student's tuition at a non-public day school for the 2017-2018 school year. Finally, District is ordered to convene an IEP team meeting no later than February 1, 2018, to develop an IEP for Student's 2018-2019 school year, and to review Student's eligibility for 2018 extended school year services.

FACTUAL FINDINGS

1. Student, at the time of filing, was a 12-year-old fifth-grader eligible for special education and privately-placed by his Parents in a non-public day school. Student was first found eligible for special education at age three in 2008 under the primary category of autism, and subsequently was found to have needs in the areas of speech and language, reading comprehension and written expression. Student generally scored in the average to above average range on tests of academic achievement, but had a history of relating inappropriately to others, difficulty communicating appropriately, and exhibited self-stimulating behaviors, peculiar motor mannerisms, resistance to controls, and an obsession to maintain sameness. Student and one or both Parents resided within District's boundaries at all times relevant to this decision.

2. In 2008-2010, the East Los Angeles Regional Center Student provided Student 20 hours per week applied behavioral analysis therapy to reinforce and encourage positive behaviors and discourage negative behaviors associated with his autism. Parents also privately funded play-based therapy and occupational therapy for Student. These early interventions were successful in improving Student's academic and social development, and he entered kindergarten as a bright and enthusiastic learner.

2013 IEP

3. Parents last consented to an IEP on October 2, 2013, when Student was in first grade. This IEP found Student eligible for special education under a primary category of autism and a secondary category of speech and language impairment. In first grade, Student attended a general education class at Valentine Elementary School, and received special education counseling, speech and language, occupational therapy, and adaptive physical education services.

2014-2015 THIRD GRADE IEP

4. Student's third grade IEP team for the 2014-2015 school year at Valentine met in October and November 2014, January, and March 2015, and on April 20, 2015, to develop Student's annual IEP. At the April 20, 2015 IEP team meeting, District offered Student continued eligibility for special education under the primary category of autism and the secondary category of speech and language impairment, with continued placement in a general education class at Valentine elementary school. The following services were to be provided by District personnel: (1) four hours per school day aide support; (2) 30 minutes per school week individual counseling and guidance; (3) 45 minutes per school week consultation/generalization counseling and guidance; (4) 60 minutes per week group speech and language; (5) 60 minutes per week individual speech and language; (6) 30 minutes per week speech and language consultation; and (7) 100 minutes per month occupational therapy consultation. District also offered Student extended school year services of 30 minutes group speech and language and 30 minutes individual speech and language.

5. The IEP indicated that Student demonstrated behavior that limited his learning; namely, limited attention when engaged in sensory stimulation for the purpose, referred to as "function," of self-regulation. District proposed three annual goals to address Student's self-regulation and attention. Noting that Student utilized sensory strategies including leg pushes with resistance elastic, hand squeezes, and chair pushups to self-regulate and maintain attention, District proposed a goal to improve Student's attention to task. The goal required him to use sensory strategies to stay focused during instruction with one non-verbal cue, as measured by his ability to complete his work without asking his teacher to repeat her directions. Student also frequently licked or spit in his hands, plugged his nose, or engaged in other similar behaviors, and District proposed a goal that Student use his pre-taught self-

regulation/behavior strategies instead of engaging in other self-stimulatory behaviors. To address Student's need for frequent prompting from his teacher, aide, and peers to commence an activity, District proposed a goal that Student learn to independently start activities within ten-seconds. District also proposed an additional nine annual goals for Student in the areas of social skills, handwriting, sensory regulation/attention to task, narrating a story effectively, using language to compare items, articulation of the /s/ sound, physical fitness, word recall, initiation of activities, reducing self-stimulatory behaviors, and typing.

6. Parents did not consent to any part of the April 20, 2015 IEP. Student began his fourth-grade school year at Valentine in the fall of 2015 with Student's October 10, 2013 IEP still in place. On October 15, 2015, Parents on behalf of Student filed a request for due process hearing with OAH, naming District in OAH case number 2015100621.

SPRING 2015 CALIFORNIA ASSESSMENT OF STUDENT PERFORMANCE AND PROGRESS

7. In the spring of 2015, Student participated in the California Assessment of Student Performance and Progress. Student met the state standard in mathematics, testing above standard in concepts and procedures, and communicating reasoning, and at or near standard in problem solving and modeling/data analysis. Student nearly met the state standard for English language arts/literacy, scoring at or near standard in reading, writing, listening and research/inquiry.

JANUARY 7, 2016 SETTLEMENT AGREEMENT

8. On January 7, 2016, Student and District entered into a settlement agreement to conclude Student's case number 2015100621. The parties agreed that the

settlement resolved all educational and legal issues between the parties– with certain exceptions not relevant here – arising on or before January 7, 2016.

9. Parents and District agreed to Student’s placement and services for the remainder of the 2015-2016 school year. District agreed to reimburse Parents² for the 2015-2016 school year for two and one-half hours per school day of one-on-one aide support provided by Meaningful Growth, a behavioral analysis clinic operated by Student’s private psychologist, Gwennyth Palafox, Ph.D., and four hours per month supervision by Meaningful Growth of the one-on-one aide. District also agreed to provide Student the following special education services at Valentine for the 2015-2016 school year: (1) 30 minutes per school week individual counseling and guidance; (2) 45 minutes per school week consultation/generalization counseling and guidance per school week; (3) 100 minutes per school month occupational therapy; and (4) meetings every other month with Parents, Student’s teachers, and Student’s District and Meaningful Growth service providers, to be held in person or by conference call. District also agreed to reimburse Parents for 40 hours of individual speech and language services to be provided to Student on or before August 15, 2016, by Student’s private speech and language providers Amy Johnson and Janelle Umfress. Parents agreed to exit Student from adapted physical education.

10. Parents did not consent to the eligibility, classroom placement, or services in the April 20, 2015 IEP. Parents did consent to the implementation of the goals and objectives developed as of the March 26, 2015 IEP team meeting, except for the adapted physical education goal made irrelevant by Parents’ agreement to exit Student from that service. The settlement agreement stated that it did not constitute a waiver of

² For purposes of reimbursement, the term “Parents” includes Student’s maternal grandfather, who paid for certain services for Student.

stay-put. Therefore, the IEP Parents agreed to in October 2013 remained Student's last agreed to and implemented IEP, as amended by the settlement agreement.

11. The parties each agreed to attend Student's 2016 annual and triennial IEP team meeting, to be scheduled and held on or before April 10, 2016. The settlement agreement contained no provisions regarding what assessments District, or Parents, would conduct for Student's 2016 IEP team to review.

MARCH 2016 FOURTH GRADE TRIENNIAL ASSESSMENT

12. In preparation for Student's 2016 fourth grade triennial IEP team meeting, District assessed Student in the areas of health, psychoeducation and academics, speech and language, and occupational therapy. Student was 10 and one-half years old at the time of these assessments. No assessment plan was put in evidence, and there was no evidence that Parents requested District conduct any particular assessments of Student. District's assessments were compiled for review by Student's IEP team in a 53-page Multi-Disciplinary Report dated March 17, 2016.

13. To assist the assessors' preparations, Parents each completed an updated developmental history form that solicited, among other things, their concerns about Student. Father was concerned about developing Student's self-advocacy skills, his ability to fit in with his peers, and his ability to understand the difference between being teased and friendly "banter." Mother was concerned about Student's academic progress, his need to improve attention and focus, language, and expressive writing. She also wanted to see Student develop socially and engage in more peer-driven activities.

14. When interviewed by District's speech and language pathologist Tina Lee, Mother was concerned about Student's lack of eye contact, tendency to interpret messages literally, inflexibility in writing, and difficulties understanding sarcasm and jokes. Father expressed concern about Student's articulation skills, poor self-expression,

and weaknesses in narrative language after reading a passage or telling his own experiences.

15. In phone interviews with District occupational therapist Vanessa Caulfield, Father stated concerns about Student's ability to sustain attention, his handwriting legibility, and sensory processing. He also shared concerns that Student would not check his work, and was not motivated to do so. Mother expressed concern that Student had recently fixated on picking the skin off his hands. Mother wanted Student to learn a different self-regulation strategy that didn't involve picking his skin.

16. Ms. Caulfield also spoke with Student, asking Student if there were areas in which he wanted assistance or needed help. Student stated that he did not need help with anything.

17. Student's classroom teacher Heather Floyd completed a teacher input form, and was interviewed by Ms. Lee. She expressed concern that Student was often quiet in class, sometimes required reminders to follow directions, and had difficulty requesting assistance, clearly stating a main idea, or expressing displeasure.

18. The report noted that Student was receiving non-District services including applied behavior analysis treatment from Meaningful Growth, speech and language therapy from Ms. Johnson and Ms. Umfress, and psychological support from clinical psychologist Mona Delahooke. Ms. Lee spoke with Ms. Johnson while preparing her assessment, but District assessors did not speak with Ms. Umfress, anyone from Meaningful Growth, or Dr. Delahooke, prior to completing the assessment.

Health Assessment

19. School nurse Karen Gines completed Student's health assessment. Student passed vision and hearing screenings, and his eye tracking was within normal limits. Student could perform simple balance and coordination acts within normal limits. He

was in good health, with no physical impediments to learning. Student was taking medication for attention deficit hyperactivity disorder.

Psychoeducational and Academic Assessments

20. District school psychologist Rachel Guest (formerly Rachel Gaynon) assessed Student's cognitive functioning, visual and auditory processing, adaptive and problem behaviors, autistic-like behaviors, and social skills. Ms. Guest was familiar with Student. She first met him when he was in first grade, and provided him individual and group counseling in grades two through four, working on his social skills, self-advocacy, and problem solving. In the 2015-2016 school year, Ms. Guest saw Student at recess three times each week, and frequently in his general education classroom.

21. To develop her assessment, Ms. Guest reviewed Student's previous assessments, Parents' updated developmental history forms, and the teacher input form. She interviewed Student and observed him in a structured classroom setting and unstructured recess setting. Ms. Guest also administered seven standardized psychological tests. District special education teacher, Colleen Levy, administered four academic tests to measure Student's overall academic achievement and specific skills related to his reading and writing.

Observations of Student

22. In preparing her assessment, Ms. Guest formally observed Student twice in class and once at recess. She also informally observed Student several times during recess. Ms. Guest first formally observed Student in a math/writing lesson in his general education classroom. Student was seated at the front, in a cluster of desks with eight other students. He tracked his teacher with his eyes and head as she described the day's schedule and moved around the room. His teacher gave multi-step directions to take out the necessary materials for correcting math homework. Student transitioned well,

and without additional prompting, immediately opened his desk to retrieve his materials. Student promptly complied with his teacher's instructions, marking his homework immediately after she provided each answer. When a whole group prompt was given asking students to turn their homework in, Student again responded immediately handing his paper toward the front of his table group.

23. Preparing to distribute math tests, the teacher reviewed the list of tasks/assignments on the board and instructed the students about what to do after they completed and submitted their tests. Student watched his teacher as she pointed and spoke to each item on the board. When math tests were distributed to the students, Student put his elbows on his desk and rested his head on his hands as he looked through the test while his teacher read the instructions and directions for each problem. While the teacher asked the class about measuring angles, Student was fully engaged in completing his test. He began working immediately. After two minutes Student self-corrected his slouching posture and sat upright. He removed his protractor without prompting to complete the test questions involving angles. When a classmate's watch began beeping during the test, Student did not seem bothered by the distraction. Student completed his test, reviewed it for approximately one minute and subsequently stood up to submit it.

24. Student returned to his desk and looked to the list of post-test activities posted on the classroom board. Student quietly took out the next item on the list from his desk, and independently initiated the task and continued working for the duration of the observation. Student responded amicably when approached by his teacher to complete an area left blank on his test. He transitioned back to his desk assignment once he made the correction and the test was collected by his teacher. Overall, Student's behavior did not differ from his peers or appear to hinder his access to learning. When asked, his teacher reported Student's behavior during this observation was typical.

25. The following week, Ms. Guest formally observed Student as he and three peers transitioned from physical education to afternoon recess. Student and peers walked over to the sandbox located on the far side of the playground. They engaged in conversation with one another as they moved in, out, and around the sandbox for the duration of recess. When the warning bell rang, Student and two peers walked side by side toward the blacktop, to the science bungalow. One of the students walked onto the ramp and waited outside of the door while Student and the other student waited at the bottom of the ramp. A same-age girl approached Student and his peer where other students began to congregate. The final bell rang and, as required, Student stopped talking with his peers and stopped moving. The closing recess whistle blew and Student lined up with his classmates, standing fifth in line.

26. Ms. Guest observed Student informally during morning and afternoon recess throughout the week of March 7 through March 11, 2017. Student's one-to-one aide was not present. Each day, Student maintained successful engagement with at least two other peers for the duration of free time. He and his peers walked to the same area on the playground each day – a bench located in the shade and near the sandbox. Student and his peers would sit on the bench or move around it as they engaged in dialogue. Consistently, when the warning bell rang, Student and at least one other peer began transitioning back to class, guiding one another to the correct location.

27. Ms. Lee and Ms. Caulfield also observed Student. Based on information from all three observers, the Multidisciplinary Report concluded Student engaged in appropriate peer interactions, transitioned easily from one activity to another, and demonstrated age appropriate behavior. However, his attention in class was inconsistent. The assessors recommended that the IEP team consider if Student could be successful in independent learning in a general education classroom.

28. Ms. Guest administered assessments to Student over several days. Each day, Student arrived at the office from his classroom and greeted this examiner

appropriately. His clothes were consistently neat and appropriate for school. Student was pleasant and cooperative. Student initiated and maintained conversation appropriately. He reported his mood to be good and his affect was consistent with that. Student's ability to attend to tasks was age appropriate and was adequate for evaluation purposes. Behavior exhibited during evaluation sessions was consistent with teacher reports of behavior exhibited in the classroom. He displayed appropriate facial expressions and his speech was readily understandable. There were no noticeable psychomotor difficulties, and his gross and fine motor functioning appeared to be intact.

29. Student's short and long-term memory appeared to be intact. Student was oriented to time, place, person, and circumstances. During the tests, Student demonstrated appropriate effort, and persisted when the tasks became difficult. He demonstrated positive problem-solving strategies including asking for clarification, asking for directions to be repeated, and self-correction.

Cognitive Assessment

30. Ms. Guest assessed Student's cognitive ability using the Kaufman Assessment Battery for Children – Second Edition. The Kaufman measures multiple factors relating to cognition in 10 subtests used to generate standardized scores in five scales and two overall indices. Overall, Student's mental processing abilities scored in the high average range. Student's scores on subtests ranged from average to very superior, except for a low average score in the area of verbal knowledge, which indicated Student had a relative weakness in expressive language skills.

31. Ms. Guest used the Motor-Free Visual Perception Test–Fourth Edition to measure Student's visual perception in five areas. Student performed in the average range on these tests, indicating that there were no deficits in Student's visual perception

that would interfere with his ability to access instruction that relied solely on visual models.

32. Ms. Guest used the Comprehensive Test of Phonological Processing – 2nd Edition, to assess Student’s auditory skills; that is, his ability to encode, synthesize and discriminate speech sounds used in spoken and written language. Student performed overall in the average range, except that he had low average to below average abilities to store sounds in his short-term memory, and to blend sounds to form real words and made-up “nonwords” (invented words designed to be new to the person assessed).

Behavior and Social-Emotional Functioning

33. Ms. Guest administered the Behavior Rating Inventory of Executive Functioning to Parents and Student’s general education teacher, Heather Floyd. This test compared Student’s behavior to same-age peers, and evaluated potential deficits in his executive functioning that might interfere with his ability to engage in purposeful, goal-directed, problem-solving behavior at home and at school. The test results yielded two indexes: a Behavioral Regulation Index, and a Metacognition Index.

34. Student’s Behavioral Regulation Index summarized his ability to inhibit or control his impulses, shift from one activity or situation to another, and exercise emotional control by appropriately regulating his emotional responses. Behavioral regulation enables cognitive processes to successfully guide active systematic problem solving. Student scored in the average range in behavioral regulation at home and school.

35. Student’s Metacognition Index summarized Student’s executive functioning – his ability to initiate an activity and independently generate ideas or problem-solving strategies, hold information in working memory when completing a task, plan for future events and organize the main points in written or verbal presentations, organize materials, and monitor his own performance and the effect of

his behavior on others. This index reflected Student's ability to self-manage and complete tasks and actively problem solve in a variety of contexts.

36. Overall, Student presented average to slightly elevated "high average" levels of deficit in his executive functioning. Ms. Floyd's and Mother's responses scored Student overall in the average range in the Metacognition Index, while Father perceived greater problems, and scored Student in the "high average" range for dysfunction in this area. Student's most significant difficulty was in independently generating ideas and problem-solving strategies, areas in which Ms. Floyd rated Student as having moderately "elevated" levels of dysfunction, and Father rated Student as having "highly elevated" levels of dysfunction.

37. Ms. Guest used the parent, teacher and student rating scales of the Behavior Assessment System for Children, Second Edition, and the Behavior Assessment System for Children, Self-Report of Personality, to assess the strengths and weaknesses of Student's behavior and feelings. These tests were also designed to help diagnose and classify any emotional and behavioral disorders Student might exhibit.

38. The parent-teacher rating scales rated Student in 16 areas, and yielded four composite scores: Externalizing Problems, Internalizing Problems, Behavioral Symptoms, and Adaptive Skills. Mother and Student's teacher, Ms. Floyd, rated Student average in all of these indexes. Ms. Floyd also rated Student as average in School Problems, an index derived solely from teacher responses. Father's scores yielded an "at risk" rating for Student in the Behavioral Symptoms and Adaptive Skills indexes. These "at risk" scores signified the possible presence of disorders in these areas.

39. Of the 16 individual rating scales, Ms. Floyd rated Student in 15 areas, and Parents rated Student in 14 areas. Ms. Floyd did not rate Student in the area of activities of daily living, and Parents did not rate Student's learning problems or study skills. Ms. Floyd rated Student as average in all areas except withdrawal (the tendency to avoid or struggle with social interactions), where she rated Student "at risk." Parents rated

Student as average in nine of fourteen areas. They, like Ms. Floyd, rated Student “at risk” in the area of withdrawal. Parents’ responses identified potential problems for Student in the areas of attention, atypicality (the degree to which Student behaved in a manner that appeared immature, odd, or associated with autism), leadership, activities of daily living (the ability to perform everyday tasks independently without reminders), and functional communication (the ability to use basic communication skills to present ideas, describe his feelings, respond appropriately to questions, and get information).

Autistic-Like Behaviors

40. To evaluate whether Student continued to exhibit autistic-like behaviors, and to estimate their severity, Parents and Ms. Floyd completed the Gilliam Autism Rating Scale – 3rd Edition, a norm-referenced, survey-based assessment based on the 2013 diagnostic criteria for autism spectrum disorder adopted by the American Psychiatric Association and published in the *Diagnostic and Statistical Manual of Mental Disorders–Fifth Edition* (DSM-5). The assessment listed characteristic behaviors of persons with autism spectrum disorder, and asked Parents and teacher to rate how often Student exhibited each behavior. The items were grouped into six subscales: restricted/repetitive behaviors, social interactions, social communication, emotional responses, cognitive style, and maladaptive speech, and yielded an autism index reflecting the probability of autism spectrum disorder, its DSM-5 level of severity, and the level of support required by Student.

41. Overall, Parents’ and Ms. Floyd’s responses confirmed that Student continued to exhibit mild to moderate levels of autistic-like behavior. Ms. Floyd’s responses based on Student’s behavior at school rated Student as probably having autism spectrum disorder, at DSM-5 level one, requiring minimal support. Mother’s responses rated Student as very likely having autism, at DSM-5 level two, requiring substantial support, and Father’s responses rated Student as very likely having autism, at

DSM-5 level three, requiring very substantial support. Ms. Floyd and Parents all indicated that Student engaged in certain restricted/repetitive behaviors (stereotyped behaviors, fixated interests, routines, or rituals); namely, (i) if left alone, most of Student's time would be spent in repetitive or stereotyped behaviors; (ii) Student could be preoccupied with specific stimuli that are abnormal in intensity; and (iii) Student stares at hands, objects, or items in the environment for at least five seconds. Ms. Floyd and Parents also agreed that in social communication, Student had difficulty understanding slang expressions, and in cognitive style, Student displayed an excellent memory.

Social Skills

42. Ms. Guest had Parents, Ms. Floyd, and Student complete the Social Skills Improvement System Rating Scales to provide additional information concerning Student's positive behaviors necessary to get along with others, and problem behaviors potentially interfering with Student's ability to get along with others. This assessment offered a broad assessment of Student's social behaviors affecting his teacher-student relationship, peer acceptance, and academic performance. The assessment collected responses in 12 sub-scales, which were summarized in two indexes: a Social Skills Index, and a Problem Behavior index.

43. Overall, despite some below-average scores in specific areas, Student rated average in the Social Skills Index, and the Problem Behavior index, based on responses from Ms. Floyd, Mother, and Student. Ms. Floyd's responses rated Student as having average skills in cooperation, responsibility, empathy, and self-control, and below average skills in communication (such as making eye-contact), assertion, and engagement (making friends, inviting others to join an activity). Mother's responses rated Student average in the subscales of communication, cooperation, responsibility, engagement, and self-control, and below average in assertion (such as asking for help) and empathy (such as feeling bad when others were sad). Student rated himself as

having average social skills in all areas. Father's responses rated Student well-below average in social skills, based on below average subscales in communication, assertion, responsibility, and empathy.

44. Mother's and teacher's responses also placed Student in the average range in the Problem Behavior index, as well as in the average range in all five subscales of that index (externalizing, bullying, hyperactivity/inattention, internalizing, and autism spectrum). Student rated himself as average in all subscales except hyperactivity/inattention, in which he rated himself "below average," indicating that he saw himself as having had fewer problems than average in that area. Father's responses rated Student above average in problem behaviors. His subscale responses rated Student average in externalizing and bullying, and above average in hyperactivity/inattention, internalizing (such as withdrawing from others or acting sad), and autism spectrum.

Academic Achievement

45. Special education teacher Ms. Levy began her assessment of Student's academic achievement by administering Student the Woodcock-Johnson IV – Tests of Academic Achievement. This measured Student's achievement in four broad academic domains: reading, written language, mathematics, and academic knowledge. Student was strong in mathematics. His abilities in problem solving, computational skills, number facility, automatic recall of basic math facts, reasoning knowledge, and cognitive processing speed placed him in the high average range in broad mathematics skills and math calculation skills. Student also scored in the high average range in academic fluency, a measure of his ability to read and formulate simple sentences quickly, and solve simple addition, subtraction, and multiplication facts quickly. He also scored in the high average range in sentence reading fluency (the ability to read and understand simple sentences quickly).

46. Student had difficulty reading and comprehending more complicated text. He scored in the average range in reading recall (reading a short story silently and then retelling as much of the story as can be recalled), and his only below average skill on the entire test was in passage comprehension (using syntactic and semantic cues to identify the missing words in paragraphs of increasing complexity.) Student's reading comprehension and overall reading skills were both in the low average range.

47. To confirm the apparent discrepancy between Student's basic reading skills and his ability to comprehend longer and more complicated passages, Ms. Levy administered additional tests – the Gray Diagnostic Reading Tests – Second Edition, and the Gray Oral Reading Tests – Edition 4. On the Gray Diagnostic Reading Test, Student's letter/word identification, phonetic analysis, and reading vocabulary scores all fell within the average range. Student's decoding skills were at grade level. However, Student's meaningful reading score fell within the below average range, again showing a weakness in reading comprehension skills.

48. Similarly, on the Gray Oral Reading Test, Student's rate, accuracy, and fluency scores all fell within the average range. His decoding skills were at grade level. However, his comprehension score again fell within the below average range, and his overall reading ability also scored within the below average range due to his lower score on the comprehension portion of the assessment.

49. All three reading assessments given showed Student to have grade level decoding skills, but below grade level comprehension skills. Student's reading grade level was approximately two years below his then-current grade level, as determined by the three assessments given.

50. Student's scores on written expression on the Woodcock-Johnson – IV were all within the average range. However, that test only assessed writing at the sentence level, and did not require Student to write a spontaneous paragraph. Ms. Levy therefore administered the Test of Written Language – Fourth Edition, to determine

Student's ability to write at a more sophisticated level, such as his ability to write full paragraphs or essays.

51. The Test of Written Language included two sections of contrived writing, which measured Student's ability to use basic vocabulary, spelling, punctuation skills to write sentences, as well as his skill in editing an illogical sentence to make sense, and to combine several short sentences into one correct, longer sentence. Student scored in the average range in all areas except sentence combining, where he scored in the above-average range.

52. Student had difficulty on the spontaneous writing portion of the test, which required him to write a story in response to a picture prompt. Student scored in the below average range in his ability to follow conventions of spelling, punctuation, and sentence construction in his story. He scored in the poor range in his ability to compose a story that demonstrated sophisticated vocabulary, plot, prose, or development of characters, and was interesting to read. His spontaneous writing was mostly a series of events listed in run-on sentences.

Conclusions From Psychoeducational and Academic Assessments

53. The assessment test and surveys indicated that Student had cognitive and processing strengths in Fluid Intelligence (Planning) and Visual Processing (Simultaneous) skills. These skills facilitated Student's ability to draw inferences, solve abstract problems, create solutions to problems, transfer and generalize information, solve unique problems, transform and extend a product or concept (rather than matching or reproducing a stimulus), think conceptually, and problem solve through rule application. This was consistent with academic testing, where Student demonstrated average to high average math skills.

54. Student was relatively weak in Crystallized Intelligence (Knowledge Index). Academic tasks that rely on this process include: learning vocabulary, answering factual

questions, comprehending oral and written language, acquiring general knowledge and knowledge in content areas, using prior knowledge to perform activities, and understanding new concepts. This was consistent with academic testing, where Student demonstrated at below average skills in the areas of spontaneous writing and low average ability in reading comprehension.

55. Although Student had a low average score in phonological memory on the Comprehensive Test of Phonological Processing, this deficit was not noticeably impairing Student's word-level reading or listening to a noticeable extent. Student's letter/word recognition, phonetic analysis, and reading vocabulary all fell within the average range on the Gray Diagnostic Reading Tests. Student also scored in the average range in letter-word identification, and in the high average range in sentence reading fluency, on the Woodcock-Johnson Tests of Achievement.

56. Student consistently displayed the learning profile and behavioral characteristics of a child with autism spectrum disorder, at school and at home. Student's atypical and withdrawal behaviors were primarily related to Student's autism spectrum disorder, and not to any significant behavioral disorder. The assessor, Ms. Guest, was unsure how much Student's autism impacted his education.

57. Ms. Guest found that Student was generally displaying age-appropriate social skills, a favorable outcome considering his autism spectrum disorder. She attributed Student's success to the intensive interventions Student had received since before he was three years of age, both in and outside of school. Ms. Guest recommended continued social skills intervention to address four social skills weaknesses that were not atypical for a child his age, but might become problematic. These were: giving and maintaining appropriate eye contact in the classroom environment; showing an understanding of others' points of view when his is in conflict with theirs; further practicing prosocial interpersonal communication (e.g., negotiation, winning arguments, listening, how to start and finish a conversation acceptably); and

demonstrating adequate assertion, such as initiating behaviors, such as asking others for information, introducing himself, and responding to the actions of others.

Functional Behavior Assessment

58. Ms. Guest did not conduct a functional behavior assessment because Student did not exhibit any behaviors that Ms. Guest believed needed to be addressed using a behavior intervention plan. She did not observe behaviors that would require a behavior intervention plan and no-one at the time, including Parents, reported that they believed Student was exhibiting behaviors that required a functional behavior analysis.

59. At hearing, Student's clinical psychologist, Dr. Delahooke, testified regarding several of his behaviors that she believed warranted a functional behavior analysis: changing topics quickly, walking away, mumbling, picking his nails, licking his hands, and touching the wall. Dr. Delahooke had worked with Student since 2008, providing him play-based therapy, and had observed him in class in kindergarten, first and second grade. She had not observed Student in Ms. Floyd's class. Dr. Delahooke believed that the function (purpose) of Student's behaviors was to relieve stress, which could be confirmed with a functional behavior analysis. Dr. Delahooke viewed Student's behaviors as consistent with Neuroception theory, which theorizes that persons with autism may have abnormalities in the neural circuits that ordinarily allow people to subconsciously process situations and people and distinguish whether they are safe, dangerous or life threatening. Dr. Delahooke testified that Student was perceiving danger even in a safe classroom environment, and was struggling to remain regulated for learning. She believed that Student required supports to increase his sense of safety in the classroom; in particular, the presence in the classroom of a person – such as a one-on-one aide – whom Student trusted.

60. Dr. Delahooke testified that District was mistaken in viewing Student's nail-biting and hand-licking as self-stimulatory actions Student employed to provide himself

sensory input to remain calm and focused. She believed District was also mistaken in using positive reinforcement based on applied behavior analysis to modify Student's behavior, instead of using supports to increase his sense of safety.

61. Ultimately, Dr. Delahooke did not present persuasive arguments either that a functional behavior analysis was needed to determine whether Student was exhibiting behaviors to relieve stress, in accordance with Neuroception theory, or that Student required a one-on-one aide as a trusted classroom presence to maintain his sense of safety. Most importantly, Dr. Delahooke did not offer evidence that Student's behaviors interfered significantly with his ability to access his educational program. Also, Dr. Delahooke's argument that Student might be experiencing stress because he felt unsafe in the classroom was unsupported by any observation of Ms. Floyd's class. Dr. Delahooke testified that the presence of a trusted person might provide Student the sense of safety he required, but she did not know whether Student trusted Ms. Floyd, or, for that matter, the one-on-one aide provided to Student by Meaningful Growth. Although Dr. Delahooke suggested that District was mistaken in relying on applied behavior analysis theory to address Student's behaviors, his parentally-chosen aide from Meaningful Growth was, in fact, trained in applied behavior analysis and used it in working with Student. Finally, Student had received extensive applied behavior analysis therapy in the past, and had, by all accounts, benefitted from it.

Speech and Language Assessment

62. To assess Student's speech and language needs, District speech and language pathologist, Tina Lee, interviewed Student's private speech and language therapist Amy Johnson. She also observed Student in class and at recess, and administered seven standardized assessments to Student as part of her assessment.

63. Ms. Johnson reported that Student made progress towards his speech and language goals in story narration, expressive language, language processing, and

articulation, that were agreed to by Parents in the January 7, 2016 settlement agreement with District. His story-telling narration was more cohesive, he expressed himself using more compound-complex sentences, and better maintained verb tenses in conversation. In terms of language processing, Student could offer at least 20 association words/concepts when provided with a key theme, subcategorize at least 15 associations within the theme, and use the Expanding Expression Tool to organize a description of an object that includes at least five content categories (category, function, appearance, parts, location).

64. Ms. Lee used the Receptive One-Word Picture Vocabulary Test-4th Edition to test Student's word-recognition. Student was asked to listen to a word and select from several pictures the one best illustrating the word. Student scored in the average range for his age.

65. The Expressive Single-Word Vocabulary Test-4th Edition tested Student's vocabulary use. Student was asked to look at a picture and state the noun, verb or category which best described the picture. Student's responses fell within the average range. He could label cheetah, pyramid, shield, lobster, stool, compass, trumpet, batteries, ostrich, chess, microphone, thermometer, skydiving, stadium, measure, windmill, saddle, reptile, springs, boomerang, vehicle, laptop, celery, stump, fraction, dock, and feelings.

66. Ms. Lee administered the Clinical Evaluation of Language Fundamentals-Fifth Edition to test Student's functional language use, such as his ability to understand and repeat sentences, interpret word meaning, and judge and analyze the content of a message. Student's overall receptive and expressive language skills fell within the average range compared with peers. Student also scored within the average range on Index Scores including the receptive language index, expressive language index, language content index, and language memory index.

67. Student showed relative strengths in word definitions, word classes, following directions, and understanding spoken paragraphs. Student's ability to formulate, recall, and assemble sentences fell in the low average range. Student scored in the below average range on the semantic relationships subtest that required him to complete a sentence using two out of four visually presented words or phrases. Student had difficulty with items that contained longer sentences. For example, he could correctly respond to: "An hour is longer than a . . . a) minute b) day c) second d) morning" but incorrectly responded to: "Dan is taller than Jeff, and Lee is taller than both of them. Dan is... a) taller than Lee, b) shorter than Lee, c) the tallest, d) not the shortest." Ms. Lee found that although Student demonstrated strength in semantics, he experienced more difficulty when required to integrate the concepts and use them in cognitively more challenging tasks that require short-term memory and word retrieval, such as narration.

68. The Language Processing Test 3 Elementary tested Student's ability to attach meaning to auditory stimuli and retrieve and organize information to respond. Student had difficulties indicative of a possible mild language processing disorder in the areas of associations, categorization, and attributes.

69. Ms. Lee administered the Test of Narrative Language to measure Student's ability to comprehend and produce connected speech to tell a story. Student scored in the below average range. When asked to formulate and orally narrate a story about being late for school, Student had trouble with grammar, organization, and causal relationships, using incomplete sentences, disorganized ideas, and poor grammar. It was evident that Student experienced breakdowns in communication when he needed to synthesize his ideas to form coherent messages.

70. Parents and Student's general education teacher, Ms. Floyd, completed the Clinical Evaluation of Language Fundamentals-Fifth Edition Pragmatics Profile to help identify verbal and non-verbal deficits potentially interfering with Student's social and

academic communication. Their responses each indicated that Student exhibited significant deficits in his pragmatic speech and rated his skills as poor. Areas of deficiency identified by Parents included making/responding to greetings from others, beginning/ending conversations, making relevant contributions to a topic during a discussion, showing a sense of humor, understanding jokes, maintaining topics using typical responses (such as head nods), asking for or responding to requests for clarification during conversations, giving or asking for directions, or asking for clarification if Student was confused or if the situation was unclear.

71. Areas of deficiency identified by Ms. Floyd included expressing displeasure or frustration, responding appropriately when told a surprising story, responding appropriately to questions, and asking for help. Ms. Floyd reported that Student had made significant progress in 2016 in his ability to speak and interact with partners in class compared to the beginning of the school year, when he was very quiet.

72. During her test sessions with Student, Ms. Lee observed that he had difficulty initiating greetings and maintaining eye contact. During her classroom observations of Student, Ms. Lee observed that Student had difficulty responding to questions that required him to understand and consider concepts broader than the facts contained in the question.

73. Ms. Lee assessed Student's speech articulation using the Clinical Assessment of Articulation and Phonology-Second Edition. Student continued to stick his tongue out between his front teeth when articulating the /s/ sound, making it sound like "th," and he spoke at a fast rate, which together made his speech sound slurred. Ms. Lee judged that a trained listener could understand 95 percent of Student's speech in contexts not known to the listener. Student's teacher, Ms. Floyd, reported that Student's teachers and peers understood him without difficulty, and his speech intelligibility was not an issue. Ms. Lee found Student's voice and fluency skills fell within normal limits.

74. Summarizing the results of her assessment, Ms. Lee found that Student's overall language skills fell within the average range, but Student had deficits in syntax and narration. Student could perform in the context of isolated language tasks, but when higher demands were placed on him to organize thoughts and express them cohesively, Student rambled without a point, his language became simplified, and errors in grammar increased. Student's pragmatic speech skills were also delayed. Ms. Lee recommended that Student continue to receive speech and language therapy to increase speech skills, expressive language, and pragmatic skills.

MARCH 2016 IEP TEAM MEETINGS

March 17, 2016 IEP Team Meeting

75. Student's IEP team met on March 17, 2016, to consider Student's triennial assessment and develop his IEP. Parents and Student's attorney attended, as did Ms. Floyd, Ms. Gines, Ms. Guest, Ms. Levy, Ms. Lee, District occupational therapist Vanessa Caulfield, District Director of Special Education Linda White, Valentine Principal Colleen Shields, District Program Specialist Jennifer Lozano, District legal counsel, and an unidentified Meaningful Growth representative.

76. District provided attendees copies of a draft IEP and copies of District's multi-disciplinary assessment report. Ms. Guest reviewed Parent and teacher concerns, and Student's educational history. Ms. Gines reviewed the hearing and vision screening results.

77. Ms. Guest described her interview of Student and Ms. Lee described her interview of Student's private speech and language therapist, Ms. Johnson. Ms. Guest, Ms. Lee, and Ms. Caulfield each described their observations of Student. Ms. Guest described the standardized assessments she used to evaluate Student's psychoeducational needs, and reported the results of her testing. Ms. Levy reviewed the results of her academic achievement assessments. Ms. Lee reviewed her assessment

results in language and speech. She noted, among other things, that Student demonstrated significant weaknesses in his expressive language, receptive language, and pragmatic speech. Ms. Lee recommended that Student receive speech services to address his difficulties in articulation and phonology, even though Ms. Floyd reported that at school Student's difficulty articulating the /s/ sound did not interfere with Student's intelligibility. Ms. Lee noted that Student's overall language skills fell within the average range, however, because deeper examination revealed deficits in the areas of syntax, narration, language processing, articulation, and pragmatics, Ms. Lee recommended that Student continue to receive speech and language services to increase speech skills, expressive language, and pragmatic skills.

ELIGIBILITY

78. The IEP team discussed Student's eligibility for special education. Ms. Guest reviewed eligibility criteria for specific learning disability, and reported that the psychoeducational assessments indicated Student qualified for eligibility as a student with a specific learning disability, based on a severe discrepancy between Student's intellectual ability and his achievement in reading comprehension and written expression. Ms. Lee reported that Student continued to qualify for special education under the category of speech and language impairment.

79. Ms. Guest suggested that Student's current assessment data no longer supported his eligibility under the category of autism. Parents and other team members thought that autism remained an appropriate basis for eligibility. The team discussed Student's behaviors that were and were not consistent with autism. The Meaningful Growth representative reported that Student's tendency to internalize is consistent with autism. Ms. Floyd reported that Student did not initiate when participating in group tasks, but does participate in groups when given prompting and support. Special education teacher Ms. Levy reported that she saw a similar pattern of language use as

Ms. Lee when Student was completing the academic assessment portions of the evaluation, in that Student was able to list information, but was not able to put the information together in an explanation. Ms. Floyd agreed that, in responding to a test or homework problem, Student struggled accessing outside information not presented within the text of the problem. She observed that this type of task would continue to get more difficult as Student progressed through the common core curriculum.

80. The IEP team considered the education code eligibility criteria for autism, but reached no decision on autism eligibility at this meeting. Student's attorney complimented the team on the thoroughness of the assessments and completeness of the assessment report, and asked the team to consider the improvements that Student is demonstrating resulting from the educational supports and interventions that were in place. The team discussed the three eligibility criteria (autism, speech and language impairment, and specific learning disability) to be considered for Student, and agreed to adjourn the meeting and continue the discussion on March 24, 2016. Parents did not consent to that IEP or eligibility.

March 24, 2016 IEP Team Meeting

ELIGIBILITY

81. Student's IEP team reconvened on March 24, 2016, with the same participants attending, except that Father did not attend, and a different Meaningful Growth representative, Behavior Supervisor Amanda Hsu, was present. Ms. Guest reconfirmed that Student met the eligibility criteria for specific learning disability, based on his deficits in reading comprehension and written expression, and in auditory and cognitive processing. Ms. Levy re-confirmed that Student met eligibility criteria for speech and language impairment, based on his deficits in pragmatic speech. The IEP team then re-considered Student's eligibility under the criteria for autism and concluded that Student met the criteria. The team agreed that Student should be primarily eligible

for special education as a student with autism, and secondarily eligible as a student with a specific learning disability.

PROGRESS ON GOALS

82. The IEP team reviewed Student's progress towards meeting his previous goals, and determined that he had met the following goals: social skills, socialization, visual/fine motor/handwriting, sensory processing/regulation/behavior, behavior/occupational therapy, attention to task/fine motor/visual motor, and sensory processing. Student met his behavioral goal of independently starting an activity within 10 seconds of being asked to do so. He made progress on, but did not meet his other behavioral goal of reducing his self-stimulatory behavior to no more than once a day, although he reduced the incidence of such behavior to no more than two times per day. These self-stimulatory behaviors were not interfering with Student's ability to access his learning.

NEW GOALS

83. The IEP team developed new annual goals for Student with input from all attendees, including Parent, and Student's attorney. These included eight new goals focused on addressing Student's specific learning disability and his deficits in reading comprehension and written expression, and in auditory and cognitive processing. Five of these goals, in the areas of written expression, literature, and informational text, were to be addressed by Student's specialized academic instruction teacher and his general education teacher. The other three, in the areas of semantics, syntax, and narrative language, were to be addressed by Student's speech and language therapist. The speech and language therapist, additionally, was to address one speech articulation goal, and a pragmatic "social thinking" goal to develop Student's ability to perceive the likely perspectives, intentions, and feelings of others.

84. In addition to the “social thinking” goal, the IEP team developed one social skills goal to be addressed by the school psychologist. The IEP contained two goals titled “social skills,” but one – a goal for identifying and obtaining materials to complete a classroom task – was not actually a social skills goal. The second social skills goal addressed Student’s difficulty asserting himself, and set an annual goal for assertively suggesting ideas to handle uncomfortable social situations. The IEP comments do not reflect any development of goals supporting Ms. Guest’s recommendations in the Multidisciplinary Report that Student receive social skills intervention to address giving and maintaining appropriate eye contact, and practicing prosocial interpersonal communication (e.g., negotiation, winning arguments, listening, how to start and finish a conversation acceptably). As noted in the Multidisciplinary Report, these social skills weaknesses were not atypical for a child his age, and were not problematic at the time of the IEP team meeting.

85. The IEP team did not develop new behavior goals for Student. Parents did not disagree with the goals, or request goals in any other areas. Student’s private speech and language provider, Ms. Umfress, agreed at hearing that the proposed goals seemed appropriate; however, both she and Student’s other private speech and language provider, Ms. Johnson, testified persuasively at hearing that Student would need one-on-one speech and language services to make progress on the semantics, syntax, and native language goals.

MEANINGFUL GROWTH REPORT

86. Ms. Hsu presented a Meaningful Growth report dated March 2016. The report described Student’s progress on his existing behavior goals in the privately-developed behavior intervention plan being implemented by Meaningful Growth, and proposed new goals. The behavior intervention plan identified seven existing target behaviors: six to be reinforced, and one to be extinguished. Student met four of seven

goals: to raise his hand when the teacher asked a question, to answer teacher's questions, to start tasks assigned within five seconds, and to verbalize his preferences during play. Student did not meet his goals of raising his hand and asking for help when needed, redirecting himself back to work within five seconds, or to stop manipulating his fingers in a non-functional manner – a behavior the report stated did not affect Student's ability to access his curriculum.

87. The report suggested four new behavioral goals for Student in the areas of redirecting himself, requesting assistance, self-organization, self-correction of work, and solving difficult situations. Ms. Hsu, Ms. Floyd, Student's attorney, and other team members discussed how much of Ms. Floyd's prompting corresponded to the proposed prompting by Student's one-on-one aide. Ms. Floyd reported that when Student needed help, he would turn his body and start to follow her until she helped him. Ms. Floyd reported that she naturally prompts the students across the classroom to maintain engagement in the task. She shared that she uses tapping on the table, proximity, and verbal cuing for all students in the classroom, and typically her redirection/prompting of Student was similar to the amount of redirection/prompting she gave to the other students in the class. The team noted that the behavior intervention plan self-organization and situation-solving goals corresponded to the IEP team's proposed IEP social skills goals.

88. The Meaningful Growth report recommended that Student continue to have a one-to-one aide. Student's teacher, Ms. Floyd, stated that she did not think that Student required an aide. Student sat at the front of the classroom, and his aide sat in the back. Student's primary interaction with his aide was to periodically talk with him about the points that Student had earned under a point system that rewarded Student for participating in class. Student's aide was present each day from 10:00 a.m. until 12:30 p.m., and Student's behavior was the same whether his aide was present or not.

AMY JOHNSON SPEECH AND LANGUAGE REPORT

89. Student's private speech and language pathologist, Amy Johnson, provided Student's IEP team a Speech-Language Pathology Progress Report describing Student's progress on 12 speech and language goals designed to address Student's deficits in reading comprehension and written expression by expanding Student's fluent oral narratives, expanding Student's underpinnings for more complex microstructure, and improving Student's language processing and semantic knowledge. Ms. Johnson had made progress with Student in weekly one-hour individual sessions over the prior year, using methodologies including Lindamood-Bell "visualizing/verbalizing" practices and the Expanding Expression Tool. Ms. Johnson believed Student continued to require individual speech and language therapy, and that the therapy needed to be increased to two hours per week to address Student's deficits.

SERVICES AND SUPPORTS

90. To support Student's continued placement in a general education class, District members of the IEP team offered Student services of specialized academic instruction for 60 minutes per day in a group setting, specialized academic instruction consultation for 60 minutes per month, group speech and language services two times per week for 30 minutes, and 30 minutes per week of counseling and guidance services in a group setting to address social skills. District also offered extended school year services of specialized academic instruction for 195 minutes per day, and 30 minutes per week of group speech and language therapy. District did not offer Student a one-on-one aide or occupational therapy services.

91. District proposed 16 supports to be provided to Student in all instructional settings: (1) break writing assignments into small steps thoroughly following POWER structure (POWER is an acronym representing plan, organize, write, edit, and revise); (2) use POWER for every writing experience to provide needed structure and support; (3)

use prepared templates for the mapping and/or webbing of ideas prior to writing; (4) teacher modeling and think-alouds during the writing process; (5) priming in the manner of brainstorming with Student the topic to be written about during the prewriting planning part of the process; (6) create a Student-developed file of vocabulary words and the use of word webs and/or visual organizers to relate words to ideas read; (7) prime Student prior to instruction using discussion strategies covering key details or important information; (8) allow Student to use sticky notes to highlight important information in text; (9) prime Student with of important vocabulary before reading text; (10) test in small group; (11) Student use graphic organizer; (12) highlight main ideas in text (use highlighting at the sentence, phrase, paragraph, and/or page as needed to learn to go back into text to find answers to comprehension questions; (13) provide step by step directions; (14) use verbal encouragement/coaching; (15) provide clear visible daily schedule and visual supports, i.e., visual reminder to ask for help and eyes on teacher; and (16) provide cohesion word (result, similarly, because) and highlight to enhance understanding of text.

PARENT QUESTIONS AND CONCERNS AND REQUEST FOR NON-PUBLIC SPEECH AND LANGUAGE PROVIDER

92. Parent and Student's attorney participated actively in the IEP. Both expressed disagreement with the view of District members of the IEP team that Student did not require a one-on-one aide. Student's attorney suggested Student might not display difficulties in individual work or within a structured group setting, but the IEP team should consider Student's need for more support in situations with less structure. Parent said Student typically did not assert himself at home, but in the event of conflict would give in to the other person.

93. Parent asked what percentage of the day Student would be within the general education classroom. The team calculated that Student was proposed to be in

the general education setting for 80 percent of his day. Student's attorney said that Parents were weighing concerns including the amount of inclusion support, consideration of times that Student may be pulled out, and close collaboration between the general education and special education teacher. Student's attorney requested that speech and language services continue to be provided after school by his current nonpublic agency provider, Ms. Johnson, to minimize Student's time out of the general education classroom. The team then discussed whether there was a negative impact on Student when he was pulled out of the classroom, and Ms. Floyd stated that it could be carefully planned to avoid any impact.

94. Parent asked what time during the school day Student would be pulled from his general education class to attend group specialized academic instruction. Ms. Floyd recommended that the first 30 minutes for priming could occur during the first 30 minutes of the day and again 30 minutes before writing (approximately 11-11:30 am).

95. Parent asked who Student's providers would be for specialized academic instruction and speech and language services. Ms. White said that a long-term substitute was providing specialized academic instruction. She told Parent she would get back to Parent to tell her who the speech and language service provider would be, but that did not happen.

96. At hearing, Parent testified regarding information Parent would like to have known, but that the IEP team did not discuss. This included how pulling Student out of his general education class for specialized academic instruction would remediate Student's specific learning disabilities; how large the specialized academic instruction class would be; how the special education instructor and Student's general education teacher would work together; and who the specialized academic instruction provider, and speech and language provider, would be. However, of these concerns, Parent only asked during the IEP team meetings who the specialized academic instruction provider,

and speech and language provider, would be. District did not fail to answer any other Parent questions.

PLACEMENT/LEAST RESTRICTIVE ENVIRONMENT

97. As previously discussed, the multi-disciplinary assessment report suggested that the IEP team needed to determine whether Student could learn independently in the general education classroom. The draft IEP's summary of Student's classroom performance incorporated this observation. The draft IEP notes indicate that the IEP team reviewed the continuum of placements, but the only boxes checked for program options in the IEP form itself as the appropriate least restrictive environment for Student were, "General education class(es) with special education monitoring, consultation, collaboration, accommodations or modifications," and "General education class(es) with special education services provided individually or in small groups outside the classroom."

98. No evidence was presented that Parents, Student's attorney, or any member of Student's IEP team, objected to Student's continued placement in a general education class at Valentine, with appropriate supports, nor complained that this would not be an appropriate least restrictive environment for Student.

99. Parents did not consent to any portion of the IEP. They took a copy of the IEP to review, and said they would get back to District.

STUDENT'S FOURTH GRADE SPRING TRIMESTER, 2016

100. Parents did not respond to District's FAPE offer before the end of the 2015-2016 regular school year. Student continued to receive the services provided in the January 7, 2016, Settlement Agreement.

101. Student's progress report for his 2015-2016 fourth grade year shows that Student performed consistently in his academic subjects, improving his grades

somewhat in his second and third trimesters, even as new, more advanced concepts were introduced into the curriculum (and the number of subjects graded increased). In fall 2015, Student's academic grades indicated he was "proficient" in 25 academic areas, "developing" in 18, and "minimal" in 1 (clearly communicating mathematical thinking). In the winter trimester, Student was proficient in 27 areas and developing in 26 (including clearly communicating mathematical thinking). In spring 2016, Student was proficient in 43 academic areas, and developing in 18. With respect to characteristics that support learning, Student began the school year "occasionally" demonstrating responsibility for own learning; producing quality performance and products; working well with others; demonstrating critical thinking and problem solving; and he improved by his winter and spring trimesters to "independently/consistently" displaying those skills. He improved from independently/consistently demonstrating responsibility in the fall and winter trimesters to being "exemplary/exceeding expectations" in that area.

MAY 23, 2016: DISTRICT PRIOR WRITTEN NOTICE RE PARENTS' FAILURE TO CONSENT TO STUDENT'S IEP

102. On May 23, 2016, District's counsel sent a prior written notice to Student's attorney, stating that District might be required to file for a due process hearing if Parents did not agree to all or part of Student's March 17, 2016 IEP.

JUNE 2016: PARENT NOTICE OF PRIVATE PLACEMENT AT FROSTIG SCHOOL FOR 2015-2016

103. On June 3, 2016, Student's counsel notified District of Parents' decision to enroll Student at Frostig School and Tom Sawyer Camp during the 2016 extended school year. On July 28, 2016, Student's counsel notified District of Parents' decision to enroll Student at Frostig for the 2016-2017 school year.

104. Frostig is certified by the California Department of Education as a nonpublic, nonsectarian school. This certification approves Frostig to educate special

needs students enrolled in California's public school system, and to contract with California school districts to provide education and related services to special education students in accordance with their IEP's.

105. For his 2016-2017 fifth-grade school year, Student attended Maureen Bennett's class at Frostig. Ms. Bennett held credentials to provide special education to children with mild-to-moderate disabilities. Student's class had 11 students, taught by Ms. Bennett and a teachers' aide. Student was taught an individualized program working on California state standards. District has not disputed that Frostig provided Student educational instruction specially designed to meet his unique needs, supported by such services as are necessary to permit the child to benefit from instruction.

106. Student has remained privately-placed at Frostig through the hearing of this matter. Student has never required a one-on-one aide at Frostig. Student attributes this to the small class size and low student-to-teacher ratio.

MARCH 2017 ANNUAL IEP NOT HELD

107. Student's fifth grade annual IEP was due to be held on or before March 17, 2017. On March 14 or 15, 2017, District contacted Parents to schedule a March 17, 2017 IEP. Parents were not able to attend a March 17, 2017 IEP on such short notice. Mother was not available to attend, and Parents could not coordinate the schedules of Student's attorney and private providers for their attendance, or appropriately consult with them prior to the meeting.

108. Student's attorney wrote District's attorney on March 22, 2017, stating that District's previously-proposed date was not mutually convenient on short notice, and proposing four alternative dates. When District did not reply, Student's attorney sent a follow-up message on April 3, 2017, listing three dates. District's attorney responded to this request on May 24, 2017, again proposing dates on short notice. Student's attorney responded the same day, asking that District offer some IEP meeting dates more than a

week away. On May 26, 2017, Student's attorney proposed several dates for an IEP meeting when school resumed in August 2017.

109. As of the hearing, District had not scheduled Student's 2017 annual IEP team meeting. District's Special Education Director, Abigail Carrera, confirmed that Parents have been cooperative and have not impeded any District attempts to assess Student at Frostig or hold an IEP.

AUGUST 2017: PARENT NOTICE OF PRIVATE PLACEMENT AT FROSTIG SCHOOL FOR 2017-2018

110. On August 4, 2017, Parents gave District notice that Parents would be placing Student at Frostig for his sixth grade 2017-2018 school year, and seeking reimbursement from District for the placement and associated related services.

PARENT EXPENDITURES

111. For the 2016-2017 school year for, Parents paid \$35,255.00 for tuition at Frostig. Parents submitted invoices and/or checks documenting \$790.00 in payments to Amy Johnson/Cornerstone Speech and Language for speech and language therapy services made up of monthly one-hour individual speech and language sessions in August, September, and October 2016 (\$145.00 per session), half-hour sessions in November 2016, January 2017, and March 2017 (\$70.00 per session), and a one-hour classroom observation in May 2017 (\$145.00). Other invoices from Ms. Johnson were for services other than therapy, including fees for late cancellation of a meeting, and hearing preparation. Parents documented payment to Janel Umfress of \$5,390.00 for language/educational therapy services made up of 34 weekly one-hour, and one 90-minute, language/educational therapy sessions (each billed at \$140.00 per hour), and three additional one-hour charges for classroom observation, preparation of a report, and a school meeting. Parents documented payment of \$835.00 to Dr. Mona Delahooke

for consultation and psychotherapy services related to Student, made up of \$175.00 for a one-hour family psychotherapy session in February 2017, and \$660.00 for observation of Student at school in April 2017. Other invoices from Dr. Delahooke were not shown to be for services directly related to counseling for Student in the 2016-2017 school year, such as consultation in March 2016, and hearing preparation. Parents documented payments of \$3,323.02 to Meaningful Growth for behavioral intervention services provided in the 2016-2017 school year and not reimbursed by insurance, including one-on-one intervention services, supervision, Parent consultation and training, and report preparation. Other invoices from Meaningful Growth were for time periods prior to the 2016-2017 school year.

112. For the 2017-2018 school year, tuition for Frostig was set at \$3,380.00 per month. Ms. Johnson's charges for speech and language therapy services remained at \$145.00 for a one-hour consult, Ms. Umfress was to charge \$140.00 per hour for language/educational therapy services, and Dr. Delahooke's rate remained \$175.00 per hour.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴ et seq.; Ed. Code, § 56000 et seq.;

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for higher education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); 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 that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In *Endrew F. v. Douglas County School District* (2017) 580 U.S. __, __ [137 S.Ct. 988] (*Endrew F.*), the Court considered the meaning of the phrase “some educational benefit.” For a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” (*Id.*, 137 S.Ct. at p. 999, quoting *Rowley, supra*, 458 U.S. at pp. 203-204.) For a child not being educated in a general education classroom, the Court rejected the contention that the IDEA was satisfied by a program providing “merely more than *de minimis*” progress. The Court clarified FAPE as “markedly more demanding than the ‘merely more than the *de minimis* test’. . . To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.*, 137 S. Ct. at p. 1001.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (j).) At the hearing, the party filing

the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student filed the complaint in this matter, and therefore had the burden of persuasion.

ISSUE 1: FAILURE TO CONDUCT A FUNCTIONAL BEHAVIOR ASSESSMENT

5. Student contends District denied him a FAPE by failing to include a functional behavior assessment in the battery of District assessments undertaken for Student's triennial IEP in March 2016. Student contends a functional behavior assessment was necessary to clarify the function (purpose) of the following behaviors of Student so that the behaviors could be understood and effectively addressed: changing topics quickly, walking away, mumbling, picking his nails, licking his hands, touching the wall, and plugging his nose. District contends that it appropriately identified behavior as a suspected area of disability, conducted behavior assessments, and considered behavior strategies at Student's IEP, and was not required to conduct a functional behavior assessment.

Applicable Law

6. In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) The district must not use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability or determining the appropriate educational program for the child. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).) The district must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors,

in addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).)

7. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) A district is not required to use a functional behavior assessment to evaluate every behavioral issue. The district may, for example, conclude that behavior that “does not seriously interfere with instruction” is not severe enough to warrant a functional behavior analysis. (*R.E. v. New York City Dept. of Educ.* (2d Cir. 2012) 694 F.3d 167, 195.)

8. A school district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 Fed. 3d 1025, 1031-1033.)

Procedural violations of the IDEA only constitute a denial of FAPE if the violation:

(1) impeded the student’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*).) A procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) A loss of an educational opportunity is shown if there is a “strong likelihood” that, but for the procedural error, an alternative placement “would have been better considered.” (*Doug C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (quoting *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657 (Gould, J., concurring).)

Analysis

9. District did not commit a procedural violation by failing to include a functional behavior assessment in the assessments it used to evaluate Student's behaviors. District appropriately assessed Student's behavior based on observations and interviews of Student and four standardized assessment tools: the Behavior Rating Inventory of Executive Functioning; the Behavior Assessment System for Children, Second Edition; the Behavior Assessment System for Children, Self-Report of Personality; and the Gilliam Autism Rating Scale – 3rd Edition. These assessment tools yielded detailed information concerning the cause and severity of Student's behaviors that Student's IEP team considered in determining Student's eligibility for special education, and his appropriate placement, services, and supports.

10. Student presented no evidence that changing topics quickly, walking away, mumbling, picking his nails, licking his hands, touching the wall, or plugging his nose was impeding Student's learning or that of others even minimally. It was thus appropriate for District to conclude that these behaviors were not severe enough to warrant a functional behavior analysis. Significantly, Parents and Student's counsel did not object to this conclusion at the time, although they could have requested that District include a functional behavior analysis in its assessments, and only raised this concern in the complaint. Testimony by Student's expert, Dr. Delahooke, that a functional behavior assessment was necessary to determine whether Student's behaviors arose from stress caused by a sense that his classroom was unsafe, was not persuasive.

ISSUE 2(A): FAILURE TO OFFER STUDENT AN APPROPRIATE LEARNING ENVIRONMENT

11. Student contends that District denied him a FAPE in his March 2016 IEP by failing to offer him placement in a small, highly structured, special-education classroom

setting. Student contends that his academic issues with reading comprehension, and written expression, and his social-emotional issues with inattention, social interaction, task completion, and self-advocacy, could not be addressed in a general education classroom. District contends that Student, at the time this IEP was developed, was making academic and non-academic progress in his general education placement, and continuing this general education placement, with specialized academic instruction, supports, and accommodations, was appropriate for Student.

Applicable Law

12. The appropriateness of an IEP for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed, by looking at the IEP's goals and goal-achieving methods at the time the plan was implemented, and determining whether the methods were reasonably calculated to confer an educational benefit. (*Adams, supra*, 195 F.3d at p. 1149.) An IEP does not have to conform to a parent's wishes to be sufficient or appropriate, and a school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.)

13. A school district must deliver each child's FAPE in the least restrictive educational environment (LRE) appropriate to the needs of the child. (20 U.S.C. § 1412(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) The least restrictive of all

educational environments – and the most preferred under the IDEA – is the general education classroom:

[T]he IDEA requires that children with disabilities receive education in the regular classroom “whenever possible.”

When this preference is met, “the system itself monitors the educational progress of the child.” “Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material.”

Progress through this system is what our society generally means by an “education.” And access to an “education” is what the IDEA promises. Accordingly, 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.”

(*Endrew F.*, *supra*, 137 S.Ct. at p. 999, quoting *Rowley*, *supra* 458 U.S. at pp. 202-204 (internal citations omitted).)

14. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, must be educated with children who are not disabled. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment is appropriate only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).)

Analysis

15. In *Rowley* and again in *Endrew F.*, the Supreme Court took pains to explain that the purpose of the IDEA was to ensure that students with special needs would be educated in the general education environment “whenever possible.” It is clear from assessments and observations in this case that the general education environment presented some challenges for Student arising from his social skills deficits associated with his autism spectrum disorder, and from his specific learning disability associated with his deficits in reading comprehension and written expression, and in auditory and cognitive processing. Most notably, Student’s reading grade level was approximately two years below his then-current grade level, and his ability to express complex ideas in writing was poor. But it is also clear from *Rowley* and *Endrew F.* that the purpose of the IDEA is to provide opportunities, not eliminate challenges.

16. At the time of his fourth grade IEP team meeting in March 2016, Student had been making educational progress in general education classes since entering kindergarten at Valentine in 2010. Student was on track to progress from fourth to fifth grade. Student’s progress report for his 2015-2016 fourth grade year shows that he performed consistently in his academics, improved his grades somewhat in his second and third trimesters, even as new, more advanced concepts were introduced into the curriculum.

17. The evidence clearly indicates that Student made progress on his goals in regular classes with the use of appropriate supplementary aids and services. District did not deny Student a FAPE by continuing to offer him placement in a general education class with related services.

ISSUES 2(B)-2(G): FAILURE TO OFFER STUDENT ADEQUATE SERVICES

18. Student contends District denied him a FAPE in his March 2016 IEP by failing to provide him appropriate support services in the areas of research-based

intervention, speech and language, a behavior support plan, social skills, a one-to-one aide, and extended school year. District contends that its offers of services in those areas were appropriate to address Student's unique needs.

Applicable Law

19. A school District must provide "related services" to a special education student "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a); 34 C.F.R. § 300.34(a).) "Related services" means transportation, and developmental, corrective, and other supportive services required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527 (*Union*).) Such services may include speech-language pathology, audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services, counseling services, speech and language services, occupational therapy services, physical therapy services, orientation and mobility services, and medical services. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a).)

20. The IDEA mandates that special education and related services, and supplementary aids and services, be based upon peer-reviewed research to the extent practicable. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. 300.320(a)(4).) The phrase "to the extent practicable" means that supports and services should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research. (71 Fed. Reg. 46,665 (Aug. 16, 2006).) The IDEA does not require the IEP to include the particular instructional methodology. (*Id.*) IEP teams are not required to have a discussion on the research-based methods offered, nor to provide documentation of

those methods, as the U.S. Department of Education has determined that such a requirement is unnecessary and would be unduly burdensome to the IEP team. (*Id.*)

21. Educational benefit is not limited to academic needs. Behavioral and emotional needs are properly addressed through an IEP when they affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*County of San Diego*).) When a child's behavior impedes his learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child's learning denies the child a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego, supra*, 93 F.3d at pp. 1467-68.)

22. Extended school year services must be provided if the child requires the services to receive a FAPE. (34 C.F.R. § 300.106(a)(2).) Extended school year services are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP. (34 C.F.R. § 300.106 (b).) Extended school year is the period between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd. (c).) A child requires extended school year services if the child's disabilities are likely to continue indefinitely or for a prolonged period, interrupt the child's educational program and cause regression which, when coupled with limited recoupment capacity, render it impossible or unlikely that the child will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.) The services a child receives during the extended school year must be comparable to those he receives during the regular school year. (Cal. Code Regs., tit. 5, § 3043, subd. (g)(2).) An educational agency satisfies the FAPE standard by providing adequate related

services such that the child can take advantage of educational opportunities. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

23. The methodology used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149.) Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley, supra*, 458 U.S. 176, 208.)

Analysis

ISSUES 2(B) AND 2(C): FAILURE TO OFFER STUDENT RESEARCH-BASED INTERVENTION AND ADEQUATE SPEECH AND LANGUAGE SERVICES

24. Student contends that District denied him a FAPE in his March 2016 IEP by failing to offer him adequate research-based intervention and speech and language services to address his specific learning disability associated with his deficits in reading comprehension and written expression, and in auditory and cognitive processing, to allow him to benefit educationally from his instructional program. District contends that its offer of speech and language services in a group setting, two times per week for 30 minutes, was adequate to address Student's specific learning disability.

25. At the time of Student's last agreed-upon and implemented IEP in October 2013, Student had not been identified as having a specific learning disability. Student's deficits in reading comprehension and written expression, and in auditory and cognitive processing, had not appeared in the assessments conducted at that time. Therefore, he was found eligible for special education under the category of speech and language impairment, due to his weaknesses in grammar skills, inferences (on one subtest and in the therapy sessions), reading facial cues, and articulation. District at that time offered

Student 60 minutes per week group speech and language services, and 30 minutes per week individual speech and language services. District also offered Student 30 minutes per month individual specialized academic instruction.

26. In Student's third grade IEP in April 2015, District recognized an increased need for speech and language services for Student, and offered him 60 minutes per week group speech and language services, and 60 minutes per week individual speech and language services. District offered Student no specialized academic instruction. Student's specific learning disability had not yet been identified.

27. Student's March 2016 IEP, as a result of the triennial assessments, addressed Student's specific learning disability. The IEP team developed eight new goals focused on addressing Student's deficits in reading comprehension and written expression, and in auditory and cognitive processing.

28. District offered Student 60 minutes daily of group specialized academic instruction to address Student's five new goals in the areas of written expression, and reading comprehension with literature and informational text. Student challenged the adequacy of this service on grounds that the IEP failed to specify the methodologies the special education teacher and general education teacher would use to work on these goals with Student. However, District was not required to include the particular instructional methodology preferred by Parents. Student did not prove District did not offer research-based interventions.

29. On the other hand, District did not explain why it cut in half its prior April 2015 offer of 120 minutes per week of speech and language services, eliminating individual speech and language services and offering only 60 minutes per week of group services. It did this after recognizing Student's specific learning disability and the need for speech and language services in the areas of semantics, syntax, and native language. At hearing, District speech and language pathologist Ms. Lee focused on Student's needs in the areas of speech pragmatics as a reason for providing only group

therapy. However, the opinions of Student's private speech and language providers, Ms. Johnson and Ms. Umfress, that Student needed individual therapy to make progress on his semantics, syntax, and native language goals, were more persuasive. Student proved that District denied Student a FAPE by failing to offer Student individual speech and language services in his March 2016 IEP.

ISSUE 2(D): FAILURE TO OFFER STUDENT A BEHAVIOR SUPPORT PLAN

30. Student contends District denied him a FAPE by failing to offer him a behavior support plan to address behaviors that impeded his learning, or that of others. District contends that Student exhibited only minimal maladaptive behaviors, and it appropriately addressed these with goals in the areas of social skills and social thinking, accommodations, and counseling, without the need for a behavior support plan.

31. Student engaged in no behavior that impeded the learning of others. There is also no evidence that his mild self-stimulatory behaviors such as picking his nails, licking his hands, or plugging his nose impeded his own learning. District appropriately considered strategies, including positive behavioral interventions and supports, to address Student's inattention and atypical behaviors, and appropriately addressed these with goals in the areas of social skills and social thinking, accommodations, and counseling. District considered and employed these strategies in the past, and successfully reduced Student's undesirable behaviors. District did not deny Student a FAPE by failing to offer him a behavior intervention plan.

ISSUE 2(E): FAILURE TO OFFER STUDENT SOCIAL SKILLS SUPPORT

32. Student contends District denied him a FAPE by failing to offer him social skills support to address deficits in his ability to interact appropriately with others. District contends that it developed and offered appropriate goals and supports.

33. District's March 2016 Multidisciplinary Report recommended that Student receive social skills intervention to address giving and maintaining appropriate eye contact in the classroom environment, showing an understanding of others' points of view when his was in conflict with theirs, further practicing prosocial interpersonal communication (e.g., negotiation, winning arguments, listening, how to start and finish a conversation acceptably), and demonstrating adequate assertion, such as initiating behaviors, such as asking others for information, introducing himself, and responding to the actions of others.

34. Student's IEP addressed some, but not all, of the social skills interventions recommended in the Multidisciplinary Report. The IEP did not incorporate goals supporting the recommendations that Student receive social skills intervention to address giving and maintaining appropriate eye contact, and practicing prosocial interpersonal communication (e.g., negotiation, winning arguments, listening, how to start and finish a conversation acceptably). However, because these social skills weaknesses were not atypical for a child his age, and were not problematic at that time, District did not deny Student a FAPE by failing to include goals and supports for social skills interventions in the IEP.

ISSUE 2(F): FAILURE TO PROVIDE A ONE-ON-ONE AIDE

35. Student contends that District's March 2016 IEP denied Student a FAPE by failing to provide Student a one-on-one aide. Student argues that he required the presence of a one-on-one aide to prompt him, or, in accordance with the theory of Neuroception, to provide reassurance that the classroom environment was safe for Student. District contends that Student did not require a one-on-one aide to access his education, and that Student's private one-on-one Meaningful Growth aide, provided as part of the parties' January 2016 settlement, did not provide any meaningful support to Student in the classroom or at recess.

36. Here, the evidence showed that Student did not need a one-to-one behavioral aide to access his education. He did not have behaviors that were potentially injurious to him or others, and he did not disrupt his peers or the classroom, generally. Although he required some level of redirection at times, Student's teacher adequately provided that redirection in his general education classroom. Ms. Floyd and Ms. Guest testified persuasively that Student did not interact much with his Meaningful Growth aide in the classroom or on the playground. Student did not receive significant prompting from the aide, and Student's classroom behavior was the same whether the aide was present or not. There was no evidence that Student required the presence of the aide for reassurance that the classroom was a safe place for Student.

37. Student did not establish by a preponderance of the evidence that District's March 2016 IEP denied him a FAPE during the two academic years at issue by failing to provide a one-on-one aide.

ISSUE 2(G): FAILURE TO PROVIDE EXTENDED SCHOOL YEAR COUNSELING SERVICES

38. Student contends District's March 2016 IEP denied Student a FAPE by failing to provide Student counseling services for the 2016 extended school year. District contends that its offer of extended school year services was appropriate, but does not otherwise address this contention.

39. Student's March 2016 IEP offered Student 30 minutes per week of counseling and guidance services in a group setting during the regular school year to address his social skills deficits. The March 2016 IEP also offered Student extended school year services, but, for unexplained reasons, failed to offer Student counseling and guidance services during the extended school year, as required under California Code of Regulations, title 5, section 3043, subdivision (g)(2). Student established by a preponderance of the evidence that District's failure to offer Student counseling and guidance services during the extended school year denied Student a FAPE.

ISSUES 3 AND 4(A): FAILURE TO TIMELY CONVENE STUDENT'S MARCH 2017 IEP TEAM MEETING, AND FAILURE TO OFFER STUDENT ANY EDUCATIONAL PLACEMENT FROM MARCH 2017 TO THE FILING OF THE COMPLAINT

40. Student contends District denied him a FAPE by failing to convene an annual IEP team meeting due in March 2017 at any time and by failing to offer Student any educational placement from March 2017 to the filing of the complaint. District contends its failure to convene an IEP should be excused because: (i) it was due to scheduling conflicts among District, Parents, and Student's private placement, Frostig; (ii) Parents had no intention of placing Student anywhere other than Frostig; and (iii) Student was not without an educational placement because Student could have agreed to the March 2016 IEP, or he could have accessed the placement and services in the January 7, 2016 settlement agreement as stay-put.

APPLICABLE LAW

41. A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (Ed. Code, § 56344, subd. (c); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) The district must also review the child's IEP at least once a year to determine whether the student's annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).)

42. In *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519 (*Union*), the Ninth Circuit held that the IDEA requires a district to make a clear written IEP offer that parents can understand. The court emphasized the need for rigorous compliance with the requirement of a formal, written IEP offer. "The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any."

"Furthermore," the court noted, "a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." (20 U.S.C. § 1415(b)(1)(E).) (*Union, supra*, 15 F.3d at p. 1526.) In *Union*, the district met with the parents, but failed to develop a formal IEP offer after parents expressed unwillingness to accept the district's suggested placement. The court held that the parents were entitled to reimbursement for tuition costs of the student's private placement because the of the district's failure to make a formal IEP offer of placement. (*Union, supra*, at p. 1527.)

43. A parent's failure to cooperate in the development of the IEP does not negate the duty to develop an IEP. (*Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 (*Anchorage*); 20 U.S.C. § 414(d)(2)(A); 34 C.F.R. § 300.323(a).) [School districts "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (*Id.* at p. 1055, citing *W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1485, superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 939.)).] In *Anchorage*, a dispute arose out of an IEP that was implemented for the 2006-2007 school year. The parties attempted to revise the IEP for the 2007-2008 school year without success, and parents filed a due process complaint. While the complaint was pending, the district postponed any further efforts to develop revise the outdated IEP. A district court excused the district's failure to develop an IEP on grounds that it was attributable to the parents' litigious approach. On appeal, the Ninth Circuit held that the district had an affirmative duty to review and revise, at least annually, an eligible child's IEP. (*Anchorage, supra*, 689 F.3d at pp. 1055-1057; 20 U.S.C. § 414(d)(2)(A); 34 C.F.R. § 300.323(a).) The court further noted that to conclude otherwise would subvert the purposes of the IDEA and sanction a school district's unilateral decision to abandon its statutorily required responsibility to the detriment of its students. (*Anchorage, supra*, pp. 1059-1060.)

44. A school district similarly may not dispense with developing an IEP as an empty gesture if parents indicate that they will not accept the offer. "[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate education placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union, supra*, 15 F.3d at p. 1526.)

45. A District may be excused from developing an IEP if the parents of child placed in private school revoke consent in writing for the provision of special education and related services to their child. If they do this, and the district gives prior written notice that it will not continue to provide special education and related services to the child, the district will not be considered in violation of the requirement to make FAPE available to the child because of its failure to provide the child with further special education and related services, and is not required to convene further IEP meetings or develop further IEP's. (Ed. Code, § 56346, subd. (d); 34 C.F.R. § 300.300 (b)(4).) If the parents do not revoke consent in writing, the district must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher. (20 U.S.C. § 1412(a)(3)(A) and (a)(4); *Dep't of Educ. v. M.F. ex rel. R.F.*, (D. Hawaii 2011) 840 F. Supp. 2d 1214, 1228-30, clarified on denial of reconsideration, (D. Hawaii 2012) 2012 WL 639141 [rejecting public agency's argument that the student's disenrollment from public education, without a written revocation of consent to special education services, excused the agency from preparing further IEP's until the parents subsequently requested services]; *Woods v. Northport Pub. Sch.* (6th Cir. 2012) 487 F. App'x 968, 979-80 ["It is residency, rather than enrollment, that triggers a district's IDEA obligations."].) Upon receipt of an offer of a FAPE, parents of a child in private school have two options: (1) accept the offer of a FAPE and enroll their student in the public school, or (2) keep their child in private school and receive "proportional share" services, if any, provided to the student pursuant to 20

U.S.C. § 1412(a)(10) and 34 C.F.R. §§ 300.130–300.144. (*D.C. v. Wolfire* (D.D.C. 2014) 10 F. Supp. 3d 89, 92.)

46. A district's failure to provide parents a timely, formal, written IEP offer is not a per se denial of FAPE. It may be excused as harmless error where parents participated fully in the IEP process, understood the placement and services being offered by the district, and the written offer was not significantly delayed. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 461 (*J.W. v. Fresno*) [District failed to make formal written IEP offer prior to start of new school year, but presented such an offer to parents three days after the start of the new school year].)

47. In carrying out its obligation to develop a formal IEP offer for a student, a district also has an obligation to convene an IEP team meeting and obtain the meaningful participation of the parents in the IEP process. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A parent is a required member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, § 56341, subd. (b)(1).) The team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c)(1)(B), (d)(3)(A)(i), (d)(4)(A)(ii)(III); Ed. Code, § 56341.1, subds. (a)(1), (d)(3), (f).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose suggestions are considered by the IEP team has participated in the IEP process in a meaningful way].)

48. The procedural safeguards that protect parents' rights to be involved in the development of their child's educational plan are among the most important in the

IDEA. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013), 720 F. 3d 1038, 1044, and a district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) A school district must take steps to ensure that one or both parents of a disabled child are present at the IEP team meeting by: “(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place.” (34 C.F.R. § 300.322(a).) If neither parent can attend an IEP Team meeting, “the public agency must use other methods to ensure parent participation, including individual or conference telephone calls” (34 C.F.R. § 300.322(c).)

49. Even when parents have already decided to place their child in private school, the school district is not excused from obtaining their participation in the IEP process. In *D.B. ex rel. Roberts v. Santa Monica-Malibu Unified Sch. Dist.* (9th Cir. 2015) 606 F. App'x 359, 360-361 (*D.B.*), the school district held an IEP team meeting to determine student's placement and services for the following school year without parents, who were unavailable and had already decided student would not be attending a district school. The court found that the failure to include parents in the IEP team meeting was a procedural violation that denied the Student a FAPE in the following school year. [“Furthermore, even if D.B.'s parents already had decided to enroll D.B. at the Westview School, their exclusion was not permissible. See *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir.2012) (‘[T]he IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the educational agency.’).” *D.B.*, *supra*, 606 F. App'x 359 at p. 361.]

50. A district's failure to obtain parental participation may be excused if the parents engage in conduct that obstructs the IEP process. For example, in *K.E. v. Independent School District No. 15* (8th Cir. 2011) 647 F.3d 795, 806, the district

attempted to schedule four different IEP team meetings over several months, but the student's parent or counsel cancelled two of the meetings, walked out of another over a dispute about the agenda, and decided simply not to attend the final meeting. Finding that "[t]he record is clear in this case that it was Parent, not the District, who refused to participate in the IEP process," the court held, "Where a parent has 'truncated [her] own procedural right to contribute to the development of [a child's] IEP,' a school district 'cannot be faulted for failing to engage in an open discussion.'" *Id.*, citing *Blackmon v. Springfield R-XII Sch. Dist.* (8th Cir.1999) 198 F.3d 648, 657.

51. Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.) However, if a student's placement in a program was intended only to be a temporary placement, such placement does not provide the basis for a student's "stay put" placement. (*Verhoeven v. Brunswick Sch. Comm.* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

Analysis

52. District's failures from March 2017 to the hearing of this matter, to convene an IEP team meeting, and to develop a formal IEP offer of placement, denied Parents the opportunity to participate meaningfully in the IEP process, and offered Student no educational program.

53. District's failure to convene an IEP team meeting was not excused by any conduct of Parents. No evidence was presented that Parents revoked Student's right to special education when they enrolled him in Frostig, or that they obstructed the IEP

process at any time. District's attempt to convene an IEP meeting on March 17, 2017 on two days' notice to Parents was not reasonable. Parents' March 22, 2017 response proposing four alternate dates was reasonable, as was their follow-up letter, sent when District did not reply and proposing three more dates. District's last attempt on May 26, 2017 to convene an IEP team meeting with Parents again proposed dates on short notice. Parents' same day response, requesting dates more than one week away, again was reasonable, as was their follow-up letter proposing more dates. District's Special Education Director, Ms. Carrera, confirmed that Parents have been cooperative and have not impeded any District attempts to assess Student at Frostig or hold an IEP.

54. District thus committed a procedural violation of the IDEA and Education Code when it failed to convene an IEP meeting. Parents had no opportunity to attend an IEP meeting, be informed of Student's problems by the professionals on Student's IEP team, express disagreement regarding the IEP team's conclusions, or request revisions in the IEP. In short, Parents had absolutely no opportunity to meaningfully participate in an IEP process, because there was none. This complete denial of parental rights denied Student a FAPE.

55. Even if Parents' failure to participate in an IEP meeting had been excused by unreasonable conduct on their part – not present here – District would still have been required to develop a formal, written IEP offer without their participation. District did not do this. District's failure to develop a formal, written IEP offer was not excused by the District's prior March 2016 IEP offer, or by the parties' January 7, 2016 settlement agreement specifying special education services for Student through the 2015-2016 school year ending June 2, 2016. Contrary to District's suggestion, the settlement agreement did not specify a placement for Student, and because, by its terms, the services it offered were temporary, expiring at the end of the 2016 school year, it would not have provided a basis for stay-put. Student's stay-put educational program was (and

remains), Student's out of date, but last agreed-upon and implemented, October 10, 2013 IEP, with goals to which Parents consented from the March 2016 IEP offer.

56. In any event, District presented no authority for the novel proposition that a district's duty to develop a written, formal IEP offer could be excused by the existence of a previously agreed-upon and implemented IEP, much less a previously rejected District IEP offer, or a settlement agreement providing for special education services of fixed duration ending prior to the start of the relevant school year.

57. District's failure to provide a formal, written IEP offer is subject to the admonition in *Union, supra*, that the requirement of a formal written offer should be vigorously enforced. The complete absence of an IEP offer with appropriate goals, placement, services, and accommodations significantly impeded, and therefore denied, Student's right to a FAPE by putting Student in a position of starting the 2017-2018 school year with no appropriate placement or services.

ISSUE 4(B): IGNORING PARENTS CONCERNS AND QUESTIONS AT THE MARCH 2016 IEP TEAM MEETINGS

58. Student contends District denied Parents the opportunity to meaningfully participate in the March 2016 IEP process by ignoring Parents' questions and concerns at the March 17, 2016 and March 24, 2016 IEP team meetings regarding: (i) how pulling Student out of his general education class for specialized academic instruction would remediate Student's specific learning disabilities; (ii) how large the specialized academic instruction class would be; (iii) how the special education instructor and Student's general education teacher would work together; (iv) who the specialized academic instruction provider, and speech and language provider, would be. District contends that Parent and Student's attorney participated fully in the March 2016 IEP team meeting.

Applicable Law

59. Paragraphs 47 and 48 above are incorporated in this section.

Analysis

60. Student did not provide convincing evidence that District denied Parents their opportunity to meaningfully participate in the development of Student's March 2016 IEP by failing to consider parental concerns. Parents and Student's attorney attended both team meetings that developed the IEP, and participated in discussions of Student's needs and proposals for addressing them. Parents and Student's attorney expressed concern over the proposal to pull Student out of his general education class for specialized academic instruction, and disagreed with the IEP team's conclusion that Student did not require one-on-one aide support.

61. Parent testified that she had several questions and concerns that were not discussed at the IEP, such as how pulling Student out of his general education class for specialized academic instruction would remediate Student's specific learning disabilities, how large the specialized academic instruction class would be, and how the special education instructor and Student's general education teacher would work together. However, District was unaware of these questions and concerns because Parent first voiced these concerns during the hearing. District did not answer Parent's requests for the names of the proposed speech and language therapist and specialized academic instruction provider, but methodology and teaching staff are left to District's discretion and the names of specific providers cannot reasonably be said to have been so significant that its absence deprived Parents of their ability to meaningfully participate in the IEP process.

62. District's disagreements with Parents did not deny Parents an opportunity to ask questions or state their opinions. The evidence does not support a finding that District denied Parents meaningful participation at the IEP's.

ISSUE 4(C): FAILURE TO CONSIDER THE FINDINGS OF PARENT'S PRIVATE EXPERT AT THE MARCH 2016 IEP TEAM MEETINGS

63. Student contends District denied Parents the opportunity to meaningfully participate in the March 2016 IEP process by failing to consider information presented by Student's private behaviorist, Ms. Hsu of Meaningful Growth. District contends that District IEP team members considered Ms. Hsu's information and participated in a discussion with Ms. Hsu and Student's attorney concerning the Meaningful Growth behavior report Ms. Hsu presented at the March 24, 2016 IEP team meeting.

Applicable Law

64. A parent has the right to present information to the individualized education program team in person or through a representative, and the right to participate in meetings, relating to eligibility for special education and related services, recommendations, and program planning. (Ed. Code, § 56341.1, subd. (f).) If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of free appropriate public education to the child, and may be presented as evidence at a due process hearing. (Ed. Code, § 56329, subd. (c).)

65. A school district is required to ensure that its evaluation of a student is sufficiently comprehensive to identify all the child's needs for special education and related services, regardless of whether the needs

are commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).) This includes consideration of private assessments which address the student's disability.

Analysis

66. Student did not prove that District denied Parents their opportunity to meaningfully participate in the development of Student's March 2016 IEP by failing to consider information presented by Student's private behaviorist, Ms. Hsu of Meaningful Growth. The IEP team meeting notes reflect a lengthy discussion among District IEP team members, Ms. Hsu, and Student's attorney, of the Meaningful Growth behavior report Ms. Hsu presented. For example, the IEP team discussed Student's progress on his existing behavior goals in the privately-developed behavior intervention plan being implemented by Meaningful Growth, and the proposed new goals. Ms. Hsu, Student's teacher, Ms. Floyd, Student's attorney, and other team members discussed how much of Ms. Floyd's current prompting corresponded to the prompting that Meaningful Growth proposed to have implemented by Student's one-on-one aide. The team also discussed the degree to which the self-organization and situation-solving goals in Meaningful Growth's proposed behavior intervention plan corresponded to the IEP team's proposed IEP social skills goals.

67. Ultimately, the IEP team disagreed with Meaningful Growth's recommendation that Student continue to be supported by a one-on-one aide. However, the team clearly considered Meaningful Growth's recommendation before rejecting it.

ISSUE 4(D): FAILURE TO PROVIDE PARENTS APPROPRIATE PRIOR WRITTEN NOTICE OF DISTRICT'S REFUSAL TO PROVIDE NON-PUBLIC AGENCY SPEECH AND LANGUAGE SERVICES

68. Because Student prevailed in Issue 2(c), proving that District's offer of speech and language services substantively denied Student a FAPE, there is no need to address whether District also denied Student a FAPE by failing to provide prior written notice of its refusal to provide Student speech and language services through a non-public agency. (See *Amanda J.*, *supra*, 267 F.3d at p. 895.)

REMEDIES

1. Student prevailed on Issues 2(c), 2(g), 3 and 4(a). District prevailed on issues 1, 2(a), 2(b), 2(d), 2(e), 2(f), 4(b) and 4(c). As a remedy with respect to the issues on which Student prevailed, Student requests that District be ordered to: (1) reimburse Parents for past out-of-pocket costs incurred for tuition at Frostig School, speech and language consultative services, speech and language/educational therapy services, consultation and psychotherapy services, and one-on-one behavioral intervention services; (2) reimburse Parents through the 2017-2018 school year for out-of-pocket costs incurred for tuition at Frostig School, speech and language consultative services, speech and language/educational therapy services, and consultation and psychotherapy services; and (3) convene an IEP team meeting to develop an appropriate IEP for Student.

APPLICABLE LAW

2. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244 n.11. [129 S.Ct. 2484, 174 L.Ed.2d 168].)

3. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id.*; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*).) A school district also may be

ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra, at p. 1496.*) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id. at pp. 1496-1497.*) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id. at p. 1496.*) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Puyallup, supra, at 1497.*) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

4. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (Ed. Code, §56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra, at 471 U.S. 359, 369-370* [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district’s proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S.Ct. 36, 1126 L.Ed.2d 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the

student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

ANALYSIS

5. Parents do not seek reimbursement for any costs incurred for the 2016 or 2017 extended school years. Parents request reimbursement for the 2016-2017 school year for tuition at Frostig (\$35,255.00), speech and language consultative services provided by Amy Johnson/Cornerstone Speech and Language (\$790.00), language/educational therapy services, provided by Janel Umfress (\$5,390.00), consultation and psychotherapy services provided by Dr. Mona Delahooke (\$835.00), and behavioral intervention services provided by Meaningful Growth (\$3,323.02).

6. For the 2016-2017 school year, Student did not prove that District's March 2016 offer to place Student in a District general education class was inappropriate and denied Student a FAPE, or that Student required one-on-one behavioral intervention services to receive a FAPE. Accordingly, Parents are not entitled to reimbursement for 2016-2017 tuition at Frostig, or costs incurred for behavior intervention services provided by Meaningful Growth. Finally, Student did not contend that District's March 2016 IEP offer of 30 minutes per week of counseling and guidance services in a group setting to address social skills was inappropriate for the regular school year. Accordingly, Parents are not entitled to reimbursement for consultation and psychotherapy services provided by Dr. Mona Delahooke for the 2017-2017 school year.

7. Student did prove that District's March 2016 offer of speech and language services was inappropriate and denied Student a FAPE, and Parents are entitled to reimbursement for the 2016-2017 school year for the speech and language consultative services provided by Amy Johnson/Cornerstone Speech and Language (\$790.00), and for language/educational therapy services provided by Janel Umfress (\$5,390.00). For the

2016-2017 school year, District shall reimburse Parents a total of \$6,180.00 for these services.

8. For the 2017-2018 school year, Student proved that District offered Student no educational program. Student also proved that Student's private placement at Frostig provided him an appropriate education, at a State-certified non-public school providing educational instruction specially designed to meet his unique needs, supported by services that permitted him to benefit from instruction.

9. Accordingly, Parents are entitled to reimbursement of their actual out-of-pocket costs for tuition for Student at Frostig for the 2017-2018 school year, in an amount not to exceed \$3,380.00 each month. Parents are also entitled to reimbursement of reasonable costs to provide Student speech and language consultative services, language/educational therapy services, and counseling services. During the 2016-2017 school year, Ms. Johnson provided Student monthly one-hour individual speech and language therapy sessions in August, September, and October 2016, tapering to half-hour sessions in November 2016, January 2017, and March 2017. Ms. Johnson also conducted a one-hour classroom observation in May 2017. The cost of these services totaled \$790.00 for the 2016-2017 school year. For the 2017-2018 school year, District shall reimburse Parents up to the same total amount for comparable speech and language services. Parents and the provider may determine the duration and frequency of these services for Student. Student received one hour per week in language/educational therapy services from Ms. Umfress in the 2016-2017 school year. District shall reimburse Parents their out-of-pocket costs language/educational therapy services for Student for the 2017-2018 school year, not to exceed one hour per week at a cost of \$140.00 per hour. District shall also reimburse Parents their out of pocket costs for the 2017-2018 school year for group or individual counseling services for Student, at a duration and frequency not to exceed the 30 minutes per week of services District

offered in Student's March 2016 IEP, and a cost per session not to exceed \$87.50 (one-half Dr. Delahooke's \$175 per-hour rate).

10. As a further remedy for District's failure to convene an IEP team meeting and provide Student a formal, written offer of FAPE prior to the start of the 2017-2018 school year, District shall, no later than February 1, 2018, convene an IEP team meeting to develop an IEP for Student's 2018-2019 school year, and to review Student's eligibility for 2018 extended school year services.

ORDER

1. District will reimburse Parents \$6,180.00 within 60 days of the date of this Decision.

2. For the duration of the 2017-2018 school year, within 60 days of proof of payment by Parents, District will reimburse Parents their out-of-pocket costs for: (i) tuition for Student at Frostig, in an amount not to exceed \$3,380.00 each month; (ii) speech and language services in an amount not to exceed \$790 for the 2017-2018 school year, with Parents and the provider determining the duration and frequency of the services; (iii) language/educational therapy services not to exceed one hour per week at a cost of \$140.00 per hour; and (iv) group or individual counseling services for Student up to 30 minutes per week, at a cost per session not to exceed \$87.50.

3. District shall, no later than February 1, 2018, convene an IEP team meeting to develop an IEP for Student's 2018-2019 school year, and to review Student's eligibility for 2018 extended school year services.

4. All of Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard

and decided. Here, Student prevailed on Issues 2(c), 2(g), 3 and 4(a). District prevailed on issues 1, 2(a), 2(b), 2(d), 2(e), 2(f), 4(b) and 4(c). Issue 4(d) was not reached, because doing so was made unnecessary by the decision with respect to Issue 2(c).

RIGHT TO APPEAL

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

DATED: October 26, 2017

_____/s/____

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings