

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2017041029

v.

SANTA PAULA UNIFIED SCHOOL DISTRICT
AND VENTURA UNIFIED SCHOOL
DISTRICT.

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on April 18, 2017, naming Santa Paula Unified School District (Santa Paula) and Ventura Unified School District (Ventura). A continuance of the hearing was granted on May 31, 2017, to dates stipulated by the parties.

Administrative Law Judge Alexa J. Hohensee heard this matter in Santa Paula, California on August 8, 9, 10, 14 and 15, 2017.

Andréa Marcus and Monique Fierro, Attorneys at Law, represented Student. Student's mother (Parent) attended and testified on behalf of Student.

Sundee M. Johnson, Attorney at Law, represented Santa Paula. Katherine Aguirre, Executive Director of Special Education and Student Services for Santa Paula, attended the hearing on behalf of Santa Paula.

Melissa Hatch and Tamra Kaufman, Attorneys at Law, represented Ventura. Robin Faigin, Director of Special Education for Ventura, attended the hearing on behalf of Ventura.

Sonia Hernandez, Jorge Moran, and Bernadette Buckley provided Spanish to English and English to Spanish interpretation throughout the hearing.

A continuance until September 5, 2017, was granted for the parties to file written closing arguments. Upon receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

Did Ventura, from the beginning of the 2014-2015 school year through the individualized education program of November 21, 2014, and Santa Paula from Student's enrollment in November 2014 through the filing of the complaint, deny Student a free appropriate public education as follows:

1. Did Ventura and Santa Paula deny Student a FAPE by failing to identify and assess Student in all areas of suspected disability, specifically autism?¹
2. Did Ventura and Santa Paula deny Student a FAPE by failing to take into consideration Parent's requests for assessments in the areas of autism and attention deficit hyperactivity disorder (ADHD)?

¹ Any claims that Student should have been assessed in areas other than autism as suspected areas of disability are deemed abandoned. In his closing brief, Student argues only that Ventura and Santa Paula failed to assess Student for autism, and this issue is limited accordingly. In addition, Student did not call experts in the appropriate fields to establish that Student had needs in the areas of speech and language, occupational therapy, adapted physical education, or assistive technology that would have been discovered had he been further assessed.

3. Did Ventura and Santa Paula deny Student a FAPE by offering him half-school days and reduced instructional time, and long periods of non-instructional time, to address Student's behaviors in lieu of appropriate behavior intervention?

4. Did Ventura and Santa Paula deny Student a FAPE by failing to consider a continuum of placement options in determining the least restrictive environment for Student, thereby denying Parent the opportunity to meaningfully participate in the development of Student's individualized education program as an informed member of the IEP team?

5. Did Santa Paula deny Student a FAPE by failing to notify Parent by behavioral emergency reports each time its staff physically restrained Student, and by failing to hold emergency IEP team meetings to address Student's behaviors, so that Parent could participate in the development of an appropriate educational program for Student?

6. Did Santa Paula deny Student a FAPE by failing to assess Student's behavioral needs and offer alternative interventions for behavior in Student's IEP's of May 5, 2015, November 18, 2015 and November 3, 2016, once the interventions in place were proven ineffective?

7. Did Santa Paula deny Student a FAPE by failing to notify Parent by prior written notice of its decision to deny Parent's request for one-on-one applied behavior analysis support for Student?

SUMMARY OF DECISION

Student's claims against Ventura are barred by the two-year statute of limitations. Student was enrolled in Ventura from September 2014 through November 2014, and Parent was aware that Ventura had not assessed Student for autism when its psychoeducational assessment report was reviewed at the November 21, 2014 IEP team meeting, which Parent attended with an interpreter. Parent was also aware of the

placement options considered at that meeting, and that Student had been placed on a shortened day schedule. Student's complaint was filed on April 18, 2017, more than two years after Parent knew the facts forming the basis of Student's claims against Ventura, and those claims are time-barred. Therefore Ventura prevailed on all issues against it (Issues 1 through 4).

Similarly, Parent was aware of the facts forming the basis of Student's claims against Santa Paula from November 2014 to April 18, 2015, and those claims are also time-barred, with one exception. Student's claim that he should have been assessed for autism as part of a functional behavior assessment that was agreed upon at the IEP team meeting of December 16, 2014 is not time barred, as the results were not reported until the May 5, 2015 IEP team meeting, and Parent did not know the assessment did not include an autism component until that time.

For the claims against Santa Paula that are not time-barred, Student did not prove that autism was a suspected area of disability from December 16, 2014 through November 3, 2016, the date on which Parent informed Santa Paula that Student was being assessed for autism by a medical doctor, or that Santa Paula failed to act promptly to assess Student when it received that information (Issue 1). Student did not prove that Parent requested assessments for autism and ADHD from Santa Paula (Issue 2). Student did not prove that Santa Paula denied him a FAPE by offering him half school days and reduced instructional time, or that the behavior interventions offered in the IEP's of May 5, 2015, November 18, 2015 and November 3, 2016 were otherwise inappropriate (Issue 3). Student did not prove that Santa Paula failed to consider a continuum of options for Student's placement at the IEP team meeting of November 3, 2016 (Issue 4). Student did not prove that he was physically restrained by Santa Paula staff at any time (Issue 5). Student did not prove that further assessments in the area of behavior were required

(Issue 6). Student did not prove that Parent requested a one-on-one aide (Issue 7). Therefore Santa Paula prevailed on all issues against it (Issues 1 through 7).

FACTUAL FINDINGS

1. Student was an eight-year-old boy at the time of the hearing. Student has resided with Parent within the boundaries of Ventura or Santa Paula at all relevant times.

2. Parent's primary language is Spanish.

STUDENT'S TIME WITHIN VENTURA

3. Parent enrolled Student in kindergarten in Ventura two weeks into the 2014-2015 school year, in early September 2014.

4. The move into Ventura was the seventh in five years for Student. His family moved to escape domestic violence by Student's father, including verbal and physical abuse of Student. Student lived with Parent and his siblings. Parent had a history of mental health problems, and Student's sister was violent.

5. Student was placed in Lisa Anctil's general education classroom. The kindergarten school day lasted for six hours. Like many kindergarteners, Student had not attended preschool and had not acquired school-readiness skills.

6. Ms. Anctil had been a teacher with Ventura for over 20 years and was a fluent Spanish speaker. At hearing, Ms. Anctil's demeanor was professional and caring, and she referred to exhibits that included her meticulous notes about Student. She recalled Student and his performance in her class, and her opinions on Student's educational needs and the program to meet those needs was very persuasive.

7. Student had a very difficult time adjusting to the kindergarten routine. Although it is common for kindergarteners to cry, ask to go home and tantrum, the frequency of Student's behaviors was unusual. Student had difficulty participating in activities because he would start to cry, and he had particular difficulty transitioning

from preferred activities to non-preferred activities, and from the playground back into the classroom. Student would scream "I hate school, school is stupid, I hate work, work is stupid, home is stupid." Student would tear up his work or scream and cry when he was not satisfied with his work. He resisted adult assistance when offered and said "I don't know how, I can't." He refused to participate in the daily class run, saying "My legs hurt, I can't run, running is stupid." When Student became upset, he laid on the ground, cried, screamed, and was difficult to console.

8. Ms. Anctil attempted a number of interventions to help Student, including scheduling preferred activities, offering behavior options and incentives, providing one-on-one adult assistance, peer modeling and working closely with the school psychologist and counselor. None of these strategies were sufficient. Student frequently had to be sent home because he was crying and tantrumming so badly that he could not participate in class at all.

9. Two weeks into the school year, on September 17, 2014, Parent wrote a letter to Ventura, in English with the assistance of the school receptionist, stating that she would like Student to be "assessed by the psychologist" as soon as possible. Parent had a copy of the letter made and stamped as received by Ventura, to prove that she had made the request.

10. On September 23, 2014, Ventura sent Parent an assessment plan to assess Student for special education eligibility. The plan was in Spanish, and indicated that Student would be assessed in the areas of pre-academics/academics, social/emotional behavior, self-help/adaptive skills, motor skills development, intellectual development, and health.

11. Ventura subsequently sent Parent a revised assessment plan, also dated September 23, 2014, to include an assessment for intensive social emotional services provided in school and in the home, referred to as ISES services.

12. On September 29, 2014, Parent signed and returned the first assessment plan.

13. On October 2, 2014, Kelsie Sims, the principal at Student's school, wrote to Parent, in English and Spanish, that Student's behaviors made him unsafe and interfered with learning. Ventura placed Student on a half-day schedule for five weeks. Parent picked up Student at school early each day during the modified schedule.

14. On October 13, 2014, Parent signed and returned the revised assessment plan, which included the ISES assessment.

15. By October 2014, Parent had decided that Ventura was not going to assess Student for ADHD or autism. Parent testified that she asked Student's doctor to type a note for Parent's signature, dated October 24, 2014, requesting the school psychologist to assess Student for ADHD and autism, and requesting that Student's teacher fill out an ADHD evaluation form for Student's doctor. Parent could not recall the name of the doctor who prepared the letter for her. Parent testified that she gave the note to Ms. Anctil.

16. Ventura staff witnesses testified credibly and uniformly that they never saw the October 24, 2014 letter before it appeared in Student's evidence binder for hearing. Mother did not have her copy of the October 24, 2014 letter stamped received, as she did the September 17, 2014 letter, to prove delivery. Ms. Anctil testified credibly and convincingly that if she had received such a letter, she would have given it to the school principal, as psychological assessments are not the purview of a general education teacher. The letter was also odd as it stated that Student's brother had autism, and the evidence established that Student's brother was not diagnosed with autism until April 2017.

17. The letter also invited the school to contact the doctor, but did not contain the name, address, or a telephone number of that doctor. Without contact information, Ms. Anctil would have been unable to return a completed ADHD questionnaire.

18. Ms. Anctil did not recall having seen or completed an ADHD questionnaire. Parent produced a document on rebuttal purporting to be an ADHD questionnaire completed by Ms. Anctil as evidence that Ms. Anctil must have also received the letter. However, Student did not produce that document during Ms. Anctil's examination, or question Ms. Anctil on whether she had seen the document or completed it. In addition, the ADHD questionnaire was not included with the October 2014 letter in Student's evidence packet, indicating that the questionnaire was a separate document, and not an attachment to the letter. Therefore, an ADHD questionnaire, had it been completed by Ms. Anctil, was not persuasive evidence that Ms. Anctil also saw the letter.

