

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ALTOS SCHOOL DISTRICT

OAH Case No. 2017030443

**NOTICE: This decision has been
VACATED by the United States District
Court, the opinion for which is attached
to the end of this decision.**

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings on March 6, 2017, naming Los Altos School District as respondent.

Administrative Law Judge Penelope Pahl heard this matter in Los Altos, California on June 6, 7, 8, 27, 28, and 29, 2017, and on July 18, 2017.

James Sibley, Amanda O'Neal and Sarah Fairchild, attorneys at law, represented Student. Student's Mother and Father attended each day of the hearing on behalf of Student.

Laurie Reynolds, attorney a law, represented Los Altos School District. Jennifer Keicher, Director of Special Education, attended the hearing each day on behalf of Los Altos School District.

The parties requested permission to file written closing arguments. A continuance was granted for that purpose and the record remained open until August 8, 2017 at 3:00 p.m.. Upon timely receipt of closing arguments, the record was closed and the matter was submitted for decision.

ISSUES^{1 2}

1. Did Los Altos fail to provide Student a free appropriate public education during the 2014-2015 school year beginning March 6, 2015, by:
 - a. failing to assess in all suspected areas of need, specifically, academic achievement, intelligence, and social-emotional needs;
 - b. failing to provide/offer appropriate placement, support and services at the April 21, 2015 IEP to address Student's unique needs including but not limited to her attention, executive functioning, reading, writing, math and social emotional needs and to enable Student to make progress or gain educational benefit.
2. Did Los Altos fail to provide Student a FAPE during the 2015-2016 school year by:

¹ The ALJ has re-worded the issues to pose questions instead of stating conclusions. The ALJ has authority to reword and re-organize a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

² It is unclear why Student separated the questions of whether FAPE was denied due to a denial of support and services and whether FAPE was denied due to a denial of appropriate placement. Placement is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code. Regs., tit. 5, § 3042) As the questions are unable to be analyzed separately, the issues have been rewritten to combine them.

- a. failing to assess in all suspected areas of need, specifically, academic achievement, intelligence, and social emotional needs;
 - b. failing to provide/offer appropriate placement, support and services at the March 21, 2016 IEP to address Student's unique needs including but not limited to her attention, executive functioning, reading, writing, math and social emotional needs and to enable Student to make progress or gain educational benefit.
3. Did Los Altos fail to fund or file for a due process hearing in response to Parents request for an IEE on April 4, 2016?
4. Did Los Altos fail to provide Student a FAPE during the 2016-2017 school year by: failing to provide/offer appropriate placement support and services at the June 2, 2016 IEP to address Student's unique needs, including but not limited to her attention, executive functioning, reading, writing, math and social emotional needs; and to enable Student to make progress or gain educational benefit?

SUMMARY OF DECISION

Student has been diagnosed with attention deficit hyperactivity disorder and generalized anxiety disorder. The attention deficits impact her ability to focus her attention and understand directions. Her inability to succeed in the school setting has steadily increased her anxiety, negatively impacting her work in the classroom and her life at home. Teachers in both first and second grade noticed that Student struggled with following directions and paying attention.

Repeated attempts at general education interventions, despite clear indications of attention deficit hyperactivity disorder, inability to sustain focus lack of executive functioning skills led to a delay in assessment until the end of Student's second grade year (the 2014-2015 school year). All that was offered to Student in second grade were classroom accommodations that had been tried and found ineffective.

When assessments were completed at the end of Student's second grade year, they were extremely limited failing to assess Student in a way that would explore an explanation of her attention and executive functioning difficulties outside the realm of a speech and language impairment. In some instances the assessments that were done were not completed according to protocols. The outcomes of the assessments completed did not support the recommended eligibility category of speech and language impairment. The limited goals and services implemented did not meet all of Student's needs.

Although it was evident early in Student's third grade year that the services and accommodations from the initial IEP were not helping her, Los Altos did not seek permission to conduct additional assessments until April of 2016, after conducting a second IEP in March of 2016. Los Altos denied Student a FAPE in failing to assess in all areas of suspected need.

The outcome of the March 21, 2016 IEP was to diminish the expectations in Student's goals and continue accommodations that had been demonstrated to be ineffective since the first grade. Los Altos provided limited services that did not adequately address Student's attention and academic deficits, resulting in a denial of FAPE due to a failure to offer appropriate placement and services from March 6, 2015 through June 2, 2016.

Parents' request for an independent educational evaluation was appropriate. Although a request for assessments was made by Los Altos on April 1st, Parents' requested IEE was based on a challenge to the March and April 2015 assessments which they asserted were improperly limited. Los Altos failed to agree to fund the requested independent evaluation and failed to file a request for due process hearing to establish that the 2015 assessments were appropriate. Parents are entitled to reimbursement for the assessments conducted by Dr. Brendan Pratt.

In all relevant time periods, Student had needs in the areas of attention, focus, task initiation and completion, math, reading, listening comprehension, writing, social skills and anxiety. Student's IEP's in the 2014-2015 and 2015-2016 school years did not recognize these needs and did not offer special education and related services and placement to address these needs.

An IEP team meeting was convened on June 2, 2016, following the completion of Dr. Pratt's assessments. Dr. Pratt diagnosed long standing attention deficit hyperactivity disorder. He also diagnosed generalized anxiety disorder. Although additional specialized academic instruction and services were added during the team meeting, the June 2, 2016 offer of special education and related services was not a FAPE as it failed to meet all of Student's special education needs. The goals carried over from the March 21, 2016 IEP were inadequate in that they were based on reduced expectations instituted as a result of a failure to properly assess. Furthermore, Los Altos did not offer adequate counseling for student. However, the academic program specified otherwise offered a free, appropriate public education. While the program was not Parent's preferred program, Parents failed to prove that Student would not receive meaningful educational benefit due to the amount of "pull-out" specialized academic services offered.

Parents are awarded reimbursement of tuition and the enrollment fee for the private school, in which Student was placed for fourth grade, as compensatory education for a denial of FAPE in the second and third grades. Although not a perfect program, the program offered was reasonably calculated to enable Student to receive educational benefit that year, which she did. As additional compensatory education, Student is awarded reimbursement for summer tutoring with Ms. Robinson during July and August of 2016. This tutoring helped to prepare Student to access her education in the fourth grade by working with Student to catch up to grade level in reading. Student is also awarded reimbursement for counseling provided by Dr. Morris for the period

between August of 2016 and May 15, 2017 as part of her compensatory education award and to remedy the failure to include appropriate counseling services in the June 2, 2016 IEP. The counseling was specifically directed to assisting Student in accessing her education. Student is further awarded reimbursement for attendance at The Friendship Program, which was a social skills training group in which she was enrolled to assist with the social anxiety that impeded her ability to work in groups at school and to have successful social relationships with peers. Student shall be reimbursed for winter and spring sports camps which also offered her the opportunity to practice her social skills training and engage with local peers in a supervised setting.

The award for tuition reimbursement is solely a compensatory award. While, the June 2, 2017 offer failed to provide adequate counseling and the goals carried over from the March 21, 2016 IEP were not based on the updated information available, the private school did not offer counselling, and, with the exception of an inadequate counseling offer, Student did not show that the June 2, 2016 IEP failed to offer FAPE.

FACTUAL FINDINGS

JURISDICTION

1. Student is a nine year old girl who, at all times relevant to these proceedings, lived with her parents in the jurisdictional boundaries of the Los Altos School District. At the time of the hearing Student had just finished her fourth grade year at a local private school. Student attended one of the elementary schools in the Los Altos School District from kindergarten through the end of third grade.

IDENTIFICATION OF STUDENT'S DISABILITY

First Grade: 2013-2014 School year

2. Student has a long history of attention problems. At least as early as first grade, Student was observed having difficulty processing directions in class to such an extent that the first grade teacher asked Mother if English was Student's first language. It is.

3. Despite consistent hard work, Student had difficulty following concepts that built on each other. In first grade Student struggled with phonics, being unsure of how to sort different kinds of words or letter blends. She also struggled with math. Student found art challenging as she would be unable to remember the multi-step directions and then would be displeased with her work product. Student was observed to lack self-starting capabilities, needing an adult or peer to help her. Her first grade teacher noted that she struggled to use a paper clip and could not find paper she was directed to get from the teacher's desk despite the paper supply being obvious. Student demonstrated a need for a quiet, smaller group environment as she needed extra instruction from the classroom teacher to complete math problems and correct tests. She also required one-to-one teaching to learn paragraph writing.

"RESPONSE TO INTERVENTION" FIRST GRADE

4. A report from the first grade teacher regarding a March of 2014 "response to intervention" conference documented the identification of Student as a child with difficulty processing directions in class.³ The report indicates that Student struggled to

³ "Response to Intervention" is a term of art in education that refers to a systematic use of school-wide testing to produce normative data against which outcomes of crafted interventions that address academic or behavioral issues of struggling students are measured. At the time of the interventions at issue here, Los

understand new concepts. This was a concern given that, especially in math, concepts built on each other as the children progressed through the curriculum. Although the response to intervention conference occurred in March of 2014, the report indicates that the first grade teacher had noticed and had been providing extra help to Student due to her difficulty in processing information for most of the 2013-2014 school year. The action plan created as a result of the response to intervention meeting continued the additional help that the teacher had been providing already for math. In the area of reading, the use of a "T-Chart" to organize information for paragraph writing was added with Parents also utilizing the system when they worked with Student on her homework. Student was also to repeat instructions to the teacher before she started to work on a project.

Second Grade: 2014-2015 School Year

5. Student's second grade class was co-taught by Malia Lammay and Michele Hayden. In early October of 2014, Ms. Hayden took some time off for a maternity leave and was replaced by a long-term substitute teacher. Ms. Hayden returned shortly after the beginning of February 2015. Ms. Lammay kept in touch with Ms. Hayden regarding developments in the class while Ms. Hayden was on leave and their discussions included Student. The teachers were aware of Student's reported attention deficits in first grade.

6. In second grade, Student continued to have difficulties following instructions and required frequently repeated directions in order to complete assigned tasks. Multi-step directions were particularly difficult for her to understand, often

Altos used a more informal method of developing interventions that were crafted by teachers on an *ad hoc* basis for individual students and did not utilize a school-wide norm basis for evaluating outcomes. Los Altos' special education director testified that the district is currently revising that practice.

resulting in skipped steps or confusion of the order of tasks necessary to complete an assignment. Student tended to be easily distracted and struggled to “keep her eyes on the speaker.” However, her teachers acknowledged that even when she was looking at the speaker she failed to understand or recall all of the instruction she received. Student continued to struggle with math concepts and required re-teaching from teachers and parents.

7. Student is a very sensitive, shy girl who had difficulty socializing with other students for several years. While at the Los Altos elementary school, Student was acutely aware of being singled out for special treatment and became embarrassed when she felt that was happening. This applied to situations ranging from the need to ask a question about the instructions just given to complete schoolwork to the need to take an envelope home to her parents that others were not given.

8. Student had difficulty making friends, both because she was naturally shy and because the girls in her second and third grade classes were more mature. It was challenging for Student to join in her classmates’ conversations and games. Student was sometimes targeted by other children in her class at recess and lunch which made her feel sad and left out. Student’s inability to socialize, coupled with her attention deficits, made it difficult for her to work on group projects in class.

“RESPONSE TO INTERVENTION” SECOND GRADE

9. When Student continued to demonstrate the same types of attention difficulties in second grade, Ms. Lammay, per Los Altos policy, convened another response to intervention conference in October of 2014. The report from that conference echoed the concerns of the first grade teacher almost exactly, stating:

[Student] struggles with understanding and carrying out directions and routine in the classroom. She is often

confused about directions and unable to complete a task without redirection from a peer or adult. She has expressed feelings of embarrassment over not knowing the classroom routines after several weeks of school.

10. Ms. Lammay testified that another Response to Intervention conference was scheduled in second grade, instead of proceeding to assessments, because they wanted to see if the different approaches the second grade teachers employed would help Student. Second grade interventions included an “eyes on the speaker” card, which was a card with cartoon eyes the teacher could point to as a reminder for Student to pay attention and reading schoolwork directions out loud before beginning work. Ms. Lammay also created a personal checklist for Student listing the “Daily Five” literature exercises Student was required to complete each day and provided Student with a “rescue” card with red and green sides to indicate whether Student needed assistance.⁴ Student did not use the rescue card because it made her feel singled out. The personal “daily 5” checklist was also discontinued as there was a classroom checklist posted that Student referenced. Student’s difficulties did not improve with the use of these interventions. Throughout the hearing, Ms. Lammay’s testimony was sincere, detailed and candid. Her testimony was given considerable weight.

STUDENT STUDY TEAM MEETING – SECOND GRADE

11. It was apparent relatively quickly that the interventions were not going to be adequate. Parents were informed during the mid-November Parent-Teacher

⁴ Use of the rescue card required Student to turn the card to the red side when she needed additional assistance with a project or needed to ask a question. It eliminated the need to raise her hand which Student found embarrassing.

conferences that Student had attention problems.

12. On December 3, 2014, Ms. Lammay sent an email to the general school-wide Student Study Team email address which was the means by which faculty requested student study team meetings. The email was short, requesting a meeting and that Student's difficulties with listening and following directions had gotten progressively more pronounced. The email continued, "Interventions have had little or no effect." The email ended with a simple "Help!!"

13. On January 26, 2015, an email was sent to Parents by the co-teachers of the second grade class telling them that "an opening had become available" to discuss Student's needs on February 9, 2015. Parents were informed the meeting would "include staff member who may be able to give us more insight on how best to instruct [Student]." Parents responded accepting the meeting and asking whether interventions already in place were improving Student's work. They were informed that Student's reading and writing had improved, as has her confidence, but concerns remained that "she still needs quite a bit of prompting to look at the speaker and follow verbal directions with visual cues." This information to Parents did not comport with the email Ms. Lammay sent to the study team email address in early December.

14. A Student Study Team meeting was convened on February 9, 2015. Present were Parents, Ms. Lammay, School Psychologist Kathy Hartley, Resource Specialist Ashley Morris, and Wade Spenader, the school Principal. Areas of concern noted in the meeting were that Student showed "difficulty with directions." Inconsistency was noted in following oral and written directions. Student showed particular problems in following multiple step directions, which often resulted in a piece or a step missing from her work. This deficit was confirmed by Ms. Hartley during her observation of Student earlier that day. It was further noted that, even when Student was looking at the speaker, she missed steps of instructions. Testing for attention,

receptive language processing and other language processing issues were discussed. Parents left the meeting stating that they wanted to consider the testing recommended. Parents notified the Student Study Team and Carol Rossi, the Los Altos speech language pathologist, via email later that evening that they consented to proceeding with the testing.

INITIAL ASSESSMENTS

15. Parents were notified on February 10, 2015 that an assessment plan that would require Parents' signatures would be prepared and provided after the February break. The assessment plan, seeking assessments in the areas of Health, "Language/Speech Communication Development" and "Behavior Observation checklists for attention", was sent to Parents on February 23, 2015. It was immediately signed and returned to Los Altos which sent it to the Los Altos district offices on February 26, 2015. The assessment plan included minimal testing for social emotional issues, and no assessment of cognitive abilities or academic achievement. No evidence was submitted indicating that the health assessment, which was to be conducted by the school nurse, was ever completed.

Speech and Language Assessment

16. The Speech and language evaluation was conducted by Carol Rossi, Los Altos' speech and language pathologist. Ms. Rossi holds a Master's degree in Communicative Sciences and Disorders and is a licensed speech and language pathologist. Ms. Rossi also holds a rehabilitation services credential. As a licensed speech pathologist, Ms. Rossi is qualified to diagnose communication disorders including receptive and expressive language issues, articulation disorders, fluency disorders, voice disorders and social language. Testing was started March 12, 2015, was continued on March 17, 2015, and completed on April 1, 2015. No separate report

regarding the results of the speech and language testing was prepared; however, information regarding the testing outcomes was included in the "Present Levels of Performance" section of the April 21, 2015 IEP.

17. The speech and language evaluation was conducted over three days spread out over approximately two weeks and consisted of the Clinical Evaluation of Language Fundamentals, Fifth edition, which tested sentence completion, linguistic concepts, word structure, word classes, following directions, formulating sentences and recalling sentences. A supplemental subtest for listening to paragraphs was also administered. These tests collectively evaluated core language skills as well as receptive and expressive language. Student scored in the average range on all of these subtests with the exception of the paragraph listening subtest which was given after all of the other testing was complete. Ms. Rossi testified that she decided to conduct this additional subtest because, based on her clinical experience, she felt like Student had an area of weakness she was not able to find. She felt that the paragraph listening subtest which included longer paragraphs would more closely resemble the classroom setting in which Student was having difficulty understanding instructions. Ms. Rossi was aware that there had been attention concerns for several years at school.

18. The Comprehensive Assessment of Spoken Language –Sentence Completion subtest was administered to evaluate Student's ability to retrieve and express one of the appropriate words that fit in the meaning of the sentence presented to her. Student achieved an above-average score on this test. The Test of Narrative Language was conducted to evaluate Student's ability to answer questions about stories heard, to retell the stories and to create her own stories. Student scored in the average range in all of these areas, albeit in the lower end of average on the Test of Narrative Language. It was noted that Student showed better comprehension of stories when visual supports were provided. Student's performance on the Story Telling subtest was

described as “very low average” in the IEP present levels of performance, despite the fact that Ms. Rossi testified that such a category is not actually identified in the testing protocols.

19. Ms. Rossi testified that she ultimately determined that Student should qualify for special education under the category of speech language impairment because she did an item analysis of the testing administered, and, as a diagnostician, determined that Student was performing in a way that raised concerns. Ms. Rossi did not believe the speech testing was “truly showing her weaknesses.” Therefore, Ms. Rossi evaluated an informal language sample and based on that, combined with the Test of Paragraphs, she determined Student qualified for special education under the category of speech or language impairment.

20. Ms. Rossi testified that a language sample of more than 50 utterances was recorded, transcribed and analyzed but was not kept in her records. Ms. Rossi acknowledged in testimony that her interpretations of the testing did not entirely conform to the manufacturer’s instructions for the tests she administered, but asserted that her evaluation and ultimate recommendation for eligibility under the speech and language category was a legitimate exercise of her expertise as a diagnostician.

21. The determination that Student qualified for special education based on the presence of a speech or language impairment did not meet the state or federal criteria. Student’s score on the Understanding Paragraphs subtest from the Clinical Evaluation of Language Fundamentals was the only test on which Student scored below the average range. The language sample Ms. Rossi asserted was relied upon in making her ultimate determination of eligibility was neither recorded nor transcribed; nor was the analysis of a language sample included in the present levels of performance section of the IEP, which is the only report of the speech and language testing. Ms. Rossi’s assertion at hearing that a language sample was completed was not credible given the

fact that no record of the language sample could be produced and her testimony on the subject was vague and contradicted by the speech and language report provided in the IEP document. The report of the speech and language evaluation contained in the April 21, 2015 IEP, referred only to "informal spontaneous speech samples throughout testing [which] shows [Student] to have weaknesses in making meaningful, semantically correct sentences in addition to needing repetition of auditory information." As a result, Ms. Rossi's testimony and written reporting of her testing in the April 21, 2015 IEP document were given little weight.

22. At no point was additional testing in other areas considered for Student prior to the April 21, 2015 IEP. The decision was made despite the facts that Ms. Rossi believed the testing she was conducting was not accurately identifying Student's learning deficits; and that several team members acknowledged that Student required an unusual amount of repetition of auditory information.

Behavior Checklists

23. Kathy Hartley, Los Altos' school psychologist holds a Master of Education degree in Counseling Psychology and is a licensed educational psychologist. She holds a California Pupil Personnel Services credential for school psychology and counseling as well as an elementary teaching credential. Ms. Hartley had recently retired at the time of the hearing, but had been a school psychologist for 25 years prior to her retirement.

24. Ms. Hartley asked Parents and Student's teacher to complete "behavior checklists" for the Brown Attention Deficit Disorder Scales for Children and the Behavior Rating Inventory of Executive Function (BRIEF).⁵ The behavior ratings were completed between March 15 and March 30, 2015. There was no actual testing of Student and

⁵ Ms. Hartley could not recall whether more than one of Student's teachers completed the inventories.

Ms. Hartley never met Student. Ms. Hartley used the two, 30 minute observations of Student completed during the morning prior to the February 9, 2015 SST meeting as the basis for the observations she discussed in her April 2015 report of the assessments.

25. The ratings Ms. Hartley received indicated that Student had significant challenges with attention and executive functioning at school. These concerns were confirmed by Ms. Hartley's classroom observations. Evaluations by both Parents and teachers revealed concerns regarding Student's mental energy control (attention) and with processing controls (focus and awareness). Student also demonstrated deficits with memory.

26. Other tests existed that could have been used to evaluate Student's attention deficits directly with student. However, Ms. Hartley stated that she did not have access to several of those tests because the Los Altos had not purchased them. There are also tests in addition to the Behavior Rating Inventory that evaluate executive functioning however Ms. Hartley had never used them. Ms. Hartley could have tested processing speed using either the Wechsler Intelligence which the school did have available or the Woodcock-Johnson cognitive battery. Ms. Hartley's testing was unreasonably limited given the range of disabilities Los Altos should have suspected based on the information gathered by the District since Student was in the first grade.

27. A Behavior Checklist Report was prepared for the April 21, 2015 IEP team meeting by Ms. Hartley. The background information provided in the report is incomplete and in some instances inaccurate when compared to documentation of Student's difficulties from first grade forward. No mention is made of the fact that interventions had been instituted to try to address Student's attention deficits since first grade.

28. Several items of information in the "Reason for Referral and Background Information" section of the Behavior Checklist report are stated in ways that minimize or

fail to acknowledge the full extent of information known about Student's deficits. For example, the report states Student is "able to write a paragraph" when teachers have noted Student struggles with paragraph writing particularly; and "knows math facts," when Student's ability to access and retain math concepts has been a subject of specific concern since first grade. The report also states that Student no longer needs cue cards for requesting help or the list of steps comprising her "Daily Five" literature routine when, in actuality, Student refused to use the rescue card to request help as it set her apart and embarrassed her; and the list reminding her of her "Daily Five" literature requirements was being referenced from the board but was still very much necessary to Student. The report goes on to say "she is working with grade level materials" implying that her work was at grade level when Student was not working at grade level in all areas as indicated by her report card and Parent reports. The report also states, "[Student] willingly does her homework independently and her mother checks it" but fails to mention that Mother reported in both response to intervention and student study team meetings that she has to re-teach concepts and work with Student in making substantial corrections to her homework due to Student's inability to learn materials during class time. All of these facts were known to Ms. Hartley prior to writing the Behavior Checklist Report.

29. The Behavior Checklist Report also makes inaccurate statements about Student's social interactions. The report states, states "she enjoys positive relationship with her ... friends" and "she is friendly and enjoys making friends" when consistent difficulties making friends had been discussed and disclosed by Parents and teachers. A few sentences below these comments, Ms. Hartley notes Parents express concerns about Student sometimes being hurt by classmates who are more mature, and the fact that [Student] "would love to have a best friend." Ms. Hartley fails to reconcile the conflicting statements.

30. The Behavior Checklist Report concluded that Student has significant challenges with inattention and the associated executive functions. It also stated that, while many examples of behaviors of concern were present both at home and at school, the frequency of behaviors was more prominent at school and were, therefore, of higher significance. The report makes no recommendations for means of addressing Student's attentional deficits; nor did it recommend categories of special education eligibility that might be appropriate for Student given the noted attention deficits.

31. In testimony, Ms. Hartley acknowledged that executive functioning deficits as well as difficulties in being able to recall elements of a story or with following multi-step directions, could be the result of a variety of causes. These include: physical problems, maintaining effort through a task to its completion, problems with working memory, difficulty understanding language, recall problems, being inattentive or disobedient, possible intelligence problems, or a problem with processing speed. She testified that attention issues require a variety of testing to determine the cause, and that attention deficits could result in different types of special education eligibility. Despite this knowledge, Ms. Hartley did not recommend any testing in addition to that proposed in the original assessment plan following the student study team meeting.

32. The only category of eligibility considered at the April 21, 2015 IEP team meeting was speech or language impairment. Possible eligibility under "other health impairment" or specific learning disability were not considered. Ms. Hartley acknowledged that at least part of the reason those categories were not considered was that adequate testing to evaluate the appropriateness of those categories had not been conducted. Ms. Hartley's failure to conduct a range of tests to evaluate all aspects of the suspected disabilities, as well as the inaccurate shading of background information in her report, resulted in her testimony and her report evaluating Student's present levels of performance for purposes of the April 21, 2015 IEP team meeting being given little

weight.

APRIL 21, 2015 INITIAL IEP TEAM MEETING

33. On April 21, 2015 an initial IEP team meeting was held. Attending were Parents, Ms. Lammay, Wade Spenader (the Elementary School Principal), Ms. Rossi, and Ms. Hartley. No special education teacher was present at the meeting. The reports from Ms. Hartley and Ms. Rossi were discussed and it was decided that Student qualified for special education under the category of speech and language impairment.

Needs Identified – Second Grade

34. Areas of need were identified by the IEP team were: 1) listening to paragraph information and responding to WH-type (who what where when) questions; 2) using expressive language to sequence and tell a descriptive story; and 3) showing learner behaviors in the classroom by actively using whole body listening postures (eyes on speaker, body facing speaker).

35. Student, however, had additional needs that were not acknowledged despite evidence of their existence. Student continued to show the inability to sustain attention that she had been demonstrating since at least the first grade. She also demonstrated an inability to fully process information. These deficits were evidenced by Student's inability to track directions from their verbalization to her execution. Even with follow-up from teachers including additional verbalization and visual prompts, Student was unable to maintain her focus long enough to execute multi-step directions. Student had needs in the areas of: attention, focus, task initiation and completion, math, reading, listening comprehension, writing, social skills and anxiety. However, no additional assessments were recommended.

Goals

36. Three goals were created to address Student's stated areas of need. The first goal required her to listen to grade level passages and respond to WH-type question with 80 percent accuracy across three sessions, given minimal support with verbal/visual prompts. The speech language specialist was responsible for the goal and would measure progress via charting and observation. The second goal required Student to create organized, linear and detailed oral narratives that included major story elements (setting, characters, plot, emotions, problem and solution), and informational discourse including transition in 80 percent of opportunities when provided minimal support over three sessions. The speech language specialist was responsible for the goal and would measure progress via charting and observation. The third goal required Student to show learner behaviors by demonstrating whole body listening (body facing speaker, eyes on speaker) in small and large group settings, in four out of five opportunities, across three sequential days as measured by school staff data and observation. This method of addressing Student's attention deficits was adopted although the team, which included Ms. Hartley, had acknowledged at the February 9, 2015 student study team meeting that Student struggles with accurately acting on multi-step directions and missing information even when she has her eyes on the speaker.

37. In order to help Student meet her IEP goals she was provided with group speech therapy once a week, beginning in April of 2015. In addition to speech therapy, Student was provided with "supplementary aids and services" which were listed in the IEP. Those included a requirement that Student repeat instructions to her teacher so her teacher could check for understanding. Student was also to be allowed movement breaks as needed; visual models as examples to be followed for projects and other work; visual cues and prompts to remind Student to attend and focus; preferential seating

near the teacher; and was to have directions and assignments written or displayed on the board along with being presented verbally by the teacher. It is notable that most of these accommodations had been implemented for Student in second grade, and many of them had been used since the first grade. It is also notable that all of these interventions with the exception of the provision of visual models or assigned projects, had previously been determined to be ineffective in addressing Student's attention and academic issues.

38. These goals written failed to address Student's full range of needs including Student's deficits in the areas of executive functioning, sustaining attention and inability to focus or social skills deficits. Nor were goals written to address academic deficits in the areas in which Student continued to struggle including reading and math and writing. No professional counseling or other therapeutic service was provided to address Student's attention deficit or executive functioning difficulties. The evidence showed that addressing Student's needs solely as a speech and language problem to be addressed by the speech and language therapist was not the correct approach for Student. All team members were aware that Student's failure to maintain focus and process complex information such as multi-step instructions persisted even when Student had her "eyes on the speaker".

END OF YEAR REPORT CARD - SECOND GRADE

39. In each reporting period of Student's second grade report card, "slash" marks indicated that "additional attention and emphasis was needed in the skill/concept areas" of "reads and follows written directions ...listens attentively ... listens and follows specific directions ... and explains math reasoning." Additionally, punctuation and grammar remained areas in which student received slash marks for the last two out of three reporting periods for the 2014-2015 school year, indicating that she was not demonstrating satisfactory development. Only partial understanding of grade level

standards was demonstrated by the third trimester in reading comprehension, and the ability to develop or strengthen writing. IEP team members, including Student's teachers, acknowledged that Student was struggling in math and with reading comprehension and the ability to organize writing.

IMPLEMENTATION OF IEP GOALS 2015-2016 SCHOOL YEAR – THIRD GRADE

40. Student's co-teachers from her second grade class accepted an assignment to a third grade classroom for the 2015-2016 school year and asked that Student be assigned to them. They believed that their history with Student would allow them to have an advantage in helping her access her education. Ms. Lammay was also a family friend and had a personal interest in helping Student succeed.

41. Student's attention deficits continued to interfere with her education in third grade. The third grade teachers were told by Mother in early December of 2015 that Student stated that her perception of information read to her by teachers was that "the words [were] really close together" making it hard to follow. She also continued to struggle with math concepts such as fractions. Student continued to balk at being singled out for special services. Various methods were tried to remind her it was time to go to speech therapy, without embarrassing her.

42. Student's academic performance declined between the first and third trimesters.

43. Neither the speech therapy, nor the accommodations put in place as a result of the April 21, 2015 IEP, resulted in substantial improvement in Student's attention deficits, or academic struggles. As a result, teachers and administrators agreed that advancing Student's annual IEP team meeting to March 21, 2016, was advisable.

IEP Goal Progress Reports: November 2015 and March 2016

44. A progress report regarding the previously established IEP goals was

prepared in advance of the March 21, 2016 IEP team meeting. Reporting was included for the periods ending November 15, 2015 and March 21, 2016. Although as of March 21, 2016 each goal is marked as "met," none of the narratives support that conclusion.

45. In her first goal, labeled reading comprehension, Student was working toward listening to a grade level passage and respond to "WH-type" questions with 80 percent accuracy with minimal support. The mid-term progress report from November 15, 2015 states that Student could respond to questions regarding three to five sentence stories using story grammar markers with icons to assist with visualization. The success rate appears to be 82 percent, although the number is overwritten and not entirely clear. By March 21, 2016, Student was 78 percent successful with five to seven sentence stories in a "highly structured task using prompts for what to listen for, repetition of passages, and the use of visual pictures." The report notes "need to increase visualization."

46. Goal number two asked Student to create organized, linear and detailed oral narratives that included major story elements of setting, characters, plot, emotions, problem, solution, and informational discourse that included transitions in 80 percent of opportunities with minimal support. This was supposed to be measured by charting and observation by the speech pathologist. As of November 15, 2015, Student was working on describing plot, emotions and identifying the problem using story grammar markers to create, organize and provide details of a story. By March 21, 2016, the goal was marked "met" but the narrative described it as "partially met -70%." Notes indicate Student's oral narratives have increased in organization, are linear with minimal detail and that she needs to continue to work on plot, problem and solutions, the report goes on to say Student is beginning to use simple transitions.

47. Regarding goal number three, the use of "whole body listening." the report was written in a cryptic manner but appears to indicate that as of November 15,

2015, Student was using whole body listening in small groups (her speech therapy group) approximately 75 percent of the time and was easily re-directed. The report also noted that Student made off topic comments and got distracted during speech therapy. As of March 21, 2016, the whole body listening goal was noted as "met," but the narrative notes that Student demonstrated the skill inconsistently, and needed clarification and repetition of auditory information, including directions and new concepts.

48. Although the annual IEP team meeting for 2016 was advanced to March 21, 2016, due to teacher and administrator concerns that Student was not showing adequate improvement, no additional assessments were requested by Los Altos prior to the March 21, 2016 IEP team meeting.

MARCH 21, 2016 IEP TEAM MEETING

49. Student's "annual" IEP team meeting was held on March 21, 2016, as arranged. The meeting was attended by Parents; Mr. Spenader, the elementary school principal, Ms. Hayden; Ms. Rossi; and Ms. Hartley. No special education teacher was present at the meeting.

50. At the IEP meeting, Parents expressed concerns with Student's inability to follow directions in class; lack of focus and self-confidence; and her inability to keep up with academic challenges in the classroom. It was specifically noted by Mother that Student was intimidated when talking with her peers, and was not confident academically or socially.

Present Levels of Academic Achievement and Academic Performance

51. During the March 21, 2016 IEP team meeting, Student's academic achievement and functional performance were discussed. Student continued to need reminders to check her writing preparation work to be certain it was complete, and also

needed reminders to transfer the information from the paragraph writing organizational chart to her paragraph. However, improvement was noted in including more meaningful information in paragraphs than she had in the past. Student continued to struggle with reading comprehension. Student's difficulty with understanding math concepts was a particular concern and her deficits were increasing despite daily re-teaching by both teachers, and Parents. Teachers described Student as being unfocused and having difficulty following instructions. Student failed to use "whole body listening," and did not keep her eyes on the speaker, despite the fact that interventions to improve this had been in place since first grade.

52. Student was hesitant to choose a partner during group activities and tended to be slow to start the activity. Teachers were unsure of whether to attribute this to a lack of confidence, or uncertainty as to the directions, or both. Student self-consciousness about needing teacher support had increased, and she showed marked embarrassment or irritation when asked a clarifying question by the teacher or during re-teaching as well as when she needed to leave class to attend her speech and language group. She appeared to be intimidated when working or playing in a group, both in the classroom and on the playground. Executive functioning skills continue to be "difficult" for Student in the face of increased workloads and classroom demands.

53. Teachers were required to repeat directions multiple times and have Student repeat the directions back to them so they could check for understanding. Student "[continued] to struggle with actively thinking about what she is listening to and using the visual cues in her environment to help her understand auditory information." Vocational and adaptive skills were also hampered by Student's inability to understand and follow directions.

54. Parents reported that Student's anxiety was increasing. They were beginning to see school avoidance behaviors.

55. The March 21, 2016 IEP document regarding Student's progress on the goals from the April 21, 2015 IEP included information that was somewhat different than the separate progress report on goals. However, the reports were similar in their carefully crafted language attempting to describe Student as having more progress than was actually present. For instance, although said to be met, the goal regarding reading comprehension of passages of three to seven sentences in length as demonstrated by accurately responding to WH questions was only partially met when Student was given substantial visual prompting and reminders. The original goal was to be successful in responding to WH questions with minimal verbal or visual prompting support. Similarly, the goal of creating organized, linear detailed oral narratives with minimal support was only able to be partially met with substantial visual and verbal prompts. Her success in using "whole body listening" states that she demonstrates the skill in small groups and less consistently in large groups. Even when used, it was noted that Student "is not actively attending to salient auditory information" in either setting. This impeded her ability to follow whole group instructions, understand new classroom concepts or comprehend reading material sufficiently to answer questions about content."

March 21, 2016 Needs – Third Grade

56. Student had continued to demonstrate needs in the areas of sustaining attention and focus throughout her third grade year. Instructions had to be repeated multiple times and the teachers reported the need for redirection several times over a short period. Student continued to require daily re-teaching of material by teachers and Parents especially in math. Student's reading comprehension and comprehension of instructions was below expectations for a Student at her grade level. Student's specific comment, as reported by Mother to Student's teachers, was that, when she listened in class, "the words sound too close together". This was an indication of auditory processing deficits and attention deficits. Student continued to demonstrate difficulties

in the area of executive functioning as evidenced by her inability to begin projects without assistance from either a teacher or peers. Her anxiety was also increasing as evidenced by her inability to choose work partners in class, her comments at home and some school avoidance behaviors being demonstrated. Overall, by this time, Student had needs in the areas of attention, focus, task initiation and completion, math, reading, listening comprehension, writing, social skills and anxiety. The approaches from the 2015-2016 IEP had not resulted in appropriate educational progress in any of these areas.

March 21, 2016 Goals

57. Despite the fact that Student continued to demonstrate the same deficits she had demonstrated since first grade, the March 21, 2016 IEP team, addressed the needs the IEP recognized by instituting similar goals to those of the prior year's IEP. The IEP also failed to address Students needs in the areas of attention, focus, task initiation and completion, math, reading, listening comprehension, writing, social skills and anxiety. The goals included in this IEP were not in all areas of need. The goals that were written were not appropriate for Student. For the goals that were written, instead of the goals having higher expectations, the expected achievements were lowered. For example, the need to listen to a five to seven sentence passage and respond to WH questions no longer included the caveat that student was to do this with minimal support. Instead, the questions were to be answered "given visual and verbal prompts." Student's ability to relay an organized short story with minimal supports was changed to being able to "create organized narratives that include details, character development, problems with a solution and an ending using connection words with 80% accuracy given visual and verbal prompts." Student was again set the goal of "showing learner behaviors by demonstrating whole body listening, referencing visual cues and written information in her environment and asking clarifying questions to assist her in her

understanding of auditory information.” These goals were included despite the fact that similar goals had failed to prevent Student from slipping further behind in reading comprehension, math, and executive functioning.

Services Offered

58. The March 21, 2016 IEP provided the same behavioral supports previously instituted including: repetition of directions, one to one instruction, preferential seating, small group instruction and the opportunity to ask clarifying questions. No frequency of the one to one or small group instruction was specified. These supports had already been shown to be ineffective for Student.

59. A number of additional accommodations were included in the March 21, 2016 IEP. They included: warning before transitions; seating near the teacher, or away from distractions or noise as needed; multiple types of relaying instructions (though the various methods are not specified); allowing extra classroom movement; and on-task reminders. Additionally, teachers were to check-in with Student to determine that she was understanding by having Student repeat instructions and ask clarifying questions. Student was also to be provided with a visual schedule. Student was also offered the opportunity to participate in a small reading group conducted by the school librarian who was neither a credentialed teacher nor a reading specialist. These groups were intended to offer extra reading practice. As the reading group focused on fluency, an area in which Student did not have deficits, as opposed to reading comprehension, in which Student had substantial deficits, Parents asked that Student’s “pull-outs” for this program be discontinued after only a few sessions as they were not helping Student improve her reading skills.

60. The sole special education service provided was 57, 30-minute sessions of speech therapy in a group setting over the coming year to “understand and use language.” These same services had failed to improve Student’s attention since second

grade. Nearly all of the additional accommodations listed had been tried and found ineffective since Student's first grade year. The evidence also showed that addressing Student's needs as a speech and language problem to be addressed by the speech and language therapist was not the correct approach for Student as it failed to address the full range of Student's needs. Despite the fact that this approach had failed to improve Student's deficits, it was the only approach offered to Student.

61. The March 21, 2016 IEP failed to recognize and provide for all of Student's needs. No assessment or services for Student's attentional, academic, auditory processing or executive functioning deficits were offered. Nor was an assessment to evaluate Student's social skills struggles or any services to address them offered.

COMMUNICATIONS REGARDING STUDENT STRESS

62. Following the March 21, 2016 IEP team meeting, Mother met with Ms. Lammay and communicated in writing with both of Student's teachers regarding specific ways in which stress could be reduced for Student. Approaches included: focusing on building her self-confidence; allowing her to take breaks in the Resource Room or to take short breaks from class using the code "I need some fresh air" to leave the classroom for a few minutes; providing counseling through the community counseling service used by Los Altos; modifications of homework; combining verbal, written and model instructions; additional math and reading tutorials; and assistance in engaging with groups in the classroom. Despite Parent's emphasis on their concerns regarding Student's anxiety during the IEP team meeting, not all of these additional supports were included in the March 21, 2016 IEP.

ASSESSMENTS FOLLOWING THE MARCH 21, 2016 IEP TEAM MEETING

63. Although no additional assessments were requested prior to the March 21, 2016 IEP team meeting, by the conclusion of the meeting it was agreed that additional

assessments were necessary. Ms. Hartley testified that the assessment plan was determined to be necessary due to “new information” developed during the March 21, 2016 IEP team meeting. However, all of the information noted in the March 21, 2016 IEP and the accompanying notes had been available to Los Altos for at least a year, and in many cases significantly longer.

64. Parents expressed a desire to have assessments completed immediately. Parents were experiencing increasing anxiety on the part of Student related to school performance and attendance. Los Altos provided an assessment plan on April 1, 2016 which was within the statutorily mandated timeframe. (Ed. Code § 56321(a).)

INDEPENDENT EDUCATIONAL EVALUATION

65. On April 4, 2016, Parents requested an independent educational evaluation based on their assertion that the 2015 Assessments were incomplete and/or inappropriate. On April 6, 2016, Ms. Hartley sent a letter to Parents stating that the request was premature as the assessments listed in Los Altos’ second assessment plan dated April 1, 2016, had not been completed. On April 13, 2016, Mother replied to the letter from Los Altos via email specifying that Parents were in disagreement with the assessment completed in March and April 2015. Los Altos did not fund Parents’ requested independent educational evaluation. Los Altos did not file a request for a due process hearing to defend their March and April 2015 assessments as being appropriate.

66. Parents had Student assessed by Brendan Pratt, Ph.D. in April and May of 2016. Mother testified that based on her experience to date with Los Altos, including the limited assessments initially conducted and the delays in getting more complete assessments finished, Parents did not trust Los Altos to conduct the testing needed.

Assessments by Dr. Pratt

67. Dr. Pratt has a Ph.D. in Clinical Psychology and completed a two-year post-doctoral fellowship in pediatric neuropsychology. He has been a licensed psychologist with a private practice focused on pediatric neuropsychology since 2002.

68. Dr. Pratt administered multiple tests to Student, and obtained additional information via questionnaires and surveys completed by Parents and teachers to evaluate Student's continued attentional difficulties, academic deficits, and anxiety. Tests administered included the Wechsler Intelligence scale for Children, Fifth Edition; the Woodcock-Johnson tests of Achievement Form A and Extended, Fourth Edition; the Gray Oral Reading Tests, Fifth Edition Form B; the Test of Mathematical Abilities, Third Edition; the Receptive One-Word Picture Vocabulary Test, Fourth Edition; the Expressive One-Word Picture Vocabulary Test, Fourth Edition; the Beery-Buktenica Developmental Test of Visual Motor Integration, Sixth Edition; the California Verbal Learning Test, Children's Version; the Test of Variables of Attention; the Tasks of Executive Control; the Behavior Rating Inventory of Executive Function, Second Edition; the Behavior Assessment System for Children, Third Edition; the Multidimensional Anxiety Scale for Children, Second Edition; the Revised Children's Manifest Anxiety Scale, Second Edition; and the Reynolds Child Depression Scale-Second Edition.

69. Dr. Pratt questioned the sufficiency of the testing conducted by Los Altos prior to the April 21, 2015 IEP team meeting, given the information available about Student's struggles. In particular, he noted that Student's speech and language scores were all in the average to high average range with the exception of a single subtest: the Understanding Spoken Paragraphs subtest, the results of which were not replicated in another test to confirm it was a reliable finding. Dr. Pratt did not believe these outcomes met the requirements for a determination of a speech and language impairment.

70. Dr. Pratt also expressed concern that no testing for the academic deficits present had been conducted nor had cognitive testing been done to explore whether there was another cause for Student's difficulties. Finally, he noted that the single attention inventory administered could only be considered a screening test because it was used in isolation. Based on the results presented compared to the other information available regarding Student's performance in class and attention concerns at home, he would not have concluded that a speech impairment was Student's primary problem.

71. Dr. Pratt acknowledged that he is not a speech pathologist. However, his observations were limited to the test scores presented by Ms. Rossi and the lack of assessment in other areas. These observations did not require the training of a speech pathologist. Dr. Pratt has conducted cognitive and academic assessments for many years and has been a member of numerous IEP teams. His review of the information previously evaluated by the IEP team and comments regarding the need for additional testing in this case were specific and professional. His opinions were given considerable weight.

72. Both of Student's third-grade teachers testified that Student was in the lower third of her class. They had no data to support that estimate and acknowledged that her position in the class could have been significantly lower. She was not in the bottom third of all third graders but in the lower third of this high-performing class. Ms. Hayden testified that Student was getting a lot of support in class but was barely keeping up academically. She noted that Student had difficulty identifying the main idea of a reading or drawing conclusions from what she read. Student also struggled with new math concepts. She was generally unfocused and had difficulty following instructions, following short instructional videos, or following board work and teacher comments. Ms. Hayden said she was sad to see Student's self-confidence begin to wane

in third grade. Ms. Hayden's testimony was detailed, thoughtful and candid. Her testimony was given considerable weight.

73. Dr. Pratt's testing revealed that, generally, student had average intellectual abilities, with some strengths in the high average range. Student had high average ability to understand words and a high average ability to name objects correctly at the single word level while overall she had average academic achievement scores. Her general academic knowledge was low average.

74. Student had average verbal learning with a single presentation; however, after a brief interference task, her memory retention was very low. Student's memory retention was also very low after a 20 minute delay between the presentation and the need to respond to questions. In completing a computer-based measure of auditory attention, Student was highly inattentive and impulsive. Her speed of responding was slow and highly variable resulting in a very low score. Student was also noted to have motor coordination deficits and below average visual motor integration skills.⁶

75. In ratings on the Behavior Rating Inventory of Executive Functions, Parents reported difficulties with task initiation and task monitoring, both in the 99th percentile. On the same instrument, Student's teachers rated difficulties with working memory (both 99th percentile) task monitoring, (both 99th percentile) task initiation (97th and 91st percentiles) and self-monitoring (98th and 95th percentiles).

76. Parent's ratings on the Behavior Assessment System for Children revealed clinically significant concerns with social withdrawal and attention problems in the at risk range. Additional concerns included somatization, and social issues. Parents also

⁶ The results of the testing of Student conducted by Dr. Pratt were not contested by Los Altos.

reported difficulties with adaptive behavior skills including social skills and leadership roles.

77. By comparison, Student's teachers endorsed school problems and attention problems in the 99th percentile. Additionally they reported clinically significant scores pertaining to learning problems as well as expressive and receptive communication skills. Also noted were clinically significant atypical behavior and social withdrawal and some scores suggesting social issues with the difficulties suggesting ADHD. Additionally, struggles were noted with social skills, leadership roles, study skills and being resilient.

78. Both Parents and teachers endorsed high ratings of autism probability. However, Dr. Pratt concluded that these were suggestive more of social withdrawal than autism as Student's interest in social interactions did not indicate autism.

79. Both Parents reported Student as having very elevated social anxiety on a measure of anxiety symptoms. They both rated her very elevated for social anxiety and in the elevated range for fears of humiliation and rejection.

80. Dr. Pratt diagnosed student with attention deficit hyperactivity disorder, predominantly inattentive presentation, noting a persistent pattern of inattention that interferes with functioning at home and at school. He also diagnosed generalized anxiety disorder. Dr. Pratt confirmed that a diagnosis of autism was not indicated as Student does not display the hallmarks of autism spectrum disorder. Dr. Pratt noted Student's well-developed language abilities but pointed out that she had trouble with oral and written language comprehension due to inattention resulting in the need for instructions and information to be repeated. Inattention also impacts her ability to read as she will sometimes read a paragraph and realize she was not paying attention to what she had just read. Dr. Pratt noted that these conclusions were consistent with the speech and language evaluation in which Student had difficulty on tasks with long

complex language, specifically the Test of Understanding Paragraphs. However, as noted above, Dr. Pratt did not believe Student had a speech or language impairment.

81. Dr. Pratt recommended special education eligibility under the categories of other health impairment based on his diagnosis of attention deficit hyperactivity disorder, and emotional disturbance, based on his diagnosis of anxiety. He also recommended grade retention with transfer to a different school to minimize the potential impact being held back might have on Student's self-esteem. Additional recommendations were placement in a small classroom with ample individual attention, specific training for executive function and review of assignments to ensure an understanding of instructions. Acknowledging the need for Student to be in the least restrictive environment, Dr. Pratt specifically recommended against placement in a class restricted to students with limited intellectual abilities or behavioral issues. However, it was Dr. Pratt who recommended the Learning Assistance class at Student's private school as being an appropriate placement for Student given her special needs.

82. Dr. Pratt also recommended a long list of accommodations to help Student in the classroom environment. These included several of the accommodations Student was already receiving, as well as multi-sensory instruction; more review of work by an adult to ensure accuracy as well as avoiding the potential embarrassment of posting mistakes; and allowing additional time for schoolwork and tasks.

83. Educationally related counseling was recommended to address low academic self-confidence, anxiety symptoms, and social withdrawal. Dr. Pratt opined this would assist Student in accessing her education by building her self-esteem and improving her ability to ask for help and develop emotional coping skills. Occupational therapy was also recommended to assist with fine motor coordination development following a screening of Student's motor coordination which produced results indicating current abilities in the fifth percentile. Extended school year services or an academic

summer school program focused on the academic skills of reading and written language was suggested to allow Student to make academic progress and to prevent her from losing skills over the summer months.

JUNE 2, 2016 IEP TEAM MEETING

84. An IEP team meeting was held on June 2, 2016, to consider Dr. Pratt's assessment report and recommendations. Attendees included Parents, Dr. Pratt, Mr. Spenader, both classroom teachers, Ms. Keicher, Ms. Rossi, Ms. Hartley, and Diane Sasaki, a special education teacher. A supplemental review/amendment IEP document was created as a result of this meeting.

Eligibility Category Adjustment

85. Eligibility categories were discussed.⁷ The team agreed that the addition of the category other health impairment, acknowledging Student's diagnosis of attention deficit hyperactivity disorder was appropriate. However, the Los Altos members of the team rejected the addition of emotional disturbance as a special education category of eligibility as they did not believe the anxiety had been a significant problem for an adequately sustained period of time. Similarly, the Los Altos members of the team rejected the proposal that Student be retained in third grade.

Present Levels of Performance

86. The IEP team discussed Student's academic performance noting that she functioned in the lower third of the class. She was approaching grade level standards

⁷ Student's eligibility for special education was not being questioned. The various members of the team had differing opinions regarding which categories of eligibility were appropriate.

but required a high degree of teacher support. Los Altos team members noted that Student's reading level was "slightly low" for the end of third grade and she "had limited comprehension of the main idea and details of stories." Student also continued to struggle with math applications. Additional areas of need noted were written language; receptive and expressive language; study and organizational skills; social, behavioral, and emotional skills; and attention.

87. Los Altos agreed to have an occupational therapy evaluation conducted in the fall of 2016. Extended school year services in the form of general education summer school were included in the offer.

Goals

88. The following goals were established for Student in the June 2, 2016 IEP:
- listening to paragraphs at her instructional level and responding to WH-type questions given visual and verbal prompts;
 - being able to create organized narratives that include details and character development using connection words given visual and verbal prompts;
 - show "learner behaviors" specifically whole body listening;
 - initiate joining a group and participating for up to 10 minutes with only two teacher prompts;
 - recognizing her feelings and utilizing anxiety coping strategies with one adult prompt;
 - following directions referencing written directions and other visual cues to complete classroom tasks;
 - given a text at her independent reading level, utilizing strategies to help determine the main idea and draw inferences from the text;

given an expository prompt, creating a plan "with support and independently" create a first draft that includes all elements of her plan; and

given new math topics and additional instruction in strategies for approaching the topic; practicing the strategies to attain a score of 75 percent or higher.

Services Added – June 2, 2016

89. Specialized academic instruction through the resource program was added to Student's IEP. Student was to receive pull-out services of 45 minutes, four times a week for reading, 30 minutes, four times a week for writing and 30 minutes, four times a week for math. Student was to be offered 45 minutes of individual counseling three times per month by the school psychologist. The licensure type and experience of the school psychologist who would provide the counseling was not specified in the IEP and nor were the areas of counseling to be provided. No psychotherapy services by a clinical psychologist were offered despite the information regarding Student's attention deficit disorder and executive functioning deficits and their impact on Student's stress level and confidence and despite the increased anxiety the IEP teams members all acknowledged. Student established that she needed a specialized service provider for her counseling, given her needs at that time.

90. Student would also continue to receive group speech therapy 30 minutes each week as well as 30 minutes per week of "push in" speech therapy to focus on Student's social skills and her ability to work in small groups in class. These services would be provided by Ms. Rossi, the speech therapist. It was clarified that the in-class or "push-in" services would not be one-to-one assistance for Student but simply the provision of a resource to assist Student in joining and working in groups. Additionally, Student was to be provided with 15 minutes a day, four times a week of executive

functioning monitoring which was defined only as a plan by the resource teacher, Ms. Sasaki, to “check in” with Student regularly.

91. It was estimated that specialized academic instruction requiring Student to be pulled out of class would constitute approximately 31 percent of Student’s time at school over the course of a week. However, Student’s exact schedule for fourth grade could not be provided. Parents were informed that Student’s specific schedule would depend on her fourth grade teacher assignment. Los Altos tried to match pull-out instruction to the instruction being offered in the classroom so Student would not miss any special activities. Thus, Student’s schedule would be created once a teacher was assigned and the teacher’s planned class schedule was known. Specific efforts would be made to keep Student in her class for the introduction and whole-group instruction in math; and Student would receive a portion of her writing instruction in the general education classroom.

END OF YEAR REPORT CARD - THIRD GRADE

92. Ms. Hayden testified that finding out that Student had ADD at the June 2, 2016 IEP team meeting, rather than a language impairment, made a significant difference in her teaching approach. Once she understood that it “wasn’t just language or understanding instructions,” her teaching methods changed. She made extra efforts to ensure Student understood assignments before she went on; gave Student extra time to get things done; gave her breaks to walk around if needed; and made sure Student was ready to start after instructions were given. Although Ms. Hayden could not testify to exactly what she did differently after being told Student had attention deficit disorder, she emphasized that information from these kind of meetings (IEP team meetings, Student Study Team, etc.) does result in an examination and adjustment of her teaching process.

93. According to Student’s report card, by the end of the third trimester of her

third grade year, Student was noted to have secure skills (that is a thorough understanding of grade level standards) only in her abilities to know and apply grade level phonics, word recognition, and to conduct short research projects to build knowledge about a topic. There were several areas noted in which Student was approaching grade level standards which was considered a satisfactory understanding of the information as Student moved on to fourth grade. However, some of the evaluations of the discrete skills in which Student was noted to be “approaching grade level” conflict with the evaluation of skills marked at an “emerging level” denoting only partial understanding. These include Student’s ability to write opinion pieces with supporting reasons; to write short pieces to examine a topic and convey ideas and information clearly; or to write a narrative to develop real or imagined experiences using descriptive details and clear event sequences.

94. Several Los Altos witnesses, including her second and third grade teachers, testified that Student was working at grade level. However, the evidence does not support that assertion. The testimony also conflicted with the reported concerns expressed by Parents and teachers at the June 2, 2016 IEP team meeting. According to Student’s third grade report card, at the end of third grade Student had only a partial understanding of grade level standards in the following areas:

asking and answering questions to demonstrate understanding of a text when referring to the text;

recounting stories and determining the central message lesson or moral while explaining it through key details in the text;

understanding terms pertaining to parts of stories or poems and describing how different parts build on earlier sections; producing writing with guidance and support from adults in which development and organization are appropriate to task and purpose at the third

grade level including planning, writing, revising and editing;
understanding fractions, solving problems involving measurement and estimation;
understanding concepts of area and relating area to multiplication and addition;
recognizing perimeter; and
knowing local history.

95. Second trimester comments from the teachers on her report card continued to express concerns about her ability to pay attention in class, stating that she continued to need reminding to turn her eye to the speaker despite several months of interventions targeting this skill. Third trimester comments encouraged Student to continue to try to work more independently and ask for help when needed. Her performance was less than satisfactory in the area of collaboration and unsatisfactory in the area of critical thinking and problem solving.

FUNDING OF PRIVATE COUNSELING

96. On July 20, 2016, Parents requested reimbursement for private counseling from Los Altos. Los Altos refused the request based on the fact that counseling through the district was offered as part of the June 2, 2016 offer of FAPE.

97. Parents secured private counseling for Student with Dr. Christina Morris, Psy. D. Dr. Morris has been licensed in California as a clinical psychologist since 2014 and has a strong background in child and adolescent psychology. Her practice has focused on children and families since 2011, first as an intern with the Portia Bell Hume Behavioral Health and Training Center, then with Kaiser Permanente as a post-doctoral resident. After becoming licensed, Dr. Morris worked as a Clinical Psychologist for Kaiser and then for the Pratt Center which is owned by Dr. Pratt. It was through the Pratt

Center that she began seeing Student. Dr. Morris started a private practice separate from the Pratt Center in January of 2017. Student continued as Dr. Morris' patient. Dr. Morris' testimony was detailed and thoughtful and was given significant weight.

98. Dr. Morris first met Student in July of 2016 when she began providing her with individual therapy. During the summer of 2016 she met with Student twice a week. Once school began, sessions were reduced to once a week. Student's anxiety was focused on school. She was sensitive about her sense of self and the need to manage her attention deficit hyperactivity disorder. She felt insecure if the teacher had to speak to her separately, or if she did not feel she was doing her best. She was particularly sensitive to any feedback or criticism of her work. Student's anxiety manifested as a lack of self-esteem. She was anxious about attending the new private school she was scheduled to begin in August of 2016.

99. Student worked with Dr. Morris on how to form relationships with teachers and peers; how to assert herself; how to avoid "beating herself up; and on developing better organizational skills to help manage Student's attention deficits." While anxiety and attention deficits continued to impact Student's ability to access her education, Dr. Morris described Student's anxiety as 70 to 80 percent improved as of the time of the hearing.

PRIVATE SCHOOL PLACEMENT

100. Parents had concerns about the amount of time and number of times per day and per week Student would be pulled out of class for specialized academic instruction at Los Altos. They believed pulling Student out of class would increase her anxiety and impact her self-esteem. They declined the June 2, 2016 IEP offer, and gave notice to Los Altos on June 15, 2016, that they would be placing Student in a private school, and would be expecting Los Altos to fund the placement based on its failure to offer a FAPE in the June 2, 2016 IEP.

101. Student began attending a local private school in August of 2016 for her fourth grade year. Her fourth grade class was taught by Ms. Audra Robinson. Ms. Robinson holds a Master of Arts degree in Education from Bethany University. The Master's degree program was coupled with a teacher training program. She does not have a California teaching credential of any kind or a teaching credential from any other state. Ms. Robinson holds a professional level teaching certification from the Association of Christian Schools International, which requires a master's degree. She has been teaching since 2013.

102. Ms. Robinson does not have any training focused on special education; however, she has been trained in various specialized methodologies of teaching including a Lindamood Bell LiPS two-day training and an Orton Gillingham one-week training. Her Orton-Gillingham training has been supplemented by mentor teachers who have explained the Slingerland method.⁸

103. Ms. Robinson was not completely forthright about her lack of a teaching credential, initially calling it a "technicality." Later she admitted she had simply chosen not to continue to pursue a California teaching credential due to her own dyslexia, and testing anxiety. She also did not want to take an additional year of teacher training to obtain a regular California teaching credential. She knew she would teach at a Christian school that did not require a California state credential. In all other respects, Ms. Robinson's testimony was straightforward and overall her testimony was evaluated as credible.

⁸ Lindamood Bell LiPS, Orton-Gillingham, and Slingerland are methodologies that are used to work with children who have skills deficits that impact their ability to read well. These methodologies are offered in a variety of settings, both privately, and sometimes in public schools.

104. Ms. Robinson first met Student when she provided summer tutoring to her prior to the beginning of Student's fourth grade year. Ms. Robinson focused her tutoring on reading comprehension. Ms. Robinson began by assessing Student using the Developmental Reading Assessment and the Reading A to Z test. She determined that Student read at approximately a second grade level. Student's summer progress was slow. Ms. Robinson testified that Student said fewer than 10 words during their initial session. However, progress was made while Student was also attending counseling to begin to address her severe anxiety issues and teach her methods of coping with her attention deficit disorder. Ms. Robinson charged \$55 per hour for tutoring and provided 9.75 hours of services during the summer of 2016. Parents paid her a total of \$526.25.

105. Ms. Robinson's Learning Assistance Department class is considered full at a population of 12 students, all of whom have special needs. Student is reported to be more comfortable in her fourth grade classroom and on the playground than she was in either second or third grade at the Los Altos elementary school. The goal of the school is to move children from the learning assistance class to a general education classroom if that is possible. The children in the Learning Assistance class have mild disabilities including dyslexia, attention deficit hyperactivity disorder, and auditory processing disorders. There are also high functioning children with autism in the class. Applicants are screened when they apply to see if they would be a good fit for the school. The class teaches to the California State standards in many instances but not in all areas. For example, the school does not teach the concept of evolution. The pacing of the work in the class is slower and the work is divided into smaller units of information.

106. There is another fourth grade class at the school that became a "hybrid" class for the 2016-2017 school year because the learning assistance class for fourth grade had more applicants than spaces, and the general education fourth grade class

was undersubscribed. The general education class included the children whose special needs were not as extensive as those in the Learning Assistance class. The two classes merge for Art, Physical Education, Library/Computers and Spanish as well as for all parties and field trips. They split into their respective classes for all other academic subjects. The Learning Assistance class also has a social skills training component that consists of a social group that meets for 45 minutes once a week.

107. Although the private school Student attends is a Christian school with a mission of integrating the bible into every class and teaching in a Christ-centered manner, Student's family is not Christian and did not seek out the school on the basis of its religious education. The school was recommended to Parents by Dr. Pratt for its Learning Assistance classes. The school is accredited by the Western Association of Schools and Colleges as well as the Association of Christian Schools.

108. The Learning Assistance class teacher develops a modified version of an IEP for each student. Ms. Robinson developed goals for Student in the areas of reading, reading foundational skills, writing, speaking and listening and social and emotional development. No math goals were developed because Ms. Robinson primarily focuses on Language Arts. None of her students have math goals. Ms. Robinson has had little formal training in developing special education goals. They were discussed in one of her graduate school courses, and she has had assistance from her mentor teachers. To develop Student's goals Ms. Robinson looked at the state standards and Student's prior IEP. She also studied how Student's goals had been written in the past.

109. Retention was considered by Student's private school but determined not to be the best idea for Student at the beginning of fourth grade. Retention was to be revisited at the end of the fourth grade year if necessary.

Academic and Social Progress – Private School

110. Student's academic progress at the private school has been steady. She is able to read the entire fifth and sixth grade Fry "hundred words lists" with 99 percent accuracy, can write a 10 word sentence with correct capitalization and punctuation, and is able to write a well-developed narrative that introduces characters and events. By the date of hearing, Student's reading comprehension level was determined to be at grade level per assessments which included the Developmental Reading Assessment, the Reading A to Z test, and Fry word lists. Student continues to have difficulty writing a three paragraph essay, and supporting research-based writing with details and evidence from two sources. Los Altos argues that Ms. Robinson was not qualified to administer the academic assessments on which she relied in providing updated information about Student's progress. However, Los Altos submitted no evidence to support that assertion and cited no legal authority indicating Ms. Robinson lacked the necessary qualifications to evaluate the academic progress of a fourth grade student in her class. Ms. Robinson established that she is competent to measure Student's academic progress for the 2016-2017 school year having given the Developmental Reading Assessment approximately 100 times and the Reading A to Z test approximately 30 times. Her testimony regarding Student's progress was considered reliable.

111. As of the date of the hearing, Student struggled to meet the goal of attending to a 25 minute lesson with only two subtle reminders. Student required redirection approximately four to five times every 30 minutes. Student's fourth grade report card indicates A- to B level work throughout the year. These marks are consistent across all of Student's courses with the exception of marks early in the school year in bible studies and library, both of which improved substantially by the final grading period.

112. Student's social progress has been mixed at the private school. She had to be handled very carefully to avoid what her teacher described as "meltdowns" which included a range of behaviors from tears, to demonstrations of physical self-protection with disengagement, to serious panic attacks. These could be triggered by Student being told her answer was wrong. Such behaviors occurred on a regular basis. Some lasted five to 10 minutes; some lasted hours and resulted in Student going home for the day. Overall some kind of incident occurred on approximately half the days Student was in school, with the larger episodes occurring approximately every other month. Ms. Robinson teaches coping skills for emotional regulation because she has several students with ADD in her classroom.

113. Ms. Robinson testified that the need to check in with Student privately to re-direct her has decreased some over the year. Student also has a "best friend" and socializes on the playground.

114. Over the year, Parents also made efforts to provide additional opportunities for Student to practice her social skills by enrolling her in sports camps during the winter and spring breaks in the 2016-2017 school year. Student was also enrolled in a social skills group called "The Friendship Program." Mother noted significant improvement over the year in Student's ability to stay at the camps for the whole day without an anxiety attack. Student grew to enjoy the camps and reported her group activities with excitement at the end of the day.

MAY 15, 2017 IEP TEAM MEETING⁹

⁹ Although a May 15, 2017 IEP was introduced into evidence, this IEP was not at issue in the complaint in this case. Therefore, the May 15, 2017 IEP offer is not analyzed here.

115. On May 15, 2017, an IEP team meeting was held and a new IEP was developed for Student. Parents did not consent to the IEP.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals

related to those needs; and that contains 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 nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. The Ninth Circuit Court of Appeals has held that, despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [in re-enacting the IDEA in 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) Recently, the U.S. Supreme Court elaborated on the *Rowley* standard declaring that, “To meet its

substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, (2017) ___ 580 U.S. ___ [137 S. Ct. 988, 999; 197 L. Ed. 2d 335].)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) 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).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62.) In this case, Student, as the complaining party, bears the burden of proof.

NO HEIGHTENED DEFERENCE DUE TO SCHOOL DISTRICT DECISIONS

6. Los Altos argues that "Just as reviewing courts must not substitute their own notions of sound educational policy for those of the school authorities which they review, administrative agencies must also provide a degree of deference to the expertise of school district employees . . . Thus, an administrative law judge should use a preponderance of the evidence standard providing deference to the opinions and acts of school authorities and professionals." As authority for this proposition, Los Altos cites *Rowley*, and Evidence Code section 664.

7. No heightened deference is automatically due to District employee opinions or actions. Nor does the evidentiary presumption of Evidence Code section 664 apply. The California Evidence Code does not apply in a due process hearing. (5 C.C.R. § 3082) District employees' opinions and actions are properly evaluated in the same manner as all other evidence presented during the course of a case: with the weight the finder of fact deems appropriate in light of the relevance, credibility, and accuracy of the information provided.

8. Even if Evidence Code section 664 applied, Los Altos confuses deference with an evidentiary presumption. Evidence Code section 664 states that "It is presumed that official duty has been regularly performed." The statute pertains to a presumption that routine tasks of government officials have been completed or conducted according to statutory or regulatory specifications absent proof to the contrary. So, school boards are presumed to have complied with their official duty and exercised discretion in enacting salary schedules absent a contrary showing. (*City and County of San Francisco v. Cooper* (1975) 120 Cal. 3d 898.) The Wildlife Conservation Board is presumed to have complied with the law in allocating money from a public fund to a particular project, absent a showing that the board acted improperly. (*Outfitter Properties, LLC, v. Wildlife Conservation Board* (2012) 207 Cal. App 4th 237, 244.) If a question pertained to whether a notice that was required had been mailed and a school district employee testified that it had, a presumption would be appropriate. However, the functions necessary to develop and implement an IEP are not "routine." Each IEP is as unique as each child's situation and needs.

9. Furthermore, the court in *Rowley, supra*, was referring to the appropriate deference to an administrative law judge's evaluation of an individual State's educational processes so that state's rights were not superseded by federal courts; it was not referring to the individual opinions of school officials. (*Rowley, supra*, 458 U.S. at

p. 207-208.) Evidence regarding the opinions and actions of Los Altos staff was evaluated and accorded the weight appropriate given the expertise and exercise of judgment evident at the time of hearing.

PROCEDURAL DENIAL OF FAPE

Issues 1 a and 2 a: Failure to Assess in All Areas of Suspected Need

10. "Under the IDEA, the school district must conduct a 'full and individual initial evaluation,' which ensures that the child is assessed in 'all areas of suspected disability,' before providing that child with any special education services. The California Education Code, which incorporates the requirements of the IDEA into state law, similarly requires that the child be assessed 'in all areas related to the suspected disability.' This requirement allows the child's IEP Team to have a complete picture of the child's functional, developmental, and academic needs, which in turn allows the team to design an individualized and appropriate educational plan tailored to the needs of the individual child." (*Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F. 3d 1105, 1119 [citations omitted] *cert. denied*, 137 S. Ct. 1578, 197 L. Ed. 2d 704 (2017).)

11. California school districts are required to actively and systematically seek out all children with exceptional needs so that they can be evaluated to determine if they require special education and related services. This includes any child suspected of being a child with a disability and in need of special education even though they are advancing from grade to grade. (Ed. Code §56300 and 56301(b)(1); 34 C.F.R. §300.111 (c)(1).)

12. A disability is "suspected," and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. (*Ibid.*) "Once either the school district or the parents suspect a disability, a test

must be performed so that parents can 'receive notification of, and have the opportunity to contest conclusions regarding their children.'" (*Id.* at p. 1120.) "In evaluating a child with a disability, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." (34 C.F.R. 300.304(c)(6).)

13. A speech and language impairment exists when a student meets one of more of the following criteria: An articulation disorder significantly interfering with the ability to speak; a defective voice in quality pitch or loudness; a fluency disorder resulting in impaired flow of verbal expression; an expressive or receptive language disorder as demonstrated by a score of at least 1.5 standard deviations below the means or below the seventh percentile for the student's chronological age on two or more standardized tests in specified areas of language development; or scores as designated above on a single test accompanied by displays inadequate or inappropriate usage of receptive or expressive language as represented by a language sample of a minimum of 50 utterances. The language sample must be recorded or transcribed and analyzed, and the results included in the assessment report. (Cal. Code Regs., tit. 5, § 3030, subd.(b)(11).)

14. "Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization and expression." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).)

15. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

16. Student was identified as having difficulty processing directions as early as first grade. The evidence clearly supports a conclusion that Student consistently struggled with understanding and carrying out instructions in the classroom and maintaining her attention. Student's second grade teachers noted that Student was often confused by directions and unable to complete tasks without redirection. Eventually, Los Altos acknowledged that the attention concerns raised suspicions of auditory processing deficits. However, Los Altos chose to limit the initial assessment to only a health assessment to be completed by the school nurse, testing for speech and language impairments, and the completion of two "behavior observation checklists", one for inattention and one for executive function deficits.

17. The assessments for auditory processing deficits were limited to those included in the speech and language evaluation. No evaluations of Student's intellectual development, social emotional issues or adaptive behavior were completed with the exception of two behavior checklists.

18. Los Altos asserts that a cognitive assessment would only have been necessary if Student was suspected of having an intellectual disability or a learning disability. Academic assessment was said to only be required if the team was looking at academic deficits or a learning disability. Those were dismissed because Los Altos decided Student did not have academic deficits based on her report cards and classroom performance. No social-emotional assessment was completed because

¹⁰ Los Altos' 2014-2015 school year began August 20, 2014 and ended June 10, 2015. Student did not make any claim for relief beyond the two-year statute of limitations; therefore, the applicable time period for remedies in this case is March 6, 2015 forward.

Student did not demonstrate social-emotional disabilities and was “well-adjusted and happy.” Los Altos argues that social emotional concerns would be limited to anxiety. However, Los Altos’ school psychologist acknowledged that cognitive and academic assessments were likely to have revealed information that would have informed the IEP team as to the reason for a student’s attention deficits. Full psycho-educational assessments are commonly conducted to evaluate the entire range of possible disabilities especially when a student has shown the type of long-standing attentional deficits shown by Student in this case.

19. A social-emotional assessment is not limited to an inquiry into a student’s anxiety. “Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization and expression.” (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) In this case, Student was demonstrating auditory processing, association, conceptualization and expression deficits as demonstrated by her difficulties maintaining her attention and by her difficulties with reading comprehension and math concepts. In light of the information available to Los Altos, failing to conduct a broad enough range of tests to rule out attention deficit disorders or identify attention deficits or other deficits or disorders as potential health impairments violated Los Altos’ obligation to assess in all areas of suspected disability.

20. Both the testing conducted by Ms. Hartley and the testing conducted by Ms. Rossi were focused on supporting a determination of a speech or language impairment rather than assessing in all areas of suspected disability. Ms. Rossi’s speech and language testing outcome did not demonstrate that Student met the standards of the California Code of Regulations title 5, section 3030(b)(11). Student had average results in all of the speech and language assessments given initially. When the results did not support a finding of speech and language impairment, Ms. Rossi selected a

single subtest she knew was likely to produce a lower score due to Student's attention deficits. That single outcome was then combined with an "informal language sample" to determine that Student had a speech or language impairment. The language sample was not recorded or transcribed and analyzed; and was not included in the report, in violation of testing protocols and in violation of both the California regulations regarding determining a disability and the California statutes mandating appropriate testing procedures. (Ed. Code 56320(b); 5 Cal. Code Reg. §3030(b)(11).)

21. The use of a single inventory to measure possible attention deficit disorders and another to measure executive functioning deficits is contrary to state and federal law as well. (20 U.S.C 1414 (b)(2)(B); Ed. Code §56320(e).) Here, Los Altos used a single measure to evaluate Student for attention processing deficits and another single assessment to determine executive functioning levels. Additional investigation was not pursued even when the initial assessments indicated that Student was struggling in these areas. This contributed to Los Altos' ultimate determination that Student's only deficit was a speech and language impairment. This erroneous determination delayed the provision of the special education and related services Student needed to access her education and address her attention deficit disorder. Ultimately, the lack of attention to the attention deficit disorder exacerbated Student's anxiety to the point where she began exhibiting school avoidance.

22. Ms. Hartley failed to pursue the broad testing necessary to thoroughly evaluate Student's attention difficulties despite knowing that the type of attention deficits demonstrated for the extensive period of time they had been present, were indications of attention deficit disorder or possibly an auditory processing disorder. This deprived Parents of the opportunity to meaningfully participate in the IEP as they did not have the information necessary to evaluate the services offered or to determine whether specialized academic instruction was necessary.

23. The failure to provide adequate assessment also deprived Student of educational benefit in that her attention deficit disorder was left undiagnosed, her executive function deficits were unidentified and her emerging social skills problems were not acknowledged. As a result, she received no assistance with her social skills deficits resulting in increasing difficulties working on group projects in class; no instruction regarding executive function leaving her at a loss as to how to organize the work she was being given at school; and no training regarding how to manage her attention deficit disorder. The failure to properly assess also deprived the Student's teachers of critical information that could have been used to modify instructional techniques and teaching plans. When testing is limited to confirm a predetermined conclusion as opposed to examining the possible causes of all suspected disabilities, it fails to meet the requirements of state and federal law. Student was denied FAPE from March 5, 2015 to June 10, 2016.

2015-2016 School Year – Third Grade

24. Los Altos also failed to evaluate all areas of suspected disability in Student's third grade year, which resulted in a denial of FAPE for the 2015-2016 school year as well. Despite the fact that staff and faculty had concerns about Student's lack of progress and even advanced the date of her annual IEP team meeting, Los Altos failed to conduct any assessments prior to the March 21, 2016 IEP meeting. When the meeting was convened, progress reports on goals were written in a way that misrepresented Student's goals as "met". This, too, denied Parents the opportunity to meaningfully participate in the IEP process. Without accurate information as to Student's progress, they could not fully understand her needs. The failure to assess also continued to deny Student educational benefit because she was not getting the specialized academic instruction and related services needed.

25. As a result of the lack of assessment and the inaccurate reporting of progress, the goals and services offered in the March 21, 2016 IEP were nearly identical to the inadequate special education and related services offered in the April 21, 2015 IEP. This further delayed the identification of appropriate specialized academic instruction and related services that might have prevented Student's further devolvement in the areas of reading comprehension, writing and math. The delay in providing services also resulted in Student developing more serious anxiety related to her academic performance. This anxiety impacted her social interactions which made it harder for Student to join in groups for learning in class, in addition to making social interaction on the playground more difficult. This snowball effect was avoidable.

26. A procedural violation such as a school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural violation of the IDEA. (Park v. Anaheim Union High School District (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, denial of a 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).)

27. In determining whether a student has received a FAPE in compliance with the IDEA, both a procedural and substantive inquiry are conducted to consider whether the school complied with the procedures set forth in the IDEA. The IEP is also evaluated to determine whether the IEP (or lack thereof) was reasonably calculated to enable the child to receive educational benefit. When a procedural violation denying a student a FAPE is identified, the second substantive prong of the inquiry is unnecessary. (*L.J. by and through Hudson v. Pittsburg Unified School Dist.*, (9th Cir., 2017) 850 F. 3d 996, 1003[citations omitted].)

28. In this case, Los Altos' failure to conduct thorough testing of all areas of suspected disability and the failure to conduct testing appropriately, according to manufacturer's testing protocols were procedural violations of the IDEA. These violations resulted in the IEP team being denied the necessary information to offer educational services and supports necessary to provide Student with the educational benefit to which she was entitled resulting in a denial of FAPE. Ms. Hayden specifically testified that, had she known Student had attention deficit disorder, there were other teaching methods she could have employed to help her. Proceeding beyond the screening phase of attentional deficits by conducting additional testing would have provided specific data as to Student's needs. The team could then have arranged for additional services to avoid the downward trajectory of Student's academic skills, as well as her frustration and anxiety levels. Her reading and math deficits could have improved with adequate treatment and training regarding her attention deficit. Student would have been provided with additional training allowing her both to begin to cope with her attention deficit disorder and avoid feeling ashamed of herself because she thought she was "stupid".

29. The failure to evaluate Student also seriously infringed on Parents' opportunity to meaningfully participate in Student's April 21, 2015 and March 21, 2016 IEP formulation processes as adequate information to evaluate the offered special education and related services was not made available to Parents. Los Altos argues it had no indication prior to the March 21, 2016 IEP team meeting that Student needed additional assessments. However, both testimony and documents provide ample evidence of Student's ongoing attention and executive functioning difficulties in third grade. The lack of significant progress and noticeably increased anxiety and academic struggles should have led to an acknowledgment of the need for additional assessment well before the March 21, 2016 IEP. This procedural violation constitutes a denial of

FAPE.

ISSUE 3: FAILURE TO FUND A REQUESTED INDEPENDENT EDUCATIONAL EVALUATION OR FILE FOR DUE PROCESS HEARING TO DEFEND THE CHALLENGED ASSESSMENT

30. Los Altos conducted a limited initial assessment of Student in March and April of 2015. On April 4, 2016, Parents requested an independent educational evaluation based on their assertion that the 2015 Assessments were incomplete and/or inappropriate. On April 6, 2016, Los Altos replied to Parents stating that the request was premature as the assessments listed on Los Altos' second assessment plan, dated April 1, 2016, had not been completed. Parent's informed Los Altos that they were challenging the assessments preceding the April 21, 2015 IEP.

31. Los Altos did not fund Parents requested independent educational evaluation. Nor did Los Altos file a request for a due process hearing to defend their March and April 2015 assessments as being appropriate.

32. The procedural safeguards of the IDEA provide that, under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an assessment obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

33. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The public agency may ask for the parent's reason why he or she objects to the public assessment, but may not require an explanation. The public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).)

34. If an independent educational evaluation is offered at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).)

35. In this case, Los Altos dismissed Parents' request for an independent educational evaluation out of hand. No criteria were supplied to offer parameters within which an independent evaluation might be allowed. Although Ms. Keicher informed Mother that the request was premature, based on the fact that the assessments requested by Los Altos in its April 1, 2016 assessment plan had not yet been conducted, Mother immediately wrote back, clarifying that her request was based on the assessments conducted in March and April of 2015. Parents' April 4, 2016 request for an independent educational evaluation regarding the March and April 2015 assessments was within the two-year statute of limitations applicable to claims pursuant to the IDEA. (Ed. Code, § 56505, subd. (l); 20 U.S.C. § 1415(f)(3)(c).)

36. Parents' request for the independent evaluation based on the 2015 evaluations was timely. Los Altos' failed to act on the request as required by statute. The evidence established that Dr. Pratt had the professional qualifications to do an assessment of Student. Because Los Altos did not fund an independent assessment, and did not request a due process hearing to defend its own assessments, there is no need to determine whether Dr. Pratt's assessment fees met Los Altos' criteria for independent educational evaluations. Therefore, Los Altos is ordered to reimburse the cost of the testing conducted by Dr. Pratt in the amount of \$6,674.00.

SUBSTANTIVE DENIALS OF FAPE

37. The IEP is considered the centerpiece of the IDEA's educational delivery system for disabled children. The procedures required to prepare a child's IEP emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. Adherence to the mandated process is designed to result in special education and related services that are tailored to the unique needs of a particular child. (*Endrew F.*, supra, 137 S. Ct. at p. 994.)

38. An IEP must contain annual goals, including academic and functional goals, that are measurable, meet the unique needs of the individual that result from the disability, and enable the pupil to be involved in and make progress in the general education curriculum. The IEP must also meet each of the other educational needs of the pupil that result from the disability. (Ed. Code § 56345, subds. (a)(2)(A) and (a)(2)(B).) "The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided." (Cal. Code Regs., tit. 5, § 3040, subd. (b).) The Supreme Court, in *Endrew F.* declared that the IDEA required a fact-intensive exercise to develop an IEP that is reasonable, based on the information available regarding the child's circumstances, including expertise of school officials, and parents.

The court emphasized that instruction must be specially designed, and must meet a child's unique needs through an IEP. (*Id.* at p. 999.)

39. The purpose of goals is to permit the IEP team to evaluate whether a student is making progress in an area of need. (Ed. Code §56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation (or most recent evaluation) of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code § 56345)

40. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is "a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir.1993) 993 F.2d 1031, 1041.)

Issue 1(b): Failing to provide appropriate support, services and placement:
2014-2015 School Year

41. In addition to the procedural violation constituting a denial of FAPE, Los Altos' failure to provide an appropriate academic program, services and placement for Student during her second grade year also resulted in a substantive denial of FAPE. Student had needs in the areas of attention, focus, task initiation and completion, math, reading, listening comprehension, writing, social skills and anxiety. Student did not have appropriate goals developed based on these needs and no special education or related services were offered to Student. Student was offered services in the April 21, 2015 IEP that addressed Student's educational needs only in the context of a speech and

language deficit. For example, instead of offering services that began to train Student to manage her attention deficit disorder, or offering executive function training to provide strategies for organization of work, Student was offered training in "showing whole body listener behaviors" by having "eyes on the speaker"; telling a descriptive story in sequence; and listening to paragraphs to answer "wh" questions (who what where, why). The training offered, however, did not address the underlying educational deficits. Most of the approaches used had been tried for two years and had yielded no change in Student's ability to pay attention in class. Student required frequent redirection and re-teaching because of her inability to maintain her attention and focus. Student was offered no services to address these areas of need despite the fact that the attention and executive functioning deficits were impeding Student's ability to access her education. The IEP also failed to address Student's academic deficits despite the fact that the various general education approaches that had been tried since the first grade were failing to help Student overcome her reading comprehension, writing organization and math concepts deficits. The evidence established that Student needed these services in order to receive a FAPE.

42. The failure to provide appropriate special education and related services during Student's second grade year constituted a denial of FAPE. Based on the applicable statute of limitations, Student was denied a FAPE from March 5, 2015 to June 10, 2015.

Issue 2 (b): Failing to provide appropriate support, services and placement:
2015-2016 School Year

43. Student's needs in the areas of attention, focus, task initiation and completion, math, reading, listening comprehension, writing, social skills and anxiety continued into the 2015-2016 school year when Student was in third grade. Despite acknowledging early in Student's third grade year that the strategies selected were not

working, no changes were made to Student's IEP and the IEP continued to ignore these areas of need

44. In a report provided to the IEP team, goals previously set were reviewed and inaccurately stated to have been met. Even without the assessments that should have been completed, the evidence showed that the IEP team had information regarding Student's areas of need in attention, focus, task initiation and completion, math, reading, listening comprehension, writing, social skills and anxiety. Despite this, at the time of the March 21, 2016 IEP, new goals were put in place that were diminished in difficulty, offering student more visual and verbal prompts to attain, in some cases, lower levels of performance than expected the prior year. Other areas of need were not addressed at all. The failure to recognize the full range of Student's needs and develop goals and associated services to address the needs, led to the failure to provide any special education and related services in any area other than speech and language. The inclusion of speech and language impairment as a basis for services was not supported by the assessment results. Furthermore, the speech and language services being provided were known to be ineffective and provision of these services by the speech therapist as the sole remedy for Student's attention deficits was inadequate.

45. The evidence showed that Student needed special education services to address her areas of need in attention, focus, task initiation and completion, math, reading, listening comprehension, writing, social skills and anxiety. The offer in the March 21, 2016 IEP of one hour of speech and language services by Los Altos was appropriate and did not address Student's areas of need and resulted in a failure to provide educational benefit to Student, resulting in a denial of FAPE.

46. The failure to address all of Student's needs, develop appropriate goals and provide Student appropriate special education and related services during her third grade year constituted a denial of FAPE from August 19, 2015 to June 2, 2016.

Issue 4: June 2, 2016 IEP Team Meeting

47. The June 2, 2016 IEP contained a far more robust offer for Student. Student's request for due process in this case posed two narrow questions about the June 2, 2016 IEP: Did Los Altos fail to provide Student a FAPE by failing to offer appropriate support and services to address Student's needs; and did Los Altos fail to provide an appropriate placement to enable Student to make progress or gain educational benefit.

48. Educational placement is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings." (Cal. Code. Regs., tit. 5, § 3042(a).)

49. Student failed to prove by a preponderance of the evidence that Los Altos' offer of a general education placement accompanied by 480 minutes per week of specialized academic instruction for math, writing and reading and group speech therapy for 30 minutes once a week as well as 30 minutes per week of in-class assistance to focus on student's social skills and her ability to work in small groups in class denied Student a FAPE, with the exception of the counseling services. . The offer failed to provide adequate counseling based on the information available to the team indicating that Student was developing increasingly serious anxiety evidenced by her extreme embarrassment in needing to ask for help in class, leave class to access additional services. Her extreme lack of self confidence impeded her ability to access her education in other important ways as well as evidenced by her difficulty working in groups. Her attention and executive function deficits interfered with her ability not only to attend to lessons but to start and manage everything from simply worksheets to larger projects. Student was in need of focused, therapeutic level assistance to address

her self degradation so she could learn to manage her attention deficit disorder, learn executive function strategies, and learn to regulate her emotions so she did not feel humiliated by the thought of performing at a level she perceived to be less than her peers.

50. The counseling services included in the June 2, 2016 offer, would have provided inadequate treatment for Student's anxiety and attention issues. Los Altos offered only counseling with a school psychologist for 45 minutes three times a month and a vague statement of the type of counseling to be provided. The evidence established that Student's increased anxiety required a clinical psychologist with several years of professional experience as a child therapist to address the interaction of her academic and social anxiety issues as well as her attention deficit disorder. It is these interrelated deficits that prevent Student from being able to access her education. Therapy with a highly experienced clinical psychologist at least once a week for an hour was required to address the increasing difficulties Student was developing. All members of the IEP team acknowledged Student's anxiety was increasing at the time of the June 2, 2016 IEP.

51. The specialized academic instruction was to consist of pull outs for math, writing and reading four times per week, each, as well as pull-out speech therapy for 30 minutes, once a week and 45 minutes, three times per month for counseling with the school psychologist. It was estimated that Student would spend approximately 31 percent of her time outside of the general education classroom. The offer contained in the June 2, 2016 IEP did not conform to Parent's preference for how Student was to be educated. They were concerned that Student did not like being pulled out of class and that it caused her anxiety. However, Parents did not prove by the preponderance of the evidence that Student would be denied educational benefit due to the implementation of the academic plan described in the June 2, 2016 IEP. Nor did Parents prove that the

plan for “pull out” specialized academic instruction offered by Los Altos would cause Student more stress than an alternative school setting.¹¹

52. In fact, Student was not demonstrating the extreme “meltdowns” described as occurring at the private school when she when she was attending the Los Altos elementary school. Student did not have to leave school in the middle of the day due to panic attacks or even leave class. Student was even offered the opportunity to take breaks in the resource room with Ms. Sasaki at the Los Altos elementary school and never took advantage of that offer, either during lunch or during class time. Student may not have liked being pulled out but she never refused to go to any tutorial.

53. While school districts are required to consider Parents’ input, parental preference is not controlling. As long as a school district provides an appropriate education with a program that offers FAPE, methodology is left up to the district’s discretion. (*Rowley*, supra, 458 U.S. at p. 209; *Gregory K.*, supra, 811 F. 2d at p. 1314; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) The specialized academic instruction offered in the June 2, 2016 IEP, while requiring Student to have pull out instruction she did not prefer, offered a reasonable approach to providing Student with educational benefit.

54. The “snapshot rule” instructs that a determination regarding Student’s IEP should be judged on the basis of the information reasonably available to the parties at the time of the IEP meeting. (*L.J. by and through Hudson v. Pittsburg Unified School District* (9th Cir. 2017) 850 F. 3d 996, 1004, citing, *Adams. V. Oregon*, (9th Cir. 1999) 195 F. 3d. 1141, 1149.) The rule is not absolute, however. Later acquired evidence is relevant

¹¹ Student did not raise issues related to any aspects of the IEP other than placement and services. Therefore, those are the only issues analyzed here.

if it sheds light on the reasonableness of a decision at the time the decision was made. (*E.M. v. Pajaro Valley Unified School District* (9th Cir. 2011) 652 F. 3d 999, 1004.)

55. Evidence established that Student required the types of intensive therapy provided by Dr. Morris. Student's anxiety had increased to a level where she was demonstrating school avoidance behaviors, and was increasingly unable to conduct necessary daily interactions with peers and teachers. These deficits impeded her ability to access her education. Student's needs exceeded the capabilities of a school psychologist. Dr. Morris' experience and familiarity with a range of therapeutic approaches for addressing Student's anxiety, attention deficit disorder and executive functioning deficits provided significant educational benefit to Student. The failure to offer services by a clinical psychologist resulted in a denial of FAPE in the offer of services in the June 2, 2016 IEP. Student failed to prove by a preponderance of the evidence that any of the other elements of the June 2, 2016 IEP denied Student a FAPE.

REMEDIES

REMEDIES FOR FAILURE TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY

1. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington*, supra, 471 U.S. 359, 374 [the purpose of the IDEA is to provide students with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs."].) Appropriate relief means "relief designed to ensure that

the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup* at p. 1496.) The authority to order such relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484].) These are equitable remedies that courts and hearing officers may employ to craft "appropriate relief" for a party. (*Puyallup* at p. 1496.) An award of compensatory education need not provide "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific. (*Ibid.*)

3. Student has been denied a free appropriate public education since the time of the first assessment plan dated February 23, 2015, at which time the inadequate testing was proposed. However, Student's Request for Due Process was filed on March 6, 2017. In this case, no evidence supporting the piercing of the statute of limitations was presented. Therefore, remedies will date back only to March 6, 2015. By that date, Los Altos had proposed and was proceeding with the inadequate assessment plan. Failure to assess in all areas of suspected disability denied Student a FAPE, as discussed above. That denial continued at the June 2, 2016 IEP team meeting, when they convened to consider the thorough testing completed by Dr. Pratt. At that time, the team changed Student's eligibility category and added more goals and services; however, three goals were not appropriate for Student and Los Altos failed to provide Student with appropriate counseling services. This denial of FAPE continued until Los Altos made another IEP offer on May 15, 2017.

4. Student's reading comprehension was found to be at only a second grade

level when she began tutoring with Ms. Robinson during the summer of 2016. Student needed extended school year services that were not offered by Los Altos in the second or third grade. Ms. Robinson worked with Student twice a week for six weeks during the summer of 2016. Student met her burden of proving that the tutoring helped Student prepare to enter fourth grade. Los Altos is ordered to reimburse Parents for the cost of the tutoring, \$536.25, as an element of compensatory education.

5. Student's reading skills improved to a fourth grade level by the end of her fourth grade year. While Student's anxiety continued to interfere with her education, Dr. Morris testified that it began to improve towards the end of the 2016-2017 school year and her fourth grade teacher confirmed that to be true. It was particularly noted that Student was more social and had a close friend. "Appropriate relief may include reimbursement for parents who place children in private school rather than accept a deficient public school IEP." (*Reid, supra*, 401 F. 3d at p.522.)

6. While no finding is being made that Student's private school placement was a FAPE, it was an appropriate placement, and not an unreasonable choice on the part of Parents, for purposes of compensatory education for the denial of a FAPE in the second and third grades. The program provided by the private school was intended to provide educational benefit to Student and evidence showed that she received educational benefit during her fourth grade year. The school was not required to meet all state standards in order to be deemed an appropriate program. (*Florence County School Dist. Four v. Carter by and Through Carter*, (1993) 510 U.S. 7, 14; 114 S. Ct. 361; 126 L. Ed. 2d, 284.)

7. Student made academic and social progress at the private school. Los Altos is ordered to reimburse Parents for the cost of Los Altos Christian School tuition and fees for the 2016-2017 school year in the amount of \$18,434 plus the \$500 enrollment fee as compensatory education only. These sums total \$18,984. Parents met

their burden of proving Student had been denied a FAPE in her second and third grade years. Furthermore, she had been denied appropriate services to identify and address Student's attention deficit disorder which increased Student's anxiety resulting in greater academic and social deficits. This sum to be reimbursed includes both elementary and learning assistance tuition and fees for field trips as well as winter and spring sports camp fees. Camps provided opportunities for Student to practice social skills in a recreational setting with peers and implement the coping mechanisms for managing her attention and anxiety deficits being taught by her therapist. No evidence was provided regarding the fees charged labeled "room parent fee" or "safety fee," so Parents did not meet their burden of proving that those fees are a proper element of compensatory education. Nor are fees for school uniforms a proper element of compensatory education.

8. Parents shall be reimbursed for the sums expended for private counseling for Student as part of Student's compensatory education for the denials of FAPE in her second and third grade years and for the failure to offer adequate counseling services in the June 2, 2016 IEP. Appropriate counseling was never offered to Student by Los Altos. However, while Los Altos offered inadequate therapy, Student's private school did not offer therapy at all. Even after the shift to the private school, Parents were required to privately fund professional counseling for Student; therefore, the change of placement to the private school did not ameliorate the denial of FAPE that is the lack of adequate counseling, in the June 2, 2016 IEP. Thus, it is reasonable to reimburse parents for the counseling services they procured outside of the district. Parents shall be entitled to reimbursement for all sums paid from August of 2016, through May 15, 2017, for

diagnostic and therapeutic services provided by Dr. Christine Morris, Psy.D., which total \$6,800.¹²

9. As additional compensatory education, Student shall also be awarded the fees for her attendance at The Friendship Program as compensatory services. Parents appropriately sought additional social skills training for Student. Los Altos failed to fully assess all suspected disabilities for a significant period of time, and this resulted in the actual nature and extent of Student attention deficits remaining unidentified. As a result, Student became increasingly frustrated both academically and socially, and her self-esteem diminished. Extra efforts to provide Student with social skills training is an appropriate remedy. The total fees paid by Parents for The Friendship Program, \$365, shall be reimbursed by Los Altos.

10. Student's request for an additional two years of private school tuition for Student's fifth and sixth grade years is denied. While reimbursement for the fourth grade tuition was appropriate compensatory education for the denial of FAPE in the second and third grade years, Parents have not met their burden of proving that the academic program offered by Los Altos for fourth grade was inappropriate and have not proven that Los Altos is unable to provide FAPE.

11. Furthermore, an administrative law judge may not render a decision that results in the placement of an individual with exceptional needs in a nonpublic,

¹² Although Student's closing brief requests a total of \$6,400 in reimbursement to Parents for expenditures to Dr. Morris, the evidence shows that the sum of \$6,800 was paid between Student's first appointment with Dr. Morris on August 4, 2016 and the last visit prior to the May 15, 2017 offer of FAPE. Thus, \$6,800 is the sum that was allowed. The charges for the appointment on May 17, 2017 were not allowed as they were incurred after the May 15, 2017 offer of FAPE which is not at issue here.

nonsectarian school or that results in a service for an individual with exceptional needs provided by a nonpublic, nonsectarian agency that has not been certified pursuant to California Education code Section 56366.1. (Ed. Code §56505.2(a).) The private school Student attended in the fourth grade did not meet the noted certification standards. Therefore, prospective placement at the school was not an available remedy even if Student had prevailed on the issue.

12. Student requested reimbursement for “travel costs”. However, no evidence was submitted demonstrating any expenditure on Parent’s part for transportation. Student failed to meet her burden of proof for reimbursement of travel costs.

ORDER

1. Los Altos shall reimburse Parents for the cost of tuition fees totaling \$18,984 as compensatory education for failure to provide FAPE from March 5, 2015 to June 2, 2016.

2. As additional compensatory education, Parents shall be reimbursed for the cost of summer tutoring in the area of reading by Audra Robinson in the amount of \$536.25.

3. As additional compensatory education, Parents shall be reimbursed for the cost of all diagnostic and therapeutic services provided by Dr. Christine Morris for the period from August of 2016 through May 15, 2017 which totaled \$6,800.

4. As additional compensatory education, Parents shall be reimbursed for Student’s attendance at The Friendship Group in the amount of \$365.

5. Student’s request for an independent educational evaluation has been granted and the cost of Dr. Pratt’s assessments of Student shall be reimbursed in the amount of \$6,674.00.

6. Los Altos shall reimburse parent all of these costs within 30 calendar days of the date of this order.

7. All other requested relief is denied.

PREVAILING PARTY

Pursuant to 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. Student prevailed on all issues heard and decided in this case.

RIGHT TO APPEAL

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

DATE: September 15, 2017

_____/s/_____

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

LOS ALTOS SCHOOL DISTRICT, a local
educational agency,

Plaintiff,

vs.

L.S., a minor,

Defendant.

Case No.: 5:17-cv-07080-EJD

~~PROPOSED~~ ORDER

Pursuant to the stipulation of the Parties and good cause appearing, it is HEREBY
ORDERED that:

1) The September 15, 2017 decision of the California Office of Administrative
Hearings in Case No. 2017030443 be VACATED in its entirety; and

2) This matter be dismissed WITH PREJUDICE. The Clerk shall close this file.

IT IS SO ORDERED.

DATED: March 8, 2018



Hon. Edward J. Davila
United States District Court Judge

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