19. Student did not establish that either the October 24, 2014 letter or the ADHD questionnaire were received by Ms. Anctil or any other person at Ventura. However, Parent's testimony did establish that she believed no later than October 24, 2014, that Ventura's assessment of Student would not include assessment for ADHD or autism.

20. A school psychologist for Ventura, conducted a comprehensive assessment of Student in October and November 2014, that included parent and teacher interviews, standardized testing and observations. The assessment showed that Student had average cognitive ability, but delayed academic skills and low processing skills. He displayed adequate communication and fine motor skills. Results of rating scales demonstrated concerns in the areas of hyperactivity, aggression, anxiety, depression, attention, atypicality, withdrawal, adaptability and social skills.

21. Student's last day of attendance in Ventura was November 10, 2014. Student and his family moved out of Ventura's boundaries on or about November 14, 2014.

STUDENT'S TIME WITHIN SANTA PAULA

22. Prior to November 21, 2014, Student enrolled in Santa Paula. Ventura agreed to have its staff conduct an IEP team meeting to review assessments conducted by Ventura, with Santa Paula team members present to discuss eligibility, services and placement.

Student's November 21, 2014 IEP

23. On November 21, 2014, Ventura and Santa Paula jointly conducted an IEP team meeting. Ventura team members included Ms. Anctil; Ms. Sims; the school psychologist who assessed Student; a program specialist; and a special education teacher. Santa Paula team members included a school psychologist; a program specialist and an intensive school based services therapist. Parent attended and received a copy of her parental rights and procedural safeguards in Spanish. A Spanish language interpreter was provided for Parent.

24. Ms. Anctil reported on Student's classroom performance. Student's social emotional and behavioral functioning was the area of most concern. Student screamed, cried, used negative and profane language, and did not complete his classwork.

25. Ms. Sims summarized her assessment results. She concluded that Student was eligible for special education under the category of emotional disturbance. Parent asked questions during the assessment review, and relayed her comments and concerns.

26. The Santa Paula IEP team, based on the Ventura assessment, concluded that Student was eligible for special education and related services under the category

of emotional disturbance. Parent, based on her testimony, was aware at the November 21, 2014 IEP team meeting that Ventura had not assessed for autism or ADHD.

27. Parent testified at hearing that she asked for Student to be assessed for autism and ADHD at this and every subsequent IEP team meeting. The testimony was not credible. Parent's recall of events in general, including IEP team meetings, was poor. Her testimony regarding the IEP team meetings was vague and evasive. Parent often testified in generalities, and was frequently unable to identify the persons with whom she had spoken. She appeared reluctant to respond to cross-examination, and her statements sometimes changed when revisited on cross-examination or re-direct. Her testimony that she had requested assessments for autism and ADHD at IEP team meetings was consistently contradicted by other team members, and not recorded in any of the contemporaneous IEP team meeting notes. Witnesses from both school districts testified credibly and persuasively that had Parent asked for autism and ADHD assessments at an IEP team meeting, the request would have been documented in the IEP team meeting notes, and their school districts would have responded to Parent's request. Their testimony was consistent with assessment information memorialized in IEP team meeting notes, including the notation in the November 21, 2014 IEP notes that an ISES assessment was pending.² Parent was not persuasive or convincing when she

² The testimony of district witnesses that the school districts would note assessment requests in contemporaneous IEP team meeting notes was corroborated by the notes regarding a team request for a functional behavior assessment in the December 16, 2014 IEP notes, Parent's request for reclassification of Student's English Language Development status in the November 18, 2015 IEP notes, and Parent's statement that she was having Student assessed for autism by his physician in the November 3, 2016 IEP notes.

testified that she had requested an assessment for autism and ADHD at every IEP team meeting.

28. Additionally, Parent's statements that she repeatedly told school district staff or IEP teams that she saw "characteristics of autism" had a rehearsed quality. The testimony was vague. It did not reveal what characteristics she saw, for example Student tantrumming or having difficulty communicating, that she now believes to be characteristics of autism.

29. The November 21, 2014 IEP team wrote and adopted goals in reading, written language and math. They also identified Student's social emotional functioning as an area of need, and wrote goals for Student to transition without tantrumming and to learn to follow instructions. The ISES assessment was pending, and the team agreed to hold another IEP team meeting to review that assessment, revise goals, and develop an assessment plan and program as needed.

30. The IEP team determined that Student should be placed in a small, highly structured special day class for the majority of the school day, with a minimum day schedule (three hours per day) during the transition to the new school.

31. Parent agreed with the eligibility determination, and consented to implementation of the IEP.

32. At hearing, Ms. Anctil opined that Student was not able to participate in regularly planned lessons due to his emotionality. She had taught students with autism, but never thought that Student had autism. She was concerned that Student speaking Spanish in the home and English at school delayed his language acquisition. Ms. Anctil believed that placing Student on half-days was an appropriate response to Student's anxiety and stress. She believed that Student found the kindergarten classroom emotionally challenging, and needed the relief provided by a half-day transition into regular school attendance. Ms. Anctil's responses were thorough and thoughtful, and

her opinions that Student's behaviors were the result of emotional disturbance and appropriately addressed were accorded significant weight.

33. Student was placed by Santa Paula in Ms. Dies' special education classroom. The ISES assessment was completed after Student began classes in Santa Paula.

34. The ISES assessment was conducted by school psychologist Rico Perez. Mr. Perez found Student argumentative and angry with a low frustration tolerance. He attributed Student's screaming, crying, negative statements and meltdowns to mood-dysregulation, feelings of helplessness, agitation and difficulty with relationships, which were exacerbated by multiple moves, a chaotic family environment and the family's lack of financial stability. He recommended that Student receive individual therapy to learn coping skills to manage his mood and attention problems, improve peer relationships and learn to identify the feelings that led to behavioral outbursts. He also recommended that Student be taught strategies to choose alternative appropriate behaviors. Mr. Perez recommended social work services to generalize positive progress to the home setting and provide parental support as needed.

December 16, 2014 IEP

35. On December 16, 2014, Santa Paula held an IEP team meeting to review the ISES assessment and Student's transition to Ms. Dies' class. The meeting was attended by Parent, Ms. Dies, two ISES clinicians and Santa Paula's school psychologist.

36. Parent informed the team that Student had been diagnosed with ADHD the day before the meeting. Ms. Dies reported that Student was very controlling and immature, although she had seen few of the negative behaviors reported in the IEP because her classroom was very structured. However, it was difficult for Student to transition back to classwork after play, and his refusal to transition was interfering with

his academics. Santa Paula team members proposed conducting a functional behavior analysis of Student's behaviors.

37. Mr. Perez recommended that Student receive ISES services to address poor mood management, impulsive attention seeking behaviors, and to increase social skills and problem solving skills. ISES service providers would work with Student on his social emotional goals of transitioning calmly and following classroom instructions. Mr. Perez recommended that Student receive 90 minutes per month of direct ISES counseling services, and 30 minutes per month of ISES consultation services with a social worker assisting Parent to generalize progress to the home setting and provide support.

38. Mr. Perez also recommended that Santa Paula refer Student to Ventura County Behavioral Health, an agency that provided educationally related social and emotional services to support students with IEP's. Behavior intervention services were provided as part of the collaborative educational services, or COEDS, program.

39. Parent asked questions about the functional behavior assessment, COEDS services, and when Student's school day would be extended. Santa Paula team members explained that the functional behavior analysis would determine why Student was behaving the way he did and come up with strategies to address those behaviors. COEDS would provide behavior support to Student and Parent at school and in the home. They also recommended that Student's school day not be extended until he could handle a longer day, perhaps when a behavior intervention plan, ISES services and COEDS services were in place to support him.

40. The team added the recommended 90 minutes of direct and 30 minutes of consultation ISES services to Student's IEP, and Parent consented to implementation of the IEP. Parent was aware at the December 12, 2014 IEP team meeting that Student had not been assessed for autism, but did not request an autism assessment.

41. In March 2015, Susan Henson, a behaviorist contracted by Santa Paula, conducted the functional behavior analysis by collecting data in a series of direct observations. The problem behaviors identified were: screaming (vocalizations above conversational volume), which occurred one to two times per week; crying, which occurred one or two times per week; negative verbal statements, usually to protest a task, which occurred daily; sitting or lying on the floor (primarily during transitions), which occurred two to three times per week; and meltdowns (screaming, throwing or other challenging behaviors for 30 seconds or more), which occurred one or two times per week. Behaviors were tracked by time and setting or other factors that preceded the behaviors, with similar tracking of the results of those behaviors. During observations the Student used complete sentences to communicate and answered questions ("I don't want to wear my jacket, it's making me itchy"). Student could understand and follow multi-step directions, and was observed to help pass out pencils to the class. Ms. Henson concluded that Student used maladaptive behaviors to escape nonpreferred tasks and to avoid transitions, and recommended that a positive behavior support plan be developed.

May 5, 2015 IEP

42. On May 5, 2015, Santa Paula convened an IEP team meeting to discuss the results of the functional behavior assessment, develop a positive behavior support plan, and get an update on the COEDS services that had been added in an earlier IEP.³ In attendance were Parent, two representatives from COEDS, Ms. Dies, Ms. Henson, Student's ISES counselor, a school psychologist and district administrators. Parent declined Spanish language interpretation.

³ A March 2015 IEP adding COEDS services was not offered into evidence.

43. Ms. Henson reported on the behavior assessment, and her conclusion that Student used maladaptive behaviors to escape nonpreferred activities and avoid transitions. The IEP team developed a positive behavior support plan to address Student's screaming, crying, negative verbal statements and dropping to the floor, and to support Student's behavior goals to transition without tantrumming and follow instructions. The replacement behaviors included transitioning from outside the classroom while remaining calm, walking with the adults or peers, and following simple instructions. Proposed strategies for teaching Student the replacement behavior were identified, including, presenting instructions clearly, holding Student's hand throughout transition, warning of transitions, reminding Student of expected behavior, offering choices (who to walk with, what to earn), reminding Student that he could ask for help when needed, and letting Student sit and rest at the new location. Reinforcements for good behavior included short private praise, reward tokens and class privileges. Ms. Dies told the team that Student looked for adults in the classroom during screams or tantrums to see how they reacted, and minimizing teacher or aide vocal attention during challenging transitions was included as a reactive strategy.

44. COEDS reported that Student needed behavioral support and requested that the services be provided in the classroom. Ms. Dies requested that COEDS services continue to be provided at recess on the playground, where Student displayed significant difficulty with transitions back into the classroom. The COEDS representatives reported that they had observed that Student interacted well with his peers until he was asked to transition. Parent reported that COEDS services had been very useful in the home, and Santa Paula team members recommended that COEDS services continue to be home-based and on the playground. Parent was aware that Student had not been assessed for autism at that time, but did not ask the IEP team for an autism assessment.

45. The IEP team adopted the positive behavior support plan, and retained COEDS services in Student's IEP at 600 minutes (10 hours) of direct behavior support per month, with 300 minutes (5 hours) per month of home-based social worker consultation with Parent.

46. Parent consented to the May 5, 2015 IEP.

47. During the 2014-2015 school year, Student was absent 33 days, or more than six weeks.

2015-2016 SCHOOL YEAR

48. For the 2015-2016 school year, Student attended first grade in Janice Fournier's special education classroom. Despite some early difficulties, Student demonstrated that he no longer required a shortened school day, and began attending for full school days.

49. The classroom included 11 students from kindergarten through second grade with a mix of mild to moderate disabilities, including autism, emotional disturbance, other health impairment and other disabilities. Ms. Fournier had two instructional assistants for 11 students, or approximately one adult for every four students. Ms. Fournier worked with the students on their grade level standards and essential skills, such as socialization. Ms. Fournier's students had recess, lunch, assemblies, music class and physical education with typical peers, and one of the instructional assistants facilitated socialization.

50. At the beginning of the school year, Student fell to the floor and tantrummed several times per week when requested to transition from preferred activities. He would also push away classwork, stating "I can't do this," "You don't want me to have fun anymore," and "Why are you making me do this?," but eventually he would do the work. Student's interactions with Ms. Fournier and her staff were sometimes positive, but at other times Student would be very angry. Student called the

instructional assistants derogatory names and frequently used swear words and profanity. A peer worker from ISES came to the classroom once a week to provide Student support, and COEDS began in-class behavior support. By the time of his first report card, Student was making progress on most first grade state standards, and had met several math standards.

51. Ms. Fournier did not speak Spanish, but Mother spoke some English. They had short conversations about once a week. Ms. Fournier observed that when Mother reported stressful events at home, Student's classroom maladaptive behaviors increased.

November 18, 2015 IEP

52. On November 18, 2015, Santa Paula held an IEP team meeting for Student, attended by Parent, Ms. Fournier, a school psychologist, a Santa Paula administrator and service providers from ISES and COEDS. Everyone in attendance was fairly fluent in Spanish except Ms. Fournier and the psychologist. The ISES social worker, Faviola Macias, was fluent in Spanish and provided Spanish language interpretation for Parent. The meeting lasted from one to two hours.

53. Ms. Fournier presented Student's present levels of performance. Student was making progress in reading, writing and math, and enjoyed math. Student communicated adequately and demonstrated average vocabulary for his age, and Ms. Fournier reported no speech and language concerns. Student was able to use the playground equipment and participate in physical education, use scissors, and was learning to print, demonstrating no motor ability concerns. Student could line up at the school cafeteria and choose his foods, feed himself and use the restroom independently, demonstrating adequate self-care and independent living skills. Ms. Fournier was concerned that Student did not complete his homework and missed 15 days of school in the first trimester, the equivalent of three weeks of instructional time, which she believed impacted his ability to learn the material presented.

54. The team identified Student's social emotional functioning and academics as areas of need. They adopted new goals in the areas of social emotional development (calm transitions to non-preferred activities), reading, writing, math, and English language development.

55. COEDS team members reported that Student was tantrumming less and more easily directed, and that COEDS services would be reduced and faded with an anticipated end date of March 30, 2016, although services could be added again if needed. The ISES team member reported that Student was making progress on his social emotional goals with counseling support. At that time, Student was transitioning into the classroom and screaming less often, although he continued to cry, make negative statements and drop to the floor.

56. The team amended Student's behavior intervention plan. Student's behaviors still served the function of escaping nonpreferred activities and transitions, but the team believed the behaviors were also focused on seeking attention from staff and peers. Ms. Fournier, the school psychologist, and ISES and COEDS staff had noticed that Student always looked over to see if the adults were watching him during problem behaviors, and would stop the behaviors if they weren't. The team retained specific strategies including positive attention to reduce problem behaviors, such as warning of upcoming transitions and holding Student's hand during transitions, and to increase positive and replacement behaviors. However, reactive strategies were modified to include ignoring problem behaviors if they did not pose a safety concern, with gentle physical guidance and short, private praise when the behavior stopped ("thanks for walking").

57. The team discussed placement options, including: general education with special education instruction in small groups outside the classroom; special education with part-time integration into general education; special education with integration

into non-academic or extracurricular activities with general education students; full-time special education classes in a public school and full-time special education classes in a non-public school. The team determined that due to Student's emotional volatility, he needed a small, highly structured classroom.

58. Student was offered specialized academic instruction for all classes, and ISES services were continued at the same level of individual ISES counseling for 90 minutes per month and home-based social work services from ISES 30 minutes per month. COEDS behavior intervention support was reduced to 240 minutes (4 hours) per month, and COEDS social work services in the home were reduced to 120 minutes (2 hours) per month. The IEP also offered proportionately less services for the four weeks of 2016 extended school year (summer school), which had shortened days for all students.

59. Parent indicated that she wanted to support Student's academic progress and help him with his homework. The team agreed to arrange opportunities for Parent to observe Student and successful motivation strategies utilized in the classroom, as well as an observation of the math program Student enjoyed. Parent also requested that Student be designated as an English speaker, rather than an English language learner, but the team requested that Student's English language supports remain in place until third grade. Parent was aware that Student had not been assessed for autism, but did not ask the IEP team for an autism assessment.

60. Parent consented to the November 18, 2015 IEP.

61. Ms. Fournier testified at hearing. She held multiple credentials to teach special education students, had coursework towards her master's degree in working with students with autism, and had attended continuing education courses on working with students with autism and behavior problems. Ms. Fournier had a professional demeanor, responded thoughtfully and completely, and seemed proud of the academic

and behavior progress Student made as her student. She was very familiar with Student's abilities and skill levels, and her opinions regarding Student's educational needs and the appropriate services and placement to meet those needs were given substantial weight. Ms. Fournier opined that a general education classroom was inappropriate for Student at the time of the November 18, 2015 IEP, because it would have been difficult for Student to progress in the general education curriculum, and in a larger classroom of students. She believed that the November 18, 2015 IEP offered Student a FAPE.

62. During the 2015-2016 school year, with a positive behavior support plan, Student's behaviors improved. He participated more, particularly in small groups at the centers in the classroom. Student liked to use earned tokens to purchase items at the classroom "store." By the end of the school year, Student was screaming and crying infrequently, and generally using less profanity, although his social skills slid back a bit when the COEDS services stopped. Academically, he was meeting most State standards in reading, writing and math. Student was still working towards State standards in a few reading categories and science, but exceeded several State standards in math.

63. Ms. Fournier credibly testified that in her weekly short conversations with Parent, Parent never said that Student's siblings had autism, and never mentioned that Parent believed Student had characteristics of autism. Ms. Fournier has had students with autism in her classrooms, and did not see Student on the autism spectrum. Student would look adults and other children in the eye and initiated engagement with peers sharing like interests. Ms. Fournier never saw Student rocking in place or hand-clapping. Student did not demonstrate classic characteristics of autism. Although Student had tantrums, Ms. Fournier did not feel that those tantrums were the equivalent of an autistic child's anti-social melt-down because Student was always looking to see if she was watching, and stopped if she was not. Ms. Fournier believed Student had trouble

regulating his emotions on a daily basis, and opined persuasively at hearing that Student's emotional functioning was the primary factor interfering with Student's access to the curriculum.

64. During the second trimester of the 2015-2016 school year, Student was absent 15 days (three weeks) and tardy 11 days. Student was absent 10 days (two weeks) and tardy 14 times in the third trimester. Student did not attend 2016 extended school year.

2016-2017 SCHOOL YEAR

65. During the 2016-2017 school year, Student was in second grade and attended Adriana Noble's special day class for second and third graders. There were 12 students in the classroom, with a wide range of mild to moderate disabilities, including specific learning disability, attention deficit hyperactivity disorder, traumatic brain injury, autism and emotional disturbance. Ms. Noble had two instructional assistants. Students were placed into levels according to their ability, and rotated through four small group stations to work on academics. Her class also worked on social emotional skills, and the students had behavioral charts and visual schedules. The class had physical education with the general education students three days per week.

66. Ms. Noble had been a teacher for five years in general education, and for four years in special education. Her credentials included an autism authorization, and she estimated that she had taught 40 to 50 students with autism, in general education as well as special education. Ms. Noble had a professional demeanor. She was very knowledgeable about autism. She had excellent recall concerning Student's performance and educational needs, and testified with thorough and detailed responses. Based upon her education, training and experience, and her work with Student in the classroom, her opinions regarding Student's educational needs and the appropriate services and placement to meet those needs were given substantial weight.

67. Academically, Student improved his reading skills over the first semester, with a better knowledge of sounding out words and sight words. Student was working at grade level in some areas of math. However, Student made limited progress in writing. It was difficult for Ms. Noble to get samples to assess his progress because he did not like to write.

68. Student's behavior in Ms. Noble's classroom was inconsistent. Student had a difficult time controlling his emotions. He had difficulty making it through the entire day without screaming or tantrumming. Student called Ms. Noble a "fucking bitch" and his classmates "fucking idiots," and would say that he wanted them all to die. Tantrums usually involved Student screaming that he wanted something to happen or not happen. He often dropped to his knees or sat on the floor in protest. Student usually requested more time to play or more break time. He would say things like "If you loved me you would let me have more breaks," and "If you loved me you wouldn't make me do these problems." Ms. Noble and her staff told Student that they loved their students, but it was their job to help students complete their work and learn. They responded by giving Student short and clear instructions. They observed that removing attention usually calmed him down and effectively decreased behaviors.

69. Student usually had some positive interactions each day. Student liked to talk about what he had learned, had cute phrases he used, was very cooperative when reading stories, and could play well with his classmates. However, he was also becoming unkind, resistant to accepting responsibility for his actions, and increasingly violent. He would kick desks, throw things, and chase other students. He once tried to stab another student in the neck with a pencil. He twice banged his head against a playground pole until Ms. Noble placed her hand between the pole and his head. Neither Ms. Noble nor school staff physically restrained Student, although she and her classroom assistants would use gentle guidance with a hand on his shoulder or back, and would hold his

hand. Student wanted to be picked up and held like a baby, which her assistants did once or twice at the beginning of the school year. Student ate at the cafeteria with other students, but if he was hungry before lunch he became upset and would throw his food on the floor. Ms. Noble solved this problem by bringing snacks. Student disliked some of the meal choices, as did his classmates, but he generally ate what the other students did.

70. Ms. Noble's students had visual reminders for behavior on their desks and throughout the classroom, which could be pointed to as a prompt. Her classroom was very structured. She used lots of positive behavior support, including praise, stickers and compliments. Stickers could be turned in for computer time and breaks. Student liked the games in the break area, and looked forward to break time. Ms. Noble also integrated a number of computer based programs into her lessons that students could work on independently. Student enjoyed going with the class to a computer lab once each week.

November 3, 2016 IEP

71. On November 3, 2016, Santa Paula conducted an IEP team meeting to review Student's program and plan for the following year. The meeting was attended by Parent and David Esquivel, an advocate from Student's counsel's office. Parent did not tell the other team members that David was an advocate from a special education law office, and instead introduced him as a friend who would interpret for her. Parent waived interpretation by Santa Paula staff. The meeting was also attended by Ms. Noble, special education director Frida Friend, who was bilingual, and a speech and language service provider.

72. Prior to the November 3, 2016 IEP team meeting, Parent told an ISES counselor and parent group advocate that she wanted to record the IEP team meeting without telling the school district or other team members. Parent was told by both that

she should give the school district notice if she wanted to record the meeting. Parent was aware that Student's IEP team meeting was confidential, and that she was required to give Santa Paula notice to record the IEP team meeting. She chose not to do so. Instead, Parent purchased a small recorder and secretly recorded the November 3, 2016 IEP team meeting without the consent of all other IEP team members. Parent testified that she has surreptitiously recorded IEP team meetings of Student's siblings, and routinely records conversations with staff at Santa Paula without their knowledge or consent. During the November 3, 2016 IEP team meeting, Parent acted in complete disregard for the privacy rights of the other team members and the laws prohibiting surreptitious recording of confidential conversations.⁴

73. Ms. Noble reported that Student was a good reader, but was still at the kindergarten to first grade level, and needed a larger vocabulary. Student did not meet his writing goal because, although he could give answers verbally, he refused to write them. Student was able to write his numbers, but became angry and oppositional and took a long time to do so. Ms. Noble opined that Student's emotions, frequent absences and tantrums were taking away from his learning and ability to complete assignments. She proposed goals in the areas of social emotional functioning and academics that were adopted by the team.

74. The team discussed placement in general education, but due to Student's delayed academic skills, increasing frustration and aggressive outbursts, Santa Paula

⁴ The recording was obtained unlawfully in violation of criminal and special education law. (See Pen. Code § 632; Ed. Code § 56341.1, subd. (g)(1).) As set forth in Orders dated August 27 and September 11, 2017, the illegally obtained recording, and the transcript obtained from that recording, were excluded from evidence in accordance with Penal Code section 632, subdivision (d).

team members believed Student needed a more, not less, restrictive placement. Student was not making the expected progress, and Ms. Noble felt that Student could learn and participate, but his level of frustration and tantrumming interfered with his ability to access the curriculum. Two placement options offered the small, structured classroom and intensive social emotional supports Santa Paula team members felt Student needed: a classroom in Ventura for students with emotional disturbance and a nonpublic school for emotionally disturbed students. The Ventura program was on a public school campus and offered integration with typical peers, so was less restrictive. The entire staff on that campus was trained in social emotional support and assisted students in the program to integrate with typical peers. Ventura's classroom had 12 students, a teacher, two full-time instructional assistants, and a full-time social worker. The team believed that the lower adult-to-student ratio, the embedded social emotional support, the high level of staff training and the support of the social worker would help Student learn and practice strategies to cope with his frustration. The team considered putting Student in a less restrictive classroom with a behavior aide, but determined that Student's level of frustration and behavior required the specialized training of a licensed social worker. Student's sibling attended the Ventura program, so Parent was familiar with it. Santa Paula also offered an increase in ISES counseling minutes to 120 minutes per month, and retained the ISES social work services with Parent at 30 minutes per month.

75. At hearing, Ms. Noble opined that a general education classroom was not appropriate for Student at the time of the November 3, 2016 IEP team meeting. She believed that Student needed the therapeutic environment of the Ventura program, and would not make the academic or social progress he was capable of until his emotions were under better control. Ms. Friend, who had a doctorate in educational psychology and had consulted with Ms. Noble as Santa Paula's special education director, concurred with Ms. Noble's opinion. Both Ms. Noble and Ms. Friend opined credibly and

persuasively that the November 3, 2016 IEP goals addressed Student's areas of need, and that the Ventura program placement and ISES services offered would enable Student to make progress on those goals and offered him a FAPE. Mother did not consent to the offer.

76. Mother informed the other members of the team that Student's physician, Dr. Thomas, was doing a medical assessment to see if Student had autism, and she expected him to recommend applied behavior analysis support. Ms. Friend stated that she did not see Student as being on the autism spectrum. The team asked Parent to inform Santa Paula if Dr. Thomas found autism and had any recommendations. Parent did not ask Santa Paula for an autism assessment, or for the IEP team to include a one-on-one behavior aide for Student in Student's IEP.

77. On November 7, 2016, District sent Parent an assessment plan to assess Student. Mother did not consent to assessment.⁵

⁵ At hearing, Student's attorney instructed Parent not to respond to questions regarding Santa Paula's offer to conduct further assessments. Student objected that such a line of questioning violated the attorney client privilege because the written offers were addressed to Student's attorney. The objection was overruled. The attorney client privilege protects disclosure of communications between the attorney and client; it does not protect disclosure of the underlying facts communicated. (*Zimmerman v. Superior Court* (2013) 220 Cal. App. 4th 389, 396.) Non-privileged correspondence does not become privileged because it is forwarded to counsel. (*San Francisco Unified Sch. Dist. v. Superior Court*, (1961) 55 Cal. 2d 451, 457.) Although Student's objection was overruled, Parent refused to respond to the questions on advice of counsel.

78. Dr. Thomas did not assess Student for autism, and Parent did not provide Santa Paula with any further information regarding Dr. Thomas's assessment, or any assessment for autism.

79. On February 2, 2017, Student was suspended for one day for refusing to follow Ms. Noble's instructions and attempting to strike classroom staff members. Mother believed that Student might have been physically restrained based on Student's statements regarding the incident, and worried about his safety. Parent did not return Student to school, and sought a doctor's letter to place student on home instruction while she obtained an autism assessment through her insurance.

80. On April 3, 2017, Dr. Gwen Huffer, M.D., wrote a medical prescription for three months of home instruction, diagnosing Student with ADHD, autism and speech delay, "until evaluation completed or new IEP in place." The diagnoses were required and intended for Student to be evaluated by Beacon, a provider of applied behavior therapy services to children with autism, to determine if Student required applied behavior therapy. On the same day, Dr. Huffer wrote similar autism diagnoses for Student's two siblings, as Parent wanted them all to be referred for evaluation to Beacon.

81. Dr. Huffer did not testify. She was a medical doctor, and her qualifications, if any, to conduct psychological testing for a diagnosis of autism is unknown. Parent did not produce an assessment report by Dr. Huffer, and the language of the prescription referencing "until evaluation is completed" suggested that the prescription was a referral for evaluation and that Dr. Huffer had not conducted an evaluation herself, or that Dr. Huffer had made a provisional diagnosis. The act of writing a diagnosis of autism for three children from the same family on the same day is also suggestive of a diagnosis made on parent report, rather than by individual assessments over time. The unauthenticated medical prescription was evidence of the notice provided by Parent to

Santa Paula for home hospital instruction, but carried no weight toward establishing that Student had autism.

82. At hearing, Parent testified that Beacon had assessed Student as having autism, but had not yet made any recommendations regarding behavior services. Parent was vague about when the assessment had taken place, testified that she had never seen the assessment, and did not provide a copy of a Beacon assessment to Santa Paula for IEP team consideration. Student did not produce an assessment report by Beacon at hearing. Parent's unsupported and uncorroborated hearsay statement that Student was diagnosed with autism by Beacon was accorded no weight in establishing that Student had autism.

ASSESSMENT BY STUDENT'S EXPERT DR. DAVID GILBERTSON

83. In March 2017, Student retained Dr. David Gilbertson to conduct a psychoeducational assessment. Dr. Gilbertson had been a licensed educational psychologist since 1984. He had worked as an administrator with various educational agencies from 1992 through 2010. Dr. Gilbertson was semi-retired, and was renewing his clinical credentials for private practice in Hawaii, and practicing once a month in California. Over the last few years, Student's counsel had referred over 25 students, including Student, to Dr. Gilbertson for psychoeducational assessment.

84. Although Dr. Gilbertson possessed impressive credentials as a psychologist and school administrator, he purported to be qualified to opine on functional behavior analyses, behavior plans and behavior interventions because he had supervised and worked with certified behaviorists for many years. Accordingly, while Dr. Gilbertson could generally be considered an expert in the broad field of educational psychology, he was not established to be an expert in functional behavior analyses or behavioral interventions for children with autism.

85. In addition, Dr. Gilbertson issued his assessment report on July 15, 2017, and none of the IEP teams who developed the IEP offers at issue could have taken his conclusions and recommendations into consideration.

86. Dr. Gilbertson interviewed Parent and conducted testing on Student in the home. During Dr. Gilbertson's testing of Student in the home, Student acted appropriately at times, but regularly refused to engage in testing in favor of playing with preferred toys. Student would return to testing with positive verbal reinforcement, verbal encouragement and redirection. Student's attention span was short, and his mood changed quickly from happy to angry and crying. Student display increased anxiety with new tasks and changes in routine, and Dr. Gilbertson reported observing Student demonstrate fleeting eye contact, rocking, hand clapping and self-talk.

87. Dr. Gilbertson's standardized testing results were consistent with Ventura's November 2014 psychoeducational assessment. Student had average cognitive ability, but delayed academic and low processing skills. Rating scales indicated concerns in the areas of hyperactivity, anxiety, depression, attention, atypicality, withdrawal, adaptability and social skills, but Dr. Gilbertson concluded that Student qualified for special education under a "primary" category of autism, rather than emotional disturbance.⁶ He failed to discuss whether or how Student's assessment results could be the result of social emotional needs, and simply concluded without significant discussion that

⁶ As long as a child remains eligible for special education and related services, the IDEA does not require that the child be placed in the most accurate disability category. Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability listed in the IDEA and who, by reason of that disability, needs special education and related services and is regarded as a child with a disability. (20 U.S.C. § 1412(a)(3)(B).)

Student's autism had an "emotional overlay." Dr. Gilbertson's failure to address Student's extensive history of emotional trauma and upheaval in the home, and intensive social emotional counseling and emotions-based behavior intervention, adversely and significantly impacted the completeness and persuasiveness of his opinions regarding Student's disabilities and educational needs.

88. Dr. Gilbertson observed Student in Ms. Noble's class on the last day before Spring Break, which was not a routine school day. Student had not attended school since February 2017. Dr. Gilbertson's conclusions from his school observations were accorded little weight in light of the unusual circumstances under which Dr. Gilbertson conducted his school-based observation.

89. Dr. Gilbertson observed that Student worked in a small group, but did not interact with his classmates and needed the aide to assist him in understanding the project. Student stayed in his chair, but sometimes blurted out and was inattentive, and needed frequent verbal prompts and redirection. When Ms. Noble told the class to line up to go outside, Student protested by lying on the floor. Student started to cough and told the teacher, "You want me to choke! You want me to choke." The teacher ignored the noncompliance and repeated her instruction to line up, consistent with Student's positive behavior intervention plan, and Student stood up and got in line.

90. At lunch, Student sat at the table with his classmates and ate independently, although he made negative verbal statements and was noncompliant. During recess, his class played tether ball, which it had learned while Student was on home instruction. In line, Student made two statements to himself, one of which was "I'm a left puncher." Student also went to join two other students and almost got hit by the swinging tether ball before he was redirected into the line. Dr. Gilbertson observed that Student did not appear to understand the game and had difficulty hitting the swinging ball. Student yelled out "No!" when given a one-minute warning that the game

would be over, and needed encouragement and prompting to line up for a race. Student ran only half the distance and fell to the ground. He then walked back to the room with the instructional assistant without incident.

91. Back in the classroom, Student engaged in loud verbal protests about each activity, and complained that a motor-movement dance activity was too loud. Student complied with adult requests when his protests were ignored. Student was told that he could not go outside, so he approached Dr. Gilbertson and said "Will you be with me? I can't be outside alone." Student then left the room followed by an instructional assistant. The assistant returned to the room, where Student could be watched through the open windows. Student was then told to return to the room, which he did. Student participated in an art activity of smearing glue on eggs and placing crepe paper on the eggs. Student complained that "I don't like sticky stuff," and "I don't feel comfortable," and then banged his hands together and said "If you do this with rocks, it will make sparks and fire."

92. Dr. Gilbertson concluded that Student was a distressed child with significant functioning and academic delays primarily due to autism and ADHD, and recommended changing Student's primary special education eligibility category to autism. In making his diagnosis, Dr. Gilbertson relied on the two diagnoses of autism reported by Parent. He did not have or review an assessment for autism by Dr. Huffer or Beacon, or speak to Dr. Huffer or anyone at Beacon. His reliance on a hearsay statement of Parent, rather than the type of documented evidence upon which an expert would rely, adversely affected the credibility and persuasiveness of his autism determination. Dr. Gilbertson did not request or review any information from ISES or COEDS concerning Student's three years of intensive social emotional counseling and emotion-based behavior support, which adversely affected the credibility and persuasiveness of his dismissive conclusion that Student's disability and behaviors were not emotions based.

93. Dr. Gilbertson made a number of recommendations for further testing, in fields in which he is not an expert. He recommended: that a board certified behavior analyst develop, implement and supervise a program of intensive services, to begin with one-on-one aide support and to be reduced as appropriate; that Student receive intensive individual academic instruction using a sensory-neural approach in reading, writing math and spelling, with further assessment to be done by a company that delivers such services, such as Lindamood Bell; and that Student receive independent educational evaluations in speech and language, occupational therapy, adapted physical education, and assistive technology.

94. Dr. Gilbertson's opinions were generally unconvincing, and appeared biased and motivated by a desire to find that Student had autism in support of Student's due process complaint, regardless of the information available. Dr. Gilbertson wrote that Ms. Noble said she saw Student as autistic, which Ms. Noble vehemently and convincingly denied she had ever said. Ms. Noble was indignant at Dr. Gilbertson's report, and persuasively testified that Dr. Gilbertson had inaccurately reported their conversation. Dr. Gilbertson's inclusion of a misstatement in his report, and during his testimony, adversely impacted the weight given that report and his testimony. The opinions of the school psychologists and educational professionals from Ventura and Santa Paula, who were familiar with Student and had participated in Student's school-based assessments and IEP team meetings, on Student's educational needs and the educational programs that would meet those needs were generally accorded greater weight than that of Dr. Gilbertson.

95. Dr. Gilbertson's observations of behavior were inconsistent with other witnesses more familiar with Student. For example, Student's teachers testified that Student had good eye contact (Ms. Fournier testified that Student would glare directly at people when angry) and never engaged in hand clapping. Dr. Gilbertson's conclusion

that Student had autism conflicted with substantial information that Student could be articulate, manipulative, social and was able to follow directions and make transitions when not frustrated, and seemed uninformed and forced for purposes of making a finding of autism. For instance, Dr. Gilbertson characterized Student's performance in tether ball as awkward gross motor and visual motor coordination, but was not aware that Student was unfamiliar with the game. He characterized Student's comment about being a "left puncher" as a form of mild verbal stimulation because it was not related to the activity, although tether ball involves punching a ball hanging from a pole. He characterized Student's comments about decorating eggs as tactile sensitivity and resistance to the activity, although this was the one activity in which Student engaged without verbal protest. In addition, a student clapping two eggs together and stating that if they were rocks a he could start a fire appears not only correct, but age appropriate for a second grader.

96. Dr. Gilbertson conceded that tantrumming and other behaviors such as those exhibited by Student do not necessarily mean that a child has autism, as those behaviors could be learned over time dependent on the responses obtained by the child. He also failed to address Student's history of excessive absences and the possible effect of that lost instruction on Student's delays in academic skills. Dr. Gilbertson relied on Parent's reports of multiple diagnoses of autism for Student in attributing Student's anxiety, sensory dysregulation and poor executive functioning to autism.

97. Dr. Gilbertson conceded that during the observation Student received frequent one-on-one prompting, and the teacher's responses were appropriate in that they did not reinforce Student's inappropriate behavior. He also conceded that there are individuals who are sensitive to noise and textures such as sticky glue who do not have autism. Dr. Gilbertson explained that he did not look for specific learning disability as a

suspected disability, because he was specifically looking to find eligibility of autism and ADHD.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁷

1. This hearing was held under the Individuals with Disabilities Education Act, 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) et seq.;⁸ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20

⁷ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁸ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel 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. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew*, 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. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on the issues decided.

5. A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).)

CLAIMS AGAINST VENTURA

All Claims Against Ventura Barred by the Statute of Limitations

6. Student contends that his claims against Ventura are not barred by the statute of limitations because Parent did not know or have reason to know that Student had autism until he was diagnosed by Dr. Huffer on April 3, 2017. Ventura contends that Parent knew of her claims as of November 2014 and failed to bring her complaint within two years of that date.

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

8. In California, a claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09-4624, 10-04223 SI) 2012 WL 398773, ** 17 – 19, *aff'd in part and reversed on other grounds at M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842; *M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039; see also *Miller v. San Mateo– Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F. Supp. 851, 861 [interpreting then Ed. Code, § 56505, subd. (j)].)

9. The weight of the evidence established that Parent suspected Student had ADHD and autism in October 2014, and knew or should have known that Ventura had not assessed Student in those areas no later than November 21, 2014. Parent had knowledge of the facts forming the basis of Student's Issues 1 and 2 more than two years prior to filing Student's due process hearing request on April, 18, 2017, and those claims are time barred.

10. With respect to Issue 1 against Ventura, Ventura reviewed its assessments of Student at the IEP team meeting of November 21, 2014. There was an interpreter provided for Parent at the meeting, and Parent participated in the meeting by asking questions and stating her concerns. Parent suspected at that time that Student might have ADHD or autism. The assessment review at the IEP team meeting did not include assessments for ADHD or autism. Parent was aware no later than November 21, 2014 that Ventura did not assess Student for ADHD or autism, the facts that form the basis of Issue 1. Accordingly, Issue 1 as to Ventura is barred by the two-year statute of limitations.

11. With respect to Issue 2 against Ventura, Parent did not request Ventura to assess Student in the areas of ADHD or autism. Parent's testimony was not credible regarding a letter making such a request being prepared for Parent by a physician. District witnesses testified credibly and convincingly that they had never seen such a letter. Therefore, Student's Issue 2, that Ventura did not take Parent's requests for assessment in the areas of ADHD and autism into account, fails on its merits. However, had Ventura received Parent's October 24, 2014 written request for ADHD and autism assessments, Parent was aware no later than November 21, 2014, that Ventura had not taken her requests into account and that no such assessments had occurred. Parent knew the facts forming the basis of Issue 2 at that time, and this claim against Ventura is also time barred.

12. With respect to Issues 3 and 4 against Ventura, the weight of the evidence established that Parent knew the facts forming the bases of Issues 3 and 4 against Ventura more than two years prior to the filing of Student's due process hearing request, and those claims are time barred.⁹

⁹ Moreover, even if not time-barred, Student's claims 3 and 4 as to Ventura are frivolous. The weight of the evidence demonstrated that Student had moved out of

13. Ventura frequently called Parent to pick Student up from school early due to his behaviors. On October 2, 2014, Parent received the letter shortening Student's school day due to his behaviors, and she picked him up early throughout October and November 2014 on the modified schedule. By October 2, 2014, Parent knew that Student's behaviors were being addressed with a shortened school day and missed instructional time. Accordingly, by October 2014, Parent knew the facts forming the basis of Student's claim at Issue 3 that Ventura inappropriately addressed Student's behaviors by offering him half-days and reducing his instructional time, and this claim is barred by the statute of limitations.

14. Parent attended, and participated in, the November 21, 2014 IEP team meeting that considered Student's placement options. At the end of that meeting, Parent knew the extent of the continuum of placement options considered in determining the least restrictive placement for Student, which facts form the basis of the injury alleged at Issue 4. Accordingly, that claim is time barred.

15. Both federal and State law establish exceptions to the statute of limitations where the parent was *prevented* from filing a request for due process due to: (1) specific misrepresentations by the local educational agency (LEA) that it had resolved the problem forming the basis of the complaint, or (2) the LEA's withholding of information

Ventura's boundaries and enrolled in Santa Paula before he was found eligible for special education. Ventura had no duty to offer Student a FAPE prior to the November 21, 2014 IEP team determination that he was eligible for special education and related services. By that time, Student had moved into another school district. Ventura was never responsible for providing Student with a FAPE, and Student's claims against Ventura at Issues 3 and 4 are devoid of merit, regardless of the application of the statute of limitations.

from the parent that was required to be provided to the parent. (20 U.S.C. § 1415(f)(3)(D); Ed. Code § 56505(l).) These narrow exceptions require that the LEA's actions be intentional or flagrant. "The statutory requirement that the misrepresentation or withholding prevented (the parent) from requesting the hearing further evidences the stringency, or narrowness, of these exceptional circumstances." (*School District of Philadelphia* (Pa. State Educational Agency, Appellate Panel, March 5, 2008) 49 IDELR 240, p. 5, 108 LRP 13930.)

16. Student did not allege any exceptions to the two-year statute of limitations, and the weight of the evidence demonstrated that neither of the exceptions to the two-year statute of limitations applied here. Ventura did not misrepresent to Parent that it would further assess Student, or that it would be responsible for Student's special education and services after Student moved beyond Ventura's boundaries. Parent received a copy of her parental rights and procedural safeguards in Spanish, and there was no evidence that Ventura withheld any other information required to be provided to Parent. (See *Moyer v. Long Beach Unified School Dist.* (C.D. Cal. Jan. 24, 2013, No. CV 09-04430 MMM (AJWx)) 2013 WL 271686, **6-8.)

CLAIMS AGAINST SANTA PAULA

Issues 1 and 2: Assessment

17. Student contends in Issues 1 and 2 that Santa Paula denied Student a FAPE by failing to assess Student for autism, despite Student displaying characteristics of autism and Parent making verbal requests for an autism assessment at all IEP team meetings. Santa Paula contends that there was no reason to suspect or assess Student for autism.

18. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and

related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.)

19. The IDEA provides for reevaluations (referred to as reassessments in California law) to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district “determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil’s parents or teacher requests a reassessment.” (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

20. The weight of the evidence did not establish that autism was a suspected area of disability until the IEP team meeting of November 3, 2016, after which Santa Paula promptly offered to reassess Student. The weight of the evidence did not establish that Parent made verbal or written requests for an autism assessment at any time. Thus, Issues 1 and 2 against Santa Paula fail.¹⁰

¹⁰ The two-year statute of limitations bars some of Student’s failure-to-assess claims against Santa Paula. Parent knew that Student had not been assessed from the information she received at the IEP team meetings in November and December 2014. Therefore, she was aware of the facts forming the basis of her claim that Santa Paula failed to assess Student for autism more than two years prior to the filing of Student’s complaint, and claims pre-dating the December 16, 2014 IEP team meeting are time barred. However, Parent could not have known whether the functional behavior assessment recommended at the December 2014 IEP team meeting included an autism

21. Parent's testimony that she had requested assessments for autism at every IEP team meeting was not credible. The testimony was not corroborated in any of the multiple contemporaneous documents, and was inconsistent with the testimony of all other witnesses who attended the various IEP team meetings. There was no evidence that Santa Paula staff had ever seen Parent's October 24, 2014 letter requesting assessment for ADHD and autism, or that the letter had been included in Student's educational records. All Santa Paula witnesses asked testified consistently and convincingly that they had not seen the October 24, 2014 letter before it appeared in Student's evidence binder.

22. At the December 16, 2014 IEP team meeting, Santa Paula was not on reasonable notice that autism was a suspected area of disability. Parent may have suspected that Student had autism, but she did not relay her concerns to Santa Paula at the December 16, 2014 IEP team meeting, or to staff at any time. The November 21, 2014 psychoeducational assessment had attributed Student's hyperactivity, anxiety, attention, atypicality and poor social skills to emotional disturbance. That conclusion was corroborated by Mr. Perez's ISES assessment, which explained Student's inappropriate behaviors as due to mood dysregulation and impulsive attention seeking. The December 16, 2014 IEP team did not have the benefit of Dr. Gilbertson's assessment, but even Dr. Gilbertson conceded that emotional disturbance would explain many of Student's behaviors. There was no reason at that time for Santa Paula staff members to suspect that Student had autism.

component until the results were reviewed at the May 5, 2015 IEP team meeting. Therefore, Student's claims that Santa Paula should have assessed him for autism from December 16, 2014 forward are not barred by the state of limitations.

23. At the May 5, 2015 IEP team meeting, Ms. Henson's functional behavior analysis indicated that the function of Student's behaviors appeared to be attention seeking as well as to escape non-preferred tasks, which was consistent with Ms. Dies' observations. Nothing in her report suggested that Student's behaviors were due to anything other than his emotional difficulties. Rather, Ms. Henson noted that Student could interact, respond to questions with articulate complete sentences when he was not upset, and follow multi-step instructions. Therapists from both the ISES and COEDS programs reviewed Student's progress in their therapeutic programs, and neither therapist indicated that they suspected that Student had autism. COEDS reported that Student socialized well with his peers on the playground until required to transition back into the classroom. Parent's testimony that she requested an autism assessment was not credible, and it was not recorded in the contemporaneous notes. On these facts, autism was not a suspected area of disability in May 2015.

24. At the time of the November 18, 2015 IEP, Student was in first grade in Ms. Fournier's class. Student communicated adequately when he wasn't distressed, and accessed the cafeteria and used the bathroom independently. Although Student had not met his academic goals, Ms. Fournier believed that Student's inability to access class materials and resulting frustration were due to his frequent absences. Ms. Fournier had worked with autistic students, and did not suspect that Student had autism. Student's behaviors had improved, although they still interfered with his education. ISES therapists believed that Student's behaviors were caused by an inability to consistently self-regulate his emotions, and recommended continuing intensive social emotional services. COEDS reported that its emotions-based behavioral interventions had worked so effectively that COEDS recommended fading services over the next several months. The only concerns raised by Parent to Santa Paula IEP team members were motivating Student to complete his homework and reclassifying him as a primarily English speaker.

On these facts, autism was not a suspected area of disability, and Student's behaviors were slowly improving with mental health supports.

25. At the IEP team meeting of November 3, 2016, Student had made progress in all academic areas, although he was still behind in most areas. Student was participating more in class, but was critical of his peers and created conflict by refusing to take responsibility for unkind actions. Student was following classroom routines with prompting, although he continued to exhibit low frustration tolerance and difficulty with transitions to non-preferred activities, which could result in tantrums and screaming. ISES recommended, and the IEP team adopted its recommendation, to continue and increase intensive social emotional services to address Student's frustration, anger and oppositional behavior. Ms. Friend and Ms. Noble did not see Student as autistic. Student's behaviors were explained by, and determined by mental health and educational professionals to be symptoms of, emotional disturbance and resultant mood dysregulation and attention seeking. On these facts, autism was not a suspected area of disability prior to the November 3, 2016 IEP team meeting.

26. At the November 3, 2016 IEP team meeting, Mother informed Santa Paula team members that Student's physician was evaluating him for autism. With this information, Santa Paula was on notice that autism was a suspected area of disability. The other team members were in disagreement with Parent's suspicion that Student had autism, but Santa Paula nevertheless responded with its November 7, 2016 assessment plan. At hearing, Parent acknowledged Santa Paula's offer to assess, but asserted the attorney client privilege and refused to answer questions regarding the offer. Student bears the burden of proving whether or not autism was a suspected area of disability after Parent's announcement at the IEP team meeting, and whether or not Santa Paula responded appropriately. Student cannot, and did not, meet this burden by failing to offer evidence of the actions or inactions of the parties after the November 3, 2016 IEP

team meeting. The trier of fact may consider logical gaps in a party's case resulting from the party's exercise of privilege, and draw reasonable inferences therefrom. (*People v. Redmond* (1981) 29 Cal. 3d 904, 910-911.) Here, it is reasonable to infer that Santa Paula promptly prepared an assessment plan for a psychoeducational assessment of Student to include an autism component in response to Parent's information.

27. Student failed to meet his burden of proving by a preponderance of the evidence that Parent had requested Santa Paula to assess Student for autism, or that autism was a suspected area of disability prior to November 3, 2016. Student failed to meet his burden of proving that Santa Paula failed to act promptly to assess Student for autism after Parent's statement at the November 3, 2016 IEP team meeting.¹¹ Santa Paula prevailed on Issues 1 and 2.

¹¹ 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 F.3d 1025, 1031-1033 (*Park*).) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).) Had Student proved that autism was a suspected area of disability, Student would nonetheless have failed to prove if or how Student was denied a FAPE by the failure to assess. Dr. Gilbertson's assessment report recommendations consisted of little more than recommendations for further assessment to determine and develop a program for Student.

Issues 3 and 6 Against Santa Paula: Behavior Interventions

28. Student contends at Issue 3 that Santa Paula denied him a FAPE by offering him a half-day schedule during his transition from Ventura as a behavior intervention.¹² Student contends at Issue 6 that Santa Paula denied him a FAPE by failing to reassess Student's behavior needs when the interventions in place were ineffective. Santa Paula responds that it appropriately addressed Student's behaviors, and regularly reviewed and updated Student's positive behavior plans.

29. The IEP team must consider the use of positive behavioral interventions, supports and strategies when a child's behavior impedes his or her learning or that of others. (34 CFR §300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The team may address the behavior through annual goals (34 CFR §300.320(a)(2)(i)), and may include modifications, support for teachers, and any related services necessary in the IEP to achieve those behavioral goals. (34 CFR §300.320(a)(4).)

30. The IDEA does not require a functional behavior assessment prior to development of a behavior intervention plan unless the child's placement has been

¹² Student's closing brief raises, for the first time that Santa Paula denied Student a FAPE by actions taken in February 2017 and afterwards, including Student's lack of instruction after Parent pulled him out of school, and an alleged delay in implementing home hospital instruction. Student is limited to the issues alleged in his complaint, unless Santa Paula agrees otherwise. (See 20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Student did not plead these claims in his complaint, or raise them as issues at the PHC or the first day of hearing, and District did not agree to an amendment to add those issues. Accordingly, they are not addressed in this Decision. (See also *Tamalpais Union High School Dist. v. D. W.* (N.D. Cal., Sept, 21, 2017, Case No. 16-cv-04350-HSG) __ F.Supp.3d __, 2017 WL 4176444, **13-14 (*Tamalpais*).)

changed for disciplinary reasons and the conduct that resulted in discipline is determined to have been a manifestation of the child's disability. (See 20 U.S.C. 1415(k)(1)(f).) The United States Department of Education, in promulgating regulations implementing the IDEA, explained that the IEP team determines whether a behavior implementation plan is required, and although a functional behavior assessment may assist the team to address behavioral issues, the IDEA does not require functional behavior assessment in order to formulate a behavior intervention plan. (71 Fed. Reg. 46683 (Aug. 14, 2006); see also *J.C. v. New York City Dept. of Educ.* (2d Cir. 2016) 643 Fed.Appx. 31 [67 IDELR 109] [pre-plan functional behavior assessment is not necessary if the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior].)

31. The weight of the evidence established that Student's modified schedule from April 18, 2015 through the end of the 2014-2015 school year, a period of approximately seven weeks, was reasonably calculated to enable Student to make progress appropriate in light of his circumstances.¹³

¹³ The statute of limitations bars Student's claim on these issues against Santa Paula prior to April 18, 2015. Parent was present at and participated in the November 21, 2014 IEP at which Santa Paula offered and Parent consented to a modified school day to address Student's behaviors during the transition to Santa Paula. Parent picked Student up at Santa Paula while he remained on the half-day schedule, and when he was sent home early due to behaviors. Parent knew that Santa Paula did not reassess Student's behavior needs from the November 2014 ISES assessment through the functional behavior analysis reported at the May 5, 2015 IEP team meeting. Accordingly, Parent knew the facts forming the basis of Issues 3 and 6 from November 21, 2014 forward, and Student's claims prior to April 18, 2015, two years before Student filed his

32. Student was placed on a shortened day schedule and occasionally removed from the classroom because Student became more anxious, frustrated, angry and aggressive as the day progressed, and he could not tolerate a full school day. District members of the November 21, 2014, December 16, 2014, and May 5, 2015 IEP teams believed that a shortened day was necessary for Student's emotional well-being and safety. It was one of many behavior interventions implemented, including ISES social emotional counseling and social work services, COEDS counseling services, and a positive behavior support plan revised after Santa Paula conducted a functional behavior analysis in March 2015. Santa Paula held multiple IEP team meetings in the 2014-2015 school year to review and amend Student's educational program. The many mental health professionals on Student's IEP teams during the 2014-2015 school year were in agreement that a shortened day was better tolerated by Student, and an appropriate means to address Student's inability to self-regulate his moods and emotions for a full day. Student was very young, but had suffered significant social emotional trauma and upheaval in his short life. Ventura and Santa Paula witnesses testified credibly and convincingly that a reduced day schedule was an appropriate behavior intervention in light of Student's emotional fragility throughout the 2014-2015 school year and until he could tolerate a full day.

33. Dr. Gilbertson conceded that a shortened day would be appropriate for a student who could not hold it together for an entire six-hour school day. His opinion that the intervention should have been for a short period of time was less persuasive than that of the school district witnesses who were more familiar with Student or his educational file, and opined that Student's shortened day schedule was appropriate for

complaint, are time-barred. (*K.P. v. Salinas Union High School Dist.* (N.D. Cal., Apr. 8, 2016, Case No. 5:08-cv-03076-HRL) 2016 WL 1394377, *10.)

as long as it took for Student to tolerate a full day. Social emotional support and behavior interventions were added to Student's program, but Student was still experiencing severe dysregulation through the end of the 2014-2015 school year, warranting a shortened day during that time.

34. Ms. Fournier's testimony demonstrated that once Student was able to adjust to a full-day schedule for the 2015-2016 school year, he was no longer retained on a shortened schedule.

35. The weight of the evidence established that the other behavior intervention services offered by Santa Paula, such as intensive social emotional services and a positive behavior support plan, were appropriate and reviewed regularly, and that no further assessments were required.

36. The December 16, 2014 IEP in effect on April 18, 2015, included behavior goals that were implemented with the support of intensive social emotional counseling and an in-home social worker to generalize progress and learned coping strategies across settings. When Student made less improvement in behaviors than anticipated, Santa Paula team members referred Student to Ventura County Behavioral Health for COEDS emotions-based behavior support services and obtained Parent's consent to conduct a functional behavior analysis to further determine why and how Student's behaviors were interfering with ability to learn.

37. The functional behavior analysis conducted by Santa Paula in March 2015 determined the antecedents of Student's behaviors, identified the specific problem behaviors, and determined the function of the behaviors, enabling the May 5, 2015 IEP team to develop a positive behavior intervention plan and create strategies to teach Student appropriate replacement behaviors. With the information provided by a detailed behavioral assessment, and the input of trained educational and behavioral professionals familiar with Student, the team addressed Student's crying, screaming and

tantrumming, which Ms. Dies reported had already been reduced with ISES and COEDS support. Parent similarly reported that she had seen improvement in Student's behavior at home. The IEP team retained ISES and COEDS supports, in addition to adopting the positive behavior support plan that supported Student's social emotional goals. On these facts, the behavior support services offered were reasonably calculated to allow Student to make meaningful progress in light of his circumstances on May 5, 2015.

38. During the 2015-2016 school year, COEDS transitioned their behavior intervention services into Ms. Fournier's classroom, and she reported adequate communication, independent living and social interaction skills when Student was not frustrated or emotionally overwhelmed. She also told Student's November 18, 2015 IEP team that she thought Student's frustration was exacerbated by his absences and missed instructional time, not by a lack of behavioral support. Both ISES and COEDS reported improvements in Student's behavior with social emotional counseling and emotions-based behavior intervention, and the November 18, 2015 IEP team maintained the level of ISES and COEDS support for an additional year. Student continued to be placed in a small special day class that provided him with the intensive academic instruction at his level that he needed to minimize frustration, and with the structure, social skills curriculum, and embedded behavior supports that enabled Student to make progress on his behavior goals. The November 18, 2015 IEP team appropriately considered and revised Student's positive behavior support plan to allow him to make progress on a revised transition goal, to transition calmly to non-preferred activities.

39. Although Student had not met his November 21, 2014 emotional social goals, he was making progress, and his screaming, crying, tantrumming and dropping to the floor had decreased to a few times each during the week. Some pupils may not meet the growth projected in annual goals and objectives of the IEP. (Ed. Code, § 56345, subd. (c).) A student may derive educational benefit under *Rowley* if some of his goals

and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. (*Rowley, supra*, 458 U.S. at pp. 202, 2013 fn. 25.) A student's failure to perform is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Cal. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.) The behavior support services offered in the November 18, 2015 IEP were reasonably calculated to, and did, allow Student to make progress in light of his circumstances at that time.

40. By the time of the November 3, 2016 IEP, Student was making academic progress, but was also experiencing increased frustration and aggression towards adults and peers. The November 3, 2016 IEP team determined that Student needed a higher level of behavioral support to access the curriculum, and offered placement in a program for students with emotional disturbance that offered a low adult-to-student ratio, and a classroom with staff highly trained in supporting emotions-based behavior. That classroom also had a full-time social worker with the training and expertise to provide a level of emotional and behavioral support unavailable from an instructional assistant or behavioral aide. The team also increased direct social emotional services from ISES. Ms. Noble and Ms. Friend testified credibly and persuasively that this level of behavioral support would address the behaviors that were interfering with Student's ability to learn, and assist him in making better progress on his social emotional goals. District also sent Parent an assessment plan four days after the November 3, 2016 IEP team meeting to further assess Student and gain more information regarding Student's educational and behavioral needs.

41. Dr. Gilbertson's criticisms of Student's November 3, 2016 behavior support plan, and his opinion that Student should have been placed in general education with a behavior aide, were neither credible nor convincing. Dr. Gilbertson was not a behaviorist. His own assessment recommendations on behavior, which were not available to the November 3, 2016 IEP team, were to conduct an updated functional behavior analysis and have a board certified behaviorist create a behavior plan with interventions. Santa Paula attempted to conduct further assessment for purposes of addressing behavior, and offered placement in a County run program of behavioral experts who would review and revise Student's behavior program within the context of a therapeutic behavioral program. In sum, Santa Paula appropriately addressed Student's behaviors and offered a program in the November 3, 2016 IEP that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances.

42. Student did not meet his burden of proving by a preponderance of the evidence that Santa Paula denied him a FAPE by offering him half-school days, and removing him from the classroom when he was severely dysregulated, as means of addressing Student's social emotional dysregulation. Student did not meet his burden of proving by a preponderance of the evidence that Santa Paula denied him a FAPE because the behavior interventions put in place by Santa Paula were ineffective and required further behavior assessment. Santa Paula prevailed on Issues 3 and 6.

Issue 4 Against Santa Paula: Consideration of Placement Options and Parent Participation

43. Student contends that Santa Paula did not consider how Student might have been supported in a general education classroom at the November 3, 2016 IEP, and therefore Parent was deprived of the opportunity to meaningfully participate in the development of Student's IEP's as an informed member of the team. Student also contends that she was unable to participate in any IEP team meetings because she was

not provided a “certified” Spanish language interpreter. Santa Paula contends that the November 3, 2016 IEP team did consider a general education placement, and that Student is not entitled to a certified Spanish language interpreter.

CONSIDERATION OF PLACEMENT OPTIONS

44. A school district must ensure that a child with a disability is educated in the least restrictive environment. (34 C.F.R. § 300.116.) To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and (2) special classes or separate schooling occur only if the nature or severity of the disability 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); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).)

45. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of general education was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette’s Syndrome].)

46. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining

whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options.¹⁴ (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

47. The weight of the evidence established that the November 3, 2016 IEP team discussed and determined that Student could not be satisfactorily educated in a general education classroom, and then considered whether Student had been mainstreamed to the maximum extent appropriate in light of the continuum of program options. The IEP document itself has a page dedicated to consideration of the least restrictive environment, and program options considered were checked off by hand, including special education classes with integration in general education for academics, special education with integration into non-academic settings, and full-time special education in a public school. Ms. Friend and Ms. Noble testified credibly and persuasively that the team discussed multiple placement options, including a general education placement, and ultimately recommended a change in placement to a special day class in Ventura for students with emotional disturbance. Parent was familiar with the program because Student's sibling attended that program, and did not raise any

¹⁴ "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

questions or concerns regarding the program. Santa Paula met its obligation to consider a continuum of placement options.

48. The November 3, 2016 IEP team appropriately determined the least restrictive environment for Student. Application of the *Rachel H.* factors to the facts shows that at the time of the November 3, 2016 IEP, Student could not have been satisfactorily educated in a regular education environment. Although Student had average cognitive abilities, many of his academic skills were at the primer and first grade level, and his emotional dysregulation and low frustration tolerance interfered with his ability to access grade level materials. Student often screamed during his tantrums that he could not do his work because it was too difficult. Student could not be expected to receive educational benefit in classes taught at the second and third grade level. Although Student could arguably have received non-academic benefit in a regular classroom from exposure to social and behavior modeling by typical peers, the evidence established that Student had severe social emotional disturbance that interfered with his ability to absorb appropriate behavior skills through casual modeling. By November 2016, Student was criticizing his peers, and his therapist reported that he was becoming more angry and oppositional. Although less frequently, Student continued to manifest his frustration and anger by screaming, crying and tantrumming, and used excessive profanity when resisting adult direction, each of which would have adversely affected the teacher and students in a regular class. There was no evidence that cost was a factor in the IEP team's decision that Student could not have been satisfactorily educated in a regular classroom. In conclusion, each of the four *Rachel H.* factors weighed in favor of a placement outside of the regular classroom.

49. Once it was determined that education in the regular classroom could not be achieved satisfactorily, per *Daniel R.R.*, the IEP team determined the maximum extent of mainstreaming appropriate for Student. Here, the evidence demonstrated that the

November 3, 2016 IEP offer of a structured classroom for emotionally disturbed students on a public school campus, with integration into the general education for recess, lunch and physical education, was the least restrictive environment for Student. The Ventura program offered its students support for socialization during mainstreaming, and Student's academic delays would not impact his participation in non-academic activities. Student enjoyed and independently accessed the playground and cafeteria, and Student had demonstrated the ability to interact appropriately with peers during lunch and on the playground with adult support.

50. Dr. Gilbertson opined that, for part of the school day, Student needed one-on-one instruction in a clinic setting such as the Lindamood-Bell program. However, such a setting would be much more restrictive than the Ventura program, as it would not allow Student to interact with other children, let alone typically developing peers.

51. Regular education offered Student little in the way of academic or other benefits, and was likely to lead to increased frustration and resulting maladaptive behaviors. On the other hand, special education in a classroom designed to support students with emotional disturbances was an environment reasonably calculated to permit Student to make progress appropriate in light of his circumstances. In conclusion, Student's placement in the Ventura County classroom, with opportunities to interact with typical peers at snack, lunch, recess and assemblies, was the least restrictive environment in which Student could be satisfactorily educated.

PARENT PARTICIPATION AT THE IEP TEAM MEETING

52. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A parent has meaningfully participated in

the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

53. Local educational agencies "shall take any action necessary to ensure that the parent or guardian understands the proceedings at [an IEP team] meeting, including arranging for an interpreter for parents or guardians . . . whose native language is other than English." (Ed. Code, § 56341.5, subd. (i); see also 34 C.F.R. § 300.322(e).) This enables parents to understand their child's needs so that they can give informed consent for their child's IEP. "Consent," as defined in Section 300.9 subpart (a) of title 34 of the Code of Federal Regulations, means the parent has been fully informed, in parent's native language, of all information relevant to the activity for which consent is sought.

54. Student cites no authority for his assertion that a school district must provide a "certified" Spanish language interpreter at IEP team meetings, and does not indicate which agency or federal, state or local governmental branch he contends is responsible for issuing such certifications.

55. Santa Paula provided Parent with a Spanish language interpreter at all meetings within the statute of limitations, except the November 3, 2016 IEP team meeting. Parent brought her own interpreter to that meeting. She waived District's offer to provide interpretation by Ms. Friend, a native Spanish speaker available to provide accurate Spanish language interpretation.

56. Student did not meet his burden of proving by a preponderance of the evidence that Santa Paula denied Parent the opportunity to participate in the development of Student's November 3, 2016 IEP by failing to consider a continuum of

placement options, or that Santa Paula denied Parent the opportunity to participate in the development of Student's program at any IEP team meeting by failing to provide a "certified" Spanish language interpreter. Santa Paula prevailed on Issue 4.

Issue 5: Physical Restraint

57. Student contends that he was denied a FAPE because Parent was not provided with emergency reports, and emergency IEP team meetings were not held, when Ms. Noble allegedly placed Student in a physical restraint. Santa Paula contends that Student was never physically restrained, and so no emergency reports or IEP team meetings were warranted.

58. Emergency interventions such as physical restraint may be used on special education students only to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the student or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Ed. Code, § 56521.1, subd. (a).) Emergency interventions shall not be used as a substitute for a systematic behavioral intervention plan designed to change, replace, modify, or eliminate the behavior. (*Id.* at subd. (b).) If a behavior report is written regarding a student with a positive behavioral intervention plan, the report must be forwarded to the IEP team to review and determine if the behavior plan requires modification. (*Id.* at subd. (h).) The parent shall be notified if an emergency intervention is used. (*Id.* at subd. (e).)

59. The weight of the evidence did not establish that Student had ever been physically restrained. Ms. Noble twice had to place her hand on a pole on the playground to stop Student from bumping his head against the pole, which action fell far short of physical restraint. Ms. Noble testified credibly and convincingly that she had never physically restrained Student, and Ms. Friend confirmed that she had never been informed by any Santa Paula staff that Student had been physically restrained. Santa

Paula staff gently guided Student with a hand on the back or shoulder, or held his hand, during transitions. These actions do not constitute placement in a physical restraint hold, and are non-restrictive interventions that did not require a behavioral emergency report to be prepared, sent to Parent, or forwarded to Student's IEP team. Parent's conjecture that Student had been physically restrained, based on Student's statements that he had been grabbed or hurt, lacked personal knowledge and was speculative.

60. Student did not meet his burden of proving by a preponderance of the evidence that Student was physically restrained. Student did not meet his burden of proving by a preponderance of the evidence that Santa Paula failed to notify Parent of, or hold IEP team meetings to discuss, physical restraints of Student. Santa Paula prevailed on Issue 5.

Issue 7: prior written notice

61. Student contends that Santa Paula failed to notify Parent by prior written notice of its decision to deny Parent's request at the November 3, 2016 IEP team meeting for a one-on-one aide for Student.¹⁵ District contends that Parent did not make such a request.

¹⁵ Student argues in his closing brief, for the first time, that Parent requested a one-on-one aide at the May 5, 2015 IEP team meeting, warranting prior written notice of denial. Student did not allege this claim in his complaint, or raise it at the PHC or the first day of hearing, and Student is limited to the issues alleged in his complaint, unless District agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Tamalpais, infra*, at **13-14.) District did not agree to an amendment to add that issue. Additionally, Parent's participation in the discussion of COEDS services at the May 5, 2015 IEP team meeting did not constitute a Parent request for a one-on-one aide for Student.

62. A school district must give prior written notice to a parent at a reasonable time before the district proposes to initiate or change, or refuses to initiate or change, the identification, assessment or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 Code Fed. Regs. § 300.503; Ed. Code, § 56500.4, subd. (a).)

63. The weight of the evidence did not establish that Parent had ever made a request of Santa Paula to provide Student with a one-on-one aide. Therefore there was no requirement for Santa Paula to provide prior written notice that such a request was denied.

64. Parent's testimony on this issue was not credible. Parent was vague in her identification of what was said at the November 3, 2016 IEP team meeting, under what circumstances and to whom. Multiple Santa Paula witnesses testified credibly and convincingly that they were unaware that Parent had ever requested a one-on-one aide for Student, at the November 3, 2016 IEP team meeting, or at any other time. The contemporaneous notes taken during the November 3, 2016 IEP team meeting do not document a request by Parent for a one-on-one aide. Although Parent knew how to write a note to Santa Paula staff to make a request, and how to time stamp such a written request for proof of delivery, Student offered no copies of date-stamped written requests for a one-on-one aide.

65. Student did not meet his burden of proving by a preponderance of the evidence that Parent requested that Student be given a one-on-one aide at the November 3, 2016 IEP team meeting, or at any other time, or that Santa Paula failed to appropriately respond to such a request. Santa Paula prevailed on Issue 7.

ORDER

All of Student's requests for remedies 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, both respondents Ventura and Santa Paula prevailed on all issues against them.

RIGHT TO APPEAL THIS DECISION

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 2, 2017

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings