BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. MANHATTAN BEACH UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017101237

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 30, 2017**,** naming Manhattan Beach Unified School District.[1] Student filed an amended due process hearing request in this matter on February 21, 2018. The matter was continued for good cause on March 23, 2018.

Administrative Law Judge Chris Butchko heard this matter in Manhattan Beach, California, on June 12-14, 18, 19, 26-28, and August 13, 2018.

Jane DuBovy, Attorney at Law, represented Student. Carrie Watts, Taylor Amstutz, and Mayra Loza assisted counsel at hearing. Student's Parents attended all days of hearing.

Chris Fernandez, Attorney at Law, and David Salazar, Attorney at Law, represented Manhattan Beach. Megan Atkins, Assistant Superintendent, attended all days of hearing on behalf of Manhattan Beach. Andrew Kilpatrick, Program Specialist, filled in for Ms. Atkins on June 26, 2018.

On August 13, 2018, OAH granted the parties' request for a continuance to allow the parties to file closing briefs. A second extension was requested by Student and granted on September 7, 2018. Upon timely receipt of the written closing arguments on September 17, 2018, the record was closed and the matter was submitted for decision.

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[1] Manhattan Beach filed its response to Student's amended complaint on March 8, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200 (*M.C.*).)

ISSUES[2]

(1) Whether Manhattan Beach infringed upon Parents' right to meaningful participation in the individualized education program process and caused a loss of educational benefit, thereby procedurally denying Student a free appropriate public education by failing to review and revise her IEP based on lack of anticipated progress during the 2016-2017 school year.

(2) Whether Manhattan Beach infringed upon Parents' right to meaningful participation in the IEP process and caused a loss of educational benefit thereby procedurally denying Student a FAPE in the development of Student's IEP in April 2016 by failing to take Parents' concerns into consideration in the development of Student's IEP.

(3) Whether Manhattan Beach infringed upon Parents' right to meaningful participation in the IEP process and caused a loss of educational benefit, thereby procedurally denying Student a FAPE in the development of Student's IEPs on October 17, 2016, November 8, 2016, November 16, 2016 and December 15, 2016 by:

a. Failing to take Parents' concerns into consideration in the development of Student's IEP;

b. Failing to consider the results of private and independent evaluations in determinations regarding placement, services and the provision of FAPE; or

c. Failing to provide prior written notice with all required information of the refusal to offer additional intensive and individualized services, supports, and interventions as requested by Parents.

(4) Whether Manhattan Beach infringed upon Parents' right to meaningful participation in the IEP process and caused a loss of educational benefit, thereby procedurally denying Student a FAPE in the development of Student's IEP in May 2017 by:

a. Failing to take Parents' concerns into consideration in the development of Student's IEP;

b. Failing to consider results of private and independent evaluations in determinations regarding placement, services and the provision of FAPE;

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[2] On June 8, 2018, shortly before the commencement of the hearing, Student filed a Revised Statement of Issues, withdrawing 10 of the 18 issues in her complaint. As this left gaps in the numbering of issues, the ALJ prepared a list of the remaining claims in this matter as presented in the Order Following Prehearing Conference and distributed a copy to each party on the first day of hearing. That revised listing is used here.

c. Failing to ensure that Parents were members of any team that made decisions regarding Student's educational placement and program and predetermining or unilaterally determining that it would only offer placement in the Success Learning Center non-public school, without participation by Parents in the decision; or

d. Failing to provide prior written notice with all required information of the proposal to change Student's placement.

(5) Whether Manhattan Beach infringed upon Parents' right to meaningful participation in the IEP process and caused a loss of educational benefit thereby procedurally denying Student a FAPE in the development of Student's IEP in September 2017 by:

a. Failing to take Parents' concerns into consideration in the development of Student's IEP;

b. Failing to consider results of private and independent evaluations in determinations regarding placement, services and the provision of FAPE;

c. Failing to ensure that Parents were members of any team that made decisions regarding Student's educational placement and program and predetermining or unilaterally determining that it would only offer placement in the Success Learning Center non-public school, without participation by Parents in the decision; or

d. Failing to provide prior written notice with all required information of the proposal to change Student's placement.

(6) Whether Manhattan Beach infringed upon Parents' right to meaningful participation and caused a loss of educational benefit to Student when it failed to provide prior written notice with all required information of the refusal to offer additional intensive and individualized services, supports, and interventions, as requested by Parents and recommended by Dr. Cowart, or of its refusal to immediately convene an IEP team meeting to discuss Student's escalating behaviors in February 2018.

(7) Whether throughout extended school year 2016, the 2016-2017 school year including extended school year 2017, and the 2017-2018 school year, Manhattan Beach substantively denied Student a FAPE in the IEPs developed in April 2016, and on October 17, 2016, November 8, 2016, November 16, 2016, December 15, 2016, May 5, 2017 and September 20, 2017 by:

a. Failing to offer and provide appropriate and sufficient related services and other supports and strategies in the area of counseling/mental health, including sufficient family/parent therapy and individual therapy by a qualified mental health specialist outside of the school day to enable Student to make progress and to meet Student's unique needs;

b. Failing to offer and provide appropriate and sufficient related services in the area of social skills to meet Student's needs and allow her to make progress;

c. Failing to offer and provide one-to-one instruction individualized to Student's unique needs and abilities and provided in an appropriate setting to allow Student to make appropriate progress and work towards general education curriculum and expectations;

d. Failing to offer and provide an appropriate placement in a setting with integrated interventions and supports appropriate to meet Student's needs throughout the day, one-to-one teaching in an environment with a one-to-one student/teacher ratio with opportunities for integration into small group learning environments, and flexibility to allow Student to access the curriculum without exacerbating her anxiety; or

e. Failing to offer and provide a program for extended school year that would meet Student's needs and prevent regression.

(8) Whether from February 6, 2018, forward, Manhattan Beach substantively denied Student a FAPE by:

a. Failing to offer and provide appropriate and sufficient related services and other supports and strategies in the area of counseling/mental health, including sufficient family/parent therapy and individual therapy by a qualified mental health specialist outside of the school day to enable Student to make progress and to meet Student's unique needs;

b. Failing to offer and provide appropriate and sufficient related services in the area of social skills to meet Student's needs and allow her to make progress;

c. Failing to offer and provide one-to-one instruction individualized to Student's unique needs and abilities and provided in an appropriate setting to allow Student to make appropriate progress and work towards general education curriculum and expectations;

d. Failing to offer and provide an appropriate placement in a setting with integrated interventions and supports appropriate to meet Student's needs throughout the day, one-to-one teaching in an environment with a one-to-one student/teacher ratio with opportunities for integration into small group learning environments, and flexibility to allow Student to access the curriculum without exacerbating her anxiety; or

e. Failing to offer and provide a program for extended school year that would meet Student's needs and prevent regression.

SUMMARY OF DECISION

Parents established that Manhattan Beach significantly impeded their ability to participate in the educational planning process by failing to give them full prior written notice of the reasons for its decision not to offer Student intensive counseling service and thereby denied Student a free, appropriate public education. Parents also demonstrated that Manhattan Beach denied Student a FAPE because it failed to meet Student's need for educationally-related mental health services in the time period between November 8, 2016, and May 5, 2017, and the time period following September 20, 2017. Manhattan Beach prevailed on all other claims.

FACTUAL FINDINGS

Background

1. Student is a 13-year-old female who has resided in Manhattan Beach at all times relevant to this action and attended Manhattan Beach's preschool and elementary schools. Student is currently classified as in the seventh grade, having fallen a year behind after entering middle school. Student has a bright personality and is eager to please. In her early years, teachers found her to be diligent and a hard worker, blessed with "creative enthusiasm."

2. However, in kindergarten, Student suffered from severe separation anxiety and was treated by a child psychologist, Dr. Keegan Tangeman, and overcame it within the year. Throughout her school years, Student was driven not to disappoint adults and to make a good impression on her peers. She was described as well-behaved, friendly, creative, athletic, and social.

3. In third grade, Manhattan Beach found Student eligible for special education services under the category of specific learning disability due to a significant discrepancy between her ability and academic achievement. She had difficulty with attention, auditory processing, and visual memory. Student received specialized academic instruction and designated instructional service counseling through the remainder of her elementary school years. Instructional service counseling is a low-intensity service provided to students who require additional counseling and guidance services to support their educational program.

4. Although initially successful in school, concerns about Student's performance mounted as she advanced. Student's fourth grade annual IEP team meeting was convened on April 15, 2015. Dr. Tangeman, who had resumed involvement with Student around third grade, and Geanne Weaver, a tutor at the private reading instruction service Student was using, attended the meeting to discuss their views of Student's needs and abilities. Student was having serious difficulty completing homework and was avoiding class by going to the health office, causing her to fall behind academically. Other concerns raised at the IEP team meeting included her declining progress in reading and writing, difficulties with independent

work, and task avoidance. Dr. Tangeman recommended to the team that they find Student eligible under the category of emotional disturbance, but the team did not agree to do so. The team agreed to provide her with 370 minutes per week of specialized academic instruction and 20 minutes of Instructional service counseling two times per month. Shortly after this meeting, Parents wrote to inform Manhattan Beach that they would be stopping the private reading tutoring because they could no longer bear the expense.

5. An amendment IEP team meeting was held on January 11, 2016, at Parents' request. Parents reported that Student's difficulty with school was becoming greater. Parents were managing to get her through each day, but were concerned because her difficulties with organization, focus, and concentration were mounting. Her teachers reported that she was meeting expectations in class, but Parents told the team that she would cry because she found organization so difficult. Dr. Tangeman discussed with the team Student's worsening behaviors of refusing to work and of school avoidance. No changes were made to her IEP following the meeting.

The April 2016 IEP Team Meetings

6. Student's last elementary school IEP team meetings were held in April 2016. The first meeting convened on April 11, 2016, to prepare for Student's transition to middle school. Dr. Tangeman again attended, as did Adrian Ojeda, another representative from the reading tutoring service Parents had used. Mr. Ojeda described the results of assessments he performed, which indicated that Student needed support in math and reading. He recommended that Student receive one-on-one tutoring from his company and the team discussed his recommendation, but there were no follow-up discussions with Manhattan Beach and no tutoring services were contracted for Student. Student's areas of need were listed as "reading, writing, spelling, classroom behavior, [and] anxiety."

7. Dr. Tangeman is a licensed psychologist specializing in treatment of adolescents. He has a bachelor's degree in psychology from the University of California at Santa Barbara, a master's degree in counseling psychology from California State University, Long Beach, and a doctorate in clinical psychology from Pepperdine University. He did two post-doctoral fellowships in child and adolescent psychology at Harbor-UCLA Medical Center, and served on the clinical faculty there for five years. He has had a private practice in that specialty since 2010.

8. At the April 11, 2016 IEP team meeting, Dr. Tangeman addressed the team on Student's progress and discussed Parents' concerns. He treated Student at various times since kindergarten, when Student showed significant separation anxiety. He had been providing her with Cognitive Behavior Therapy since then, although he had limited contact with Student from late 2011 through 2014. At this meeting, Dr. Tangeman expressed concern with Student's increasing frustration, temper tantrums, crying, and task refusal.

9. Student was exposed to methamphetamines in utero, prior to her adoption by Parents. Dr. Tangeman reported that such exposure worsens distractibility, emotional

lability, and disruptive behavior in children and adolescents. Dr. Tangeman noted that Student's difficulties in those areas existed alongside inattentive and hyperactive behaviors that occur during emotional escalation, which suggested to him an anxiety disorder. He found through testing and rating scale results that Student was likely experiencing clinically significant symptoms of anxiety. He recommended psychotherapy and behavioral supports in school, and that adding emotional disturbance to her special education eligibility be considered by the team. Again, this recommendation was not adopted by the team.

10. Dr. Tangeman's input was not recorded in the IEP team meeting notes for this meeting. The notes did state that school psychologist Rosalyn Cusik found that Student met her instructional service counseling goals. In addition, she reported that Student participated in class, had good social relationships, and got along with peers and adults. However, Ms. Cusik also noted that Student had difficulty attending, missed important components of instruction, was "triggered" by tests, how others perceive her, and by unscheduled events, and presented with symptoms of anxiety.

11. The IEP notes also stated that Parents expressed concerns about Student's "increased anxiety and inconsistent performance" in school. The elementary school principal assured Parents that Student would be supported in middle school, and a second meeting was scheduled for the following week to provide for Student's transition needs. Parents were very concerned about Student's ability to deal with the demands of middle school.

12. At the next meeting on April 18, 2016, the team met without Dr. Tangeman or Mr. Ojeda, but with additional staff from the middle school. The IEP notes do not contain a narrative of what was discussed or considered, other than the notation that "[a]ccomodations were addressed and agreed upon." Student's Instructional service counseling services were increased to 20 minutes per week for the remainder of fifth grade, and then set at 15 minutes per week for middle school. In addition, Student's specialized academic instruction was increased to 176 minutes per day in sixth grade for humanities, math, and the learning center. The reduction in instructional service counseling in middle school was made to align the service with the class periods in middle school.

Dr. Budding's Independent Evaluation

13. At to the April 11, 2016 IEP team meeting, Parents presented a letter requesting an independent educational evaluation of Student's neuropsychological functioning because of their disagreements with prior assessments. They also voiced concerns over Student's increased anxiety and inconsistent academic performance. Manhattan Beach agreed to the request, and Dr. Deborah Budding was selected as the assessor. In the intervening period, Parents consulted with Dr. Suzanne Goh, a neurologist, and received mental health services from Dr. Diane Goldwater for Student and Parents.

14. Dr. Budding is a neuropsychologist and psychotherapist with over 20 years in private practice. Dr. Budding received a bachelor's degree in liberal arts from the University of California at Los Angeles, a doctorate in clinical psychology from the University of

Southern California, and a post-doctorate specialization certificate in neuropsychology from the Fielding Graduate Institute. She is a licensed clinical psychologist who specializes in assessments. She is also a Board certified neuropsychologist, who studies neurologically based brain disorders, such as attention deficit hyperactivity disorder and autism. She has an extensive list of publications and presentations and is on the supervising faculty at the Department of Psychiatry in the Psychology Division at Harbor-UCLA Medical Center. Dr. Budding was a highly qualified and credible witness.

15. Dr. Budding conducted her testing of Student in July of 2016. She found Student bright and inquisitive, with strong empathy for others. However, Student was prone to becoming overwhelmed, oversensitive to sounds, and dependent upon structure. She was highly sensitive to feelings of shame and struggled to maintain effort with challenging tasks. Student began attending sixth grade at Manhattan Beach's middle school before Dr. Budding's report was received by Manhattan Beach.

The October 2016 IEP Team Meeting

16. Dr. Budding attended the October 17, 2016 IEP team meeting to present her report. The IEP meeting report notes that Dr. Budding felt that Student would be successful in middle school with appropriate support, but it does not record any diagnosis or recommendations by her. It reports that Dr. Budding found Student to be an atypical case, whose biggest challenge was "variable arousal[3]" and who "need[ed] much behavior assistance with starting and stopping behavior."

17. Student's testing results with Dr. Budding were significantly variable, making it hard for Dr. Budding to accept index scores as a representation of Student's functioning. Her abilities to focus, process, and shift attention were variable, as were her reaction times. Student's ability to sustain attention and her organizational capacity were impaired, which adversely affected her ability to access memory. As a result, despite strong language skills, she would have difficulty using language effectively for problem solving and communication. These tendencies, combined with a high level of emotional sensitivity and a disposition to anxiety, frustrated her ability to access her abilities. Overall, Student's anxiety was "an impediment to her ability to effectively access curriculum." Student was quick to feel distress, had a constricted affect, and was hypervigilant.

18. Dr. Budding found that Student met behavioral criteria for generalized anxiety disorder and attention deficit/hyperactivity disorder, and noted that a secondary eligibility under other health impaired or emotional disturbance should be considered to address those attention and anxiety issues. She found that Student had a longstanding tendency toward anxiety. The assessment report made nine recommendations, including recommending significant educational therapy interventions in relation to executive functioning and organization and content-based tutoring. If this was not done, Dr. Budding warned that

[3] By "arousal," Dr. Budding was referring to Student's emotional tone.

outside intervention would be needed, as well as "placement in a school geared toward educating students with learning disabilities and executive functioning challenges." Dr. Budding's opinion delivered to the IEP team was that Student would benefit from both one-to-one and small group instruction.

19. Dr. Tangeman also attended the October IEP team meeting. He again recommended that the team add emotional disturbance to Student's eligibilities. Although Dr. Budding agreed with the recommendation, she deferred to Dr. Tangeman to make the argument and felt that it should be a secondary eligibility. The Manhattan Beach members of the team declined to add the eligibility, choosing to have further assessments performed by Manhattan Beach staff before making a decision. Similarly, no additional mental health services were provided to Student. Student's IEP plan was tweaked by the addition of further accommodations for homework, schoolwork, and testing. No assessment plans were generated at the meeting.

20. In sixth grade, Student received her instructional service counseling from Marjorie Questin, the school psychologist. Ms. Questin has master's degrees in psychology from Pepperdine University and in educational psychology from Loyola Marymount University. She worked as a special education teacher before receiving her master's degrees and has been a school psychologist for over 11 years, all at Manhattan Beach. She worked with Student in 15-minute sessions to teach her to use a visual work organizer for academics and on "rating her anxiety" to come up with strategies or tools to deal with it. Ms. Questin observed that Student's needs changed and her ability to manage the demands of school declined quickly over the few months they were together. In Student's last months at the school, Ms. Questin often saw her every day in an effort to help her cope.

21. After an initial honeymoon period at her new school, Student's difficulties with school resumed and increased in intensity. At home, Student was refusing to go to school. She would delay leaving and then become upset at the prospect of coming to school late. Student began suffering frequent bouts of what were termed "panic attacks," where she would shut down and withdraw from the source of her stress. She expressed distress that her peers were noticing her difficulties and were, in her view, ostracizing her. She cut classes, most often math class, because it was difficult and made her feel ashamed and embarrassed. Student was disruptive in her classes: fidgeting, acting up, and blurting out. She began failing math. Student cried when Parents picked her up after school, and often called them to be picked up at school. Parents funded psychotherapy with Dr. Goldwater, but the cost was a strain for them. Ms. Questin was in contact with Dr. Goldwater during this time.

The November 2016 "Emergency" IEP Team Meetings

22. An "emergency" IEP team meeting was held on November 8, 2016. The team meeting report stated the meeting was called because Parents were concerned because "[Student's] anxiety attacks are occurring more regularly and are becoming more difficult to resolve." Student had begun to miss full days of school because of her anxiety. The

Manhattan Beach members of IEP team urged Parents to bring Student to school even if she would be late, and proposed to have staff meet her to help her transition into class.

23. Ms. Questin discussed having Student's teachers employ a coping mechanism devised by Dr. Goldwater, which was intended to de-escalate Student's anxiety by taking her through a script to analyze whether her stress was because something was dangerous or just scary. The team noted that part of Student's difficulty with her peers was because of her "perspective of body language and peer reactions."

24. The team discussed the possible need to place Student at a non-public school in the future, conducting an educationally related intensive counseling services assessment, a functional behavior analysis, and creating a behavior intervention plan. The team discussed adding a behaviorist to Student's IEP, based upon an intensive counseling assessment and recommendation of service at follow-up meeting. The IEP team did not make any changes to Student's services at the meeting; Student's instructional service counseling remained at 15 minutes per week. The team agreed that a group aide would be introduced to Student's science class on a trial basis to see if an aide might be beneficial, and Student would be offered participation in the school's Girl's Club for socialization and therapy. Parent signed an intensive counseling assessment plan for Student, which Ms. Questin would conduct on an expedited basis.

25. Less than a week after that meeting, Student suffered a more severe panic attack. Student manifested new behaviors, such as twitching and losing control with her body. Her breakdowns were now widely known among her peers, and her school refusal increased in severity. Parents called another emergency IEP team meeting.

26. The purpose of the November 16, 2016 IEP team meeting was reported as adding intensive counseling and behavioral services. The team did not provide intensive counseling to Student, but gave Parents 120 minutes per month of intensive counseling counseling from Elizabeth Fong, a licensed social worker working for a non-public agency under contract with Manhattan Beach, to help Parents support Student and cope with her refusal to go to school. In addition, a behaviorist was added to the IEP team for 30 minutes per month on a consultation basis to implement a behavior plan and match her sensory needs. The team also discussed assigning Student an aide or putting her on minimum days or on home/hospital instruction. No additional direct services were to be provided to Student. No discussion of a non-public school placement took place. The severity of Student's needs was a surprise to the Manhattan Beach IEP team members.

The December 2016 IEP Team Meeting

27. The IEP team met again on December 15, 2016, to discuss Ms. Questin's intensive counseling assessment. Ms. Questin found that Student was having difficulty in all dimensions: relationships with peers and adults, friendships, poor judgment, anxiety, worry, staying on task, self-control, and self-regulation. Student was worried about making mistakes, how others saw her, disappointing her parents, or having something bad happen to

her. Student was unable to deal with the transition between classes and wanted to stay in one class all day. Her teachers reported tearful breakdowns. Ms. Questin believed Student needed more support than she was getting and that she met the criteria for eligibility due to emotional disturbance. Because there was going to be another psychoeducational assessment for Student's triennial IEP team meeting in April, the team put off consideration of emotional disturbance eligibility until then, believing the school could meet Student's needs without changing her eligibility.

28. Student was shutting down at school. Her teachers felt that general education was no longer appropriate for her, and recommended that she be placed in a special day class for math and English. The team agreed to put in place a full-time temporary support aide that would be primarily assigned to Student. An assessment plan was proposed to evaluate Student's occupational therapy needs and to conduct a functional behavior analysis, but no contemporaneous assessment plan appears in the record. Student was placed in a special day class for math and English and assigned a group temporary support aide, but the IEP plan otherwise maintained Student's specialized academic instruction, Parents' intensive counseling, the 30 minutes per month consultation with the behaviorist, and Student's 15 minutes per week of instructional service counseling. No intensive counseling was offered to Student.

29. The positions held by Manhattan Beach IEP team members at these IEP team meetings were motivated in part by considerations that were not aired in discussion with the full team. Adding emotional disturbance as an eligibility category was resisted by staff because that disability had consequences for a student's educational progress. Increasing the counseling minutes in Student's in-school services would result in the loss of class time, and the Manhattan Beach team members thought it would possibly worsen her academic performance. Manhattan Beach IEP team members did not offer to replace the parentally-provided psychotherapy with Manhattan Beach-funded intensive counseling because they believed it unwise to introduce another therapist to Student's treatment. However, the Manhattan Beach IEP team could have offered to fund psychotherapy for Student, and could have contracted with Dr. Goldwater to have her provide therapy at Manhattan Beach's expense and has done so for other students, but they did not do so in response to Student's needs.

Student's Breakdown

30. Following Winter Break, after approximately seven days of school under the new IEP plan, Student suffered a major panic attack on January 19, 2017. She eloped from class, ran to a field, and broke down. Parent picked her up and took her to the emergency room, where Student was tested for a seizure disorder. Parent tried to return her to school on January 27, 2017, to see if she could get through the morning, but Student dysregulated after less than two hours.

31. Parents consulted with Dr. Goldwater, who said that Student needed to be in a more restrictive setting and intensive mental health environment. Student was admitted to

the partial hospitalization program at Evolve Treatment Centers on February 6, 2017. Parents informed Manhattan Beach that Student was attending Evolve. The program at Evolve was six hours per day, five days per week. Manhattan Beach offered to hold an IEP team meeting on February 9, 2017, but Parents declined. The parties agreed to hold an IEP team meeting after Student was discharged from Evolve, and Manhattan Beach offered to provide Student with home/hospital instruction once Student was ready for it. Student's stay at Evolve was paid for by Parents' health insurance.

32. Student was the youngest in her group at Evolve and staff considered her to be "in many ways a young 12-year-old." She received individual and group therapy and had individual access to a therapist as needed. She continued to have panic attacks which would last as long as 60 minutes at Evolve, and often displayed an inappropriate aspect and behaviors. Student was not regarded as a good fit at Evolve, because she had externalizing behaviors and was so much younger than the other patients. In group therapy, she had to be excused when patients were sharing stories of behaviors that were deemed inappropriate for her to hear. Student's challenges were unusually severe for a person as young as she was.

33. Evolve began introducing academics to Student's day, which then consisted of five hours of therapy and one hour of academics. Parent, with Manhattan Beach's assistance, completed a request form for home/hospital instruction on March 10, 2017, which commenced in the first week of April 2017. Student received six hours per week of service from her Manhattan Beach tutor, who found that she was initially very resistant to schoolwork. She was unorganized and anxious, and needed lots of breaks.

The May 2017 IEP Team Meeting

34. Manhattan Beach contacted Parents on March 2, 2017 to set up an IEP team meeting, which was eventually set for April 18, 2017, and finally held on May 5, 2017. In the interim, Parents updated Manhattan Beach on Student's progress by email on April 3, 2017, and listed 14 non-public schooling options. Parents asked Manhattan Beach to suggest any "viable options" that were not on that list, and said they were going to try two or three classes at one school on that list once Student had a sufficient tolerance for academics, and may revisit another. Parents informed Manhattan Beach that their "energy and finances were stretched thin" by Student's crisis.

35. At the May 5, 2017 IEP team meeting, the team was given Evolve's recommendation that Student was ready to be released from Evolve. Veronica Valdiva, Student's therapist at Evolve, reported that Student had increased her coping skills and was being assisted by pharmacotherapy. A letter from Evolve's Director shared at the meeting noted that despite her progress, Student continued to be impaired in her ability to function at school and had "crippling anxiety and fear of failure, particularly in educational settings" because of fear that she would reveal a flaw. The Director stated that Student required "considerate, preferably one-on-one teaching with a professional who can direct her educationally while managing her behavioral symptoms."

36. Parent presented a letter setting out the opinion of Patti Earlix, an educational therapist. Ms. Earlix worked as a teacher and administrator for the Los Angeles Unified School District for almost 20 years and then began working as an educational therapist after being certified in the field in 1997. She is a school placement specialist, and was aware that there were many more specialized options for Student's education than the 14 on Parents' list. Ms. Earlix recommended that Student attend a school with a "1:1 individualized approach to mathematics, reading fluency, and executive skills," attend a school with students of above average cognitive ability, learn through multiple modalities, and have available counseling support.

37. The team agreed that Student was ready to start the transition to an educational environment, "though the timing of her readiness is uncertain." To that end, the team discussed possible placements at several non-public schools. Manhattan Beach members of the IEP team agreed that Success Learning Center would be an appropriate placement for Student. Success Learning Center is a school run by the Special Education Local Plan Area, a consortium of local school districts. In its middle school, Success Learning Center offered class sizes of eight with a credentialed teacher and aide, consultation with a school behaviorist, services from a psychologist, and individualized curriculums and interventions.

38. The team agreed that Student should repeat the sixth grade, but could not reach agreement on Student's placement. As noted in the IEP team meeting report, Manhattan Beach made an offer of FAPE, consisting of placement at Success Learning Center, with 60 minutes per week of individual counseling, 60 minutes of group counseling, 240 minutes per month of intensive counseling for Parents, 240 minutes per month of intensive counseling for Student, and transportation to school. Parents were unwilling to accept the offer. Parents wanted to tour Success Learning Center and possibly arrange for Student to tour it as well, and the team agreed to meet again on June 8, 2017, to consider Parents' input on placement.

39. Parents toured Success Learning Center for two hours and did not approve. They believed there were too few children and too few female students in the class for Student's age group. Parents recalled that Student was uncomfortable with the older peer group at Evolve. The only female student present during the visit was significantly older than Student. In addition, Parents believed that Student would not have sufficient access to a therapist, as one was on site only three days per week and otherwise on-call at the nearby SELPA office. Success Learning Center did not offer exclusively one-to-one instruction.

40. At this point Parents withdrew from the IEP process. Parents believed that they had been exposed to all of the placements Manhattan Beach could offer and did not wish to meet again with the team. Parents did not think it was a good use of their money to pay an advocate to accompany them to the IEP team meeting as the meeting could not be fruitful. Parents' counsel sent an email to Manhattan Beach on May 22, 2017, informing it that Parents would not attend the IEP team meeting and followed it up with a letter on May 24, 2017, stating that they did so because Success Learning Center was Manhattan Beach's unilateral and final offer of a placement. Manhattan Beach responded with a letter on June 13, 2017, which noted that the team had agreed to reconvene to discuss Parents'

input on the placement decision and included an offer to reschedule the meeting to a mutually agreeable date. Parents responded by letter dated June 30, 2017, informing Manhattan Beach that they would be unilaterally placing Student in a non-public school and would seek tuition reimbursement from Manhattan Beach. Although they denied that they had refused to participate in IEP team meetings, they did not respond to the offer to reschedule.

Summer 2017

41. Staff from one of the schools Parents visited and another parent suggested to Parents that they seek therapy for Student from Dr. Shahrzad Giti. Dr. Giti is a licensed clinical psychologist who holds a liberal arts degree from Rice University and a Master of Music degree from Boston University. She received a master's degree and a doctorate in clinical psychology from Alliant International University, completing her studies there in 2012, and was a Doctoral Fellow in psychological assessment at the Reiss Davis Child Study Center in Culver City, California, through 2014. She has been the clinical director and senior clinician at South Bay Child and Family Therapy, Inc., since 2013.

42. Dr. Giti works with "high-crisis" children. She has contracted with Manhattan Beach to provide intensive counseling and has clients at Success Learning Center. She started providing services to Student on June 20, 2017, and counseled her once or twice per week for 45 to 60 minute sessions. Dr. Giti found Student to be very fragile, with significant levels of anxiety and depression. She focused on crisis intervention, and worked on cognitive behavior therapy with Student. That therapy attempts to get the patient to cognitively recognize and understand their behavior, rather than simply changing negative behaviors.

43. Parents also attempted to address Student's academic deficits during that summer. Another parent recommended Pacific Point Academy in Santa Monica, California, which had a Learning Center program that offered one-to-one instruction for remediation and to prevent regression. Pacific Point Academy used the same reading instruction program that Parents had previously funded in 2015. Student did not reject instruction at Pacific Point Academy, and Parents decided that they would apply to have her placed there for the 2017-2018 school year. Pacific Point Academy does not require that its teachers have California teaching credentials or be certified to work with special education students, although Student's teachers were credentialed by other states.

Placement for the 2018-2018 School Year

44. Student was accepted to the Innovation Program at Pacific Point Academy on September 11, 2017, and began attending. The Innovation Program was developed for students who cannot sustain attendance in a classroom but who would benefit from opportunities for socialization. Academics are delivered one-to-one with minimal changes in location and a psychologist is always on-site for therapy. Student was eased into attendance. Student initially attended from 8:20 to 11:22, with the goal that Student would attend to 2:33.

That goal was never reached. Student was eventually able to persist to the lunch period beginning at 12:10, although she became overwhelmed by the presence of others and always left early.

45. Student had trouble coping with even that level of academics. Her work tolerance was low, and she would suffer panic attacks and other episodes requiring calming by her instructor and sometimes intervention by a therapist. Student had difficulty with the 14-minute snack break because it was unstructured time during which the other students were present.

46. Student received programmed social/emotional instruction and group therapy. Student continued to have problems relating to and establishing relationships with peers. Her peers were alarmed by her conversational habits, as she was quite expressive of her mental health issues. Student would perseverate, rock herself, talk to herself, and laugh without context. She remained exquisitely sensitive to the opinions of others, and her therapist at Pacific Point Academy found that she would read incorrect and negative meaning into the words and body language of other students and adults.

The September 2017 IEP Team Meeting

47. Parents agreed[4] to permit Manhattan Beach to administer a psychoeducational assessment of Student, which was conducted in late August and early September of 2017. Emily Allen, a school psychologist with Manhattan Beach, reviewed of Student's records, did an in-class observation of Student at Pacific Point Academy, conducted standardized testing, and distributed rating scales to Student and the people knowledgeable about her. Ms. Allen consulted with Dr. Giti, but did not speak with Dr. Arastou Aminzadeh, whom Ms. Allen knew was Student's treating psychiatrist and who was prescribing psychotropic medication. The report was presented at an IEP team meeting held on September 20, 2017.

48. Ms. Allen reported that Student's emotional dysregulation has worsened since Dr. Budding's assessment the previous year. She found that depressive symptoms had overtaken anxiety as the major outward signifier of Student's condition. Student was unable to work in groups at Pacific Point Academy and would become emotional and disassociate when put with others. In such circumstances she would suffer flashbacks to traumatic events and her time at Evolve. She continued to display variable and often inappropriate arousal as well as mood lability. Student was open about her struggles and could describe her challenges and the strategies and tools she had to deal with them.

49. Ms. Allen found that Student did meet the criteria for eligibility as emotionally disturbed, might meet the criteria for other health impairment due to attention

[4] Neither party presented evidence at hearing about the process of arranging the assessment or of calling the subsequent team meeting. The meeting was not a resumption or continuation of the May 5, 2017 IEP team meeting.

deficit/hyperactivity disorder, and would meet the criteria for specific learning disability if the team found that the discrepancy between her academic ability and her performance was more due to her processing deficits than to her emotional problems. The team considered Ms. Allen's report and found Student eligible under all three categories.

50. The IEP team discussed placements for Student. The team agreed that Student could not be placed at her school of attendance, and considered placements at non-public schools in the Help Group, but the discussion resolved into the choices of Pacific Point Academy and Success Learning Center. Manhattan Beach staff rejected Pacific Point Academy because the students there appeared too developmentally delayed to be proper peers for Student and because instruction was not being provided by teachers credentialed in California and did not follow state standards. Parents disputed those objections, and maintained their contention that Success Learning Center was not appropriate. As Pacific Point Academy was not certified by the state of California as a non-public school, the team could not place Student there.

51. Parents requested continued placement at Pacific Point Academy, and provided a September 19, 2017 letter from Dr. Giti in support of that placement. They believed Pacific Point Academy was appropriate because it provided Student with one-on-one instruction and was working to reintegrate her with peers. Dr. Giti recommended that Student be placed where she would receive individualized and one-to-one intervention and academics interwoven with small class instruction. Dr. Giti had not toured Success Learning Center before she wrote her letter and her letter did not directly address the appropriateness of a placement at Success Learning Center.

52. Dr. Giti explained her letter at hearing by noting that Student was so fragile that all of the progress she had made in her time at Pacific Point Academy could be undone in five minutes at a Manhattan Beach placement. It was extremely rare that Dr. Giti would recommend a placement as restrictive as that, but Student required it. Student needed one-to-one instruction to slow the pace so that she could rebuild her relationship with teachers after feeling that she had been bullied or singled out by them.

53. Manhattan Beach members of the IEP team decided that placement at Success Learning Center would be part of the offer of FAPE. Success Learning Center had small group instruction and could work with students on a one-to-one basis. Student would be placed at Success Learning Center for a 314-minute full day of group specialized academic instruction and would be supported by a full-time aide from a non-public agency provider. The aide would be supervised for 120 minutes per month by a board certified behavior analyst, also provided by a non-public agency. Student would get 60 minutes per week of individual instructional service counseling and 30 minutes per week of group counseling. Both Student and Parents would also be provided with 240 minutes per month of intensive counseling. The offer deferred consideration of Student's need for extended school year services to the annual IEP team meeting in the spring. No plan was provided for Student's transition from Pacific Point Academy to Success Learning Center.

2017-2018 School Year at Pacific Point Academy

54. Student did not follow an uninterrupted positive trajectory at Pacific Point Academy. Around the end of January 2018, Student suffered a severe downturn in her mental state. Her incidences of self-harm, such as cutting herself, increased substantially and she again had flashbacks that left her shaking and crying uncontrollably.

55. Parents retained Dr. Elizabeth Cowart, a psychiatrist, to treat Student in October of 2017. On February 6, 2018, Dr. Cowart wrote a letter reporting that Student had not responded adequately to the medical and psychotherapeutic interventions with which she had been treated. Dr. Cowart reported that Student was suffering from psychotic symptoms which suggested a diagnosis of bipolar disorder. Because Student was engaging in daily episodes of self-harm, Dr. Cowart wrote to recommend that Student be placed in a residential treatment center for immediate stabilization of her condition. Parents shared this letter with Manhattan Beach and wrote that same day to request an immediate IEP team meeting to respond to Student's changed circumstances. District did not immediately respond.

56. Student filed an amended due process hearing request on February 21, 2018.

57. Manhattan Beach then responded to Parents' February 6, 2018 request by email on March 2, 2018, suggesting IEP team meeting dates within the following week. Getting no response, Manhattan Beach again wrote on March 8, 2018, suggesting meetings the following week. Counsel for Parents responded on that date, noting that she was in hearing that week and did not have availability for a meeting until the last week in March. Manhattan Beach suggested three dates in the last week of March, but counsel for Parents rejected the offer, stating that "[o]ur clients are not interested in participating in the IEP that they requested during crisis last month." Student's mental health was then sufficiently stable that placement in a treatment center was not necessary.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA[5]

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)[6] 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

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

[6] All subsequent references to the Code of Federal Regulations are to the 2006 version.

children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a)) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

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 enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases were applied to define the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id*. at p. 951, fn. 10.)

5. The Supreme Court's decision in *Endrew F. v. Douglas County Sch. Dist.* (2017) 580 U.S.____ [137 S.Ct. 988] (*Endrew F.*) reaffirmed that to meet its substantive

obligation under the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The Ninth Circuit further refined the standard in *M.C., supra,* 858 F.3d at pp. 1189, 1194, 1200-1201, stating that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so as to enable the child to make progress in the curriculum, taking into account the child's potential.

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56 62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student, as the complaining party, bears the burden of proof in this case.

7. The legal analysis of whether a school district offered a pupil a FAPE consists of two parts. First, whether the local educational agency complied with the procedures set forth in the IDEA, and, second, whether the IEP developed through those procedures was substantively appropriate. (Rowley, supra, 458 U.S. at pp. 206-207.) Procedural violations do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); W.G. v. Board of Trustees of Target Range School Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (Target Range).)

Issue One: Failure to Revise IEP due to Lack of Anticipated Progress in 2016-2017

8. Parents contend[7] that Manhattan Beach committed a procedural violation of the IDEA because it failed to review and revise Student's IEP based on lack of anticipated progress during the 2016-2017 school year.

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[7] Student's briefing does not reference the issues by number or follow the organization of the issues she presented in her complaint, prehearing conference statement, or Revised Statement of Issues. Similarly, Manhattan Beach's counsel employs the numbering system for the issues used in the Order Following Prehearing Conference and the not the revised system distributed at hearing and employed here.

9. An IEP team must review a student's IEP at least annually to review the pupil's progress, to determine whether the annual goals are being achieved, and revise the IEP as appropriate, taking into account among other matters, whether there is a lack of expected progress toward the annual goals. (34 C.F.R. § 300.324(b)(1)(ii)(a); Ed. Code, § 56341.1, subd. (d)(1).) The IEP team shall also meet whenever the student "demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).) To the extent possible, a school district shall encourage the consolidation of reassessment meetings or other IEP team meetings. (20 U.S.C., § 1414(d)(3)(E).)

10. Student contends that the IEP team meeting held in October, the two meetings held in November, and the meeting in December of 2016 constituted a procedural violation because the team did not revise the IEP plan at those meeting to address Student's poor progress at those points. Student acknowledges that Manhattan Beach did hold IEP team meetings on those dates to discuss what could be done in response to Student's declining academic achievement and participation, but asserts a further obligation for Manhattan Beach to "proactively revise the IEP" in response to Student's needs.

11. Student further acknowledges that "the Manhattan Beach made some minor changes at these IEP meetings," but failed to make the revisions to her services that were actually necessary to help her. This asserts a substantive denial of FAPE, not the charged procedural violation. Manhattan Beach convened four IEP team meetings in the first half of the 2016-2017 school year in response to Student's academic difficulties, and thereby met its obligation under this section. Student has not carried her burden of proof on this issue.

Issue Two: Failure to Consider Parent's Input at the April 2016 IEP Team Meeting

12. Although Parents did attend and share their concerns at the April 15, 2016 IEP Team Meeting, they contend that Manhattan Beach committed a procedural violation by failing to take their concerns into consideration in the formulation of Student's IEP.

13. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693 (*N.L.*); *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

14. At this IEP team meeting, Parents raised concerns about Student's struggles with peer interactions, how school triggered her anxiety, and how her anxiety was increasing. They assert that their input was given "lip service" and their concerns were not meaningfully discussed. However, testimony by the participants and the IEP team meeting notes

demonstrate that Parents' concerns over Student's anxiety, school performance, and ability to meet the demands of middle school were discussed and considered by the IEP team. In addition, Dr. Tangeman also attended the IEP team meeting and he testified that the team discussed Parents' concerns about Student.

15. Parents argue that they were denied meaningful participation because the possibility of individual counseling for Student was not discussed at the meeting and Parents were not aware that intensive counseling was a service that could be provided through the IEP. Because they were not fully informed, they argue, they were not full participants. Dr. Tangeman did recommend that the school provide psychotherapy, but Manhattan Beach members of the team did not agree that it was called for.

16. The offer of FAPE generated after that IEP team meeting increased Student's counseling for the remainder of her time in middle school, but cut it back in middle school to match the time blocks at that school. Manhattan Beach members of the IEP team appeared to give more weight to Ms. Cusick's depiction of Student as a child with a level of anxiety that was manageable through a much lesser amount of counseling than Parents and Dr. Tangeman thought necessary. The difference of opinion, however, is not proof that Manhattan Beach did not consider Parents' concerns.

17. Manhattan Beach did agree to fund Dr. Budding's independent assessment of Student following presentation of Parents' request at the IEP Team meeting and the IEP notes that Parents made the request because of their concerns that the team was "missing something." Parents have not proven that they were actually or constructively denied meaningful participation in the April 15, 2016 IEP team meeting.

Issue Three: Failure to Consider Input and Give Proper Notice in Fall 2016 IEP Meetings

18. Although Parents did attend and share their concerns at the IEP Team Meetings held in October, November, and December of 2016, they contend that Manhattan Beach committed procedural violations at these meetings by failing to take their concerns into consideration, failing to consider Dr. Budding's independent evaluation, and failing to provide prior written notice of its refusal to provide the services requested by Parents. These violations are procedural violations under the IDEA.

19. As noted above, a district meets its obligations to allow a parent to meaningfully participate in an IEP team meeting when the parent is informed of the child's problems, attends the meeting, and is allowed to express disagreement with the IEP team's conclusions and request revisions to the IEP plan. (*N.L.*, *supra,* 315 F.3d at pp. 693-694.) In addition, if parents obtain an independent educational assessment of the child, the results of the assessment must be considered by the district in the process of providing FAPE. (34 C.F.R. § 300.502; Cal. Educ. Code § 56329, subd. (c).)

3A: FAILURE TO CONSIDER PARENTS' CONCERNS

20. Parents again assert that they received "lip service" in response to the concerns they raised at each of the IEP team meetings held from October to December 2016. As discussed above, Parents attended, participated, raised concerns, and expressed their disagreements with the team's decisions. Dr. Tangeman again supported Parents' concerns at the October meeting. The November meetings were held at Parents' requests, and Parents were appropriately engaged at the meetings. The same was true of the December IEP team meeting, and Parent testified at hearing that she pushed the team to "give us everything you got" because both Student and Parents were at the end of their ropes. Parents' charge that they were not allowed to meaningfully participate in these meetings again resolves to the objection that their opinions and recommendations were not followed. Parental participation does not equate to control of the process. Accordingly, Student did not prevail on Issue 3a.

3B: FAILURE TO CONSIDER INDEPENDENT ASSESSMENT

21. Similarly, Parents contend that the IEP Team did not consider Dr. Budding's independent neuropsychological examination of Student at the October 17, 2016 IEP team meeting. Dr. Budding attended the meeting and presented her report. She testified at hearing that she felt that she had contributed to the discussion and was not ignored or shut down. Dr. Tangeman also spoke in support of her views. Dr. Budding made recommendations that were not adopted by the team, but her report was discussed and considered.

22. Student argues that an IEP team denies FAPE to a child even if it is "partially responsive" to the evaluation of an independent assessor, but cites a case dealing not with a procedural violation but with substantive denial of FAPE. (*District of Columbia v. E.T.* (DC DC 2009) 675 F.Supp.2d 115, 121.) A school district is not required to adopt the recommendations of an independent assessment, and failure to adopt the recommendations does not signify that the district IEP team members did not consider the assessment. Student has not proven a violation in Issue 3b.

3(C) FAILURE TO PROVIDE PRIOR WRITTEN NOTICE

23. A school district must provide written prior notice to the parents of a child whenever it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).) The notice shall include a description of the action the school district proposes or refuses; an explanation of why the school district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action; a statement that the parents have procedural safeguards; if the notice is not an initial referral for evaluation, the procedure to obtain a copy of the procedural safeguards; sources the parents may contact to obtain assistance; a description of other options considered by the IEP team and the reason those options were rejected; and a description of the factors relevant to the

school district's proposed or refused action. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

24. Prior written notice is required of any decision to change or refusal to change the provision of FAPE to a child. Manhattan Beach did not offer individual intensive counseling to Student at any of these IEP team meetings. Parents assert that this triggered an obligation for Manhattan Beach to provide prior written notice of those decisions so that they would have an opportunity to fully consider the decision and have enough information to respond.

25. A school district may use the IEP document to provide prior written notice, as long as the IEP includes all of the content required by 34 CFR § 300.503(b). (71 Fed. Reg. 46691(Comments to the 2006 Federal IDEA regulations); *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008.) Part of the required content is an explanation of why the district proposes or refuses to take an action. Manhattan Beach staff did not offer to replace the parentally-funded psychotherapy with Manhattan Beach-funded intensive counseling because the Manhattan Beach IEP team members did not wish to add another therapist to Student's treatment. This was not disclosed to Parents at the IEP team meeting or in the IEP team meeting report. Testimony at hearing by District members of the IEP team revealed that they concluded, without sharing their reasoning with Parents, that adding intensive counseling services might disrupt Student's on-going therapy, conflict with the methodology being used by Student's therapist, or overwhelm Student.

26. Parent testified at hearing that the expense of Student's therapies were stressing the family and that they would gladly have allowed Manhattan Beach to replace Student's privately-funded psychotherapy with intensive counseling to be relieved of the expense. Manhattan Beach may have been correct in reasoning that it might not be in Student's best interest to end Student's therapy relationship with a provider who had been treating her for a substantial time, but the decision should have been made after full discussion with Parents, not unilaterally by Manhattan Beach staff. By withholding their reasoning from Parents, Manhattan Beach staff significantly impeded Parents' ability to participate in the IEP process.[8]

27. The failure to provide proper prior written notice is a procedural violation of the IDEA. In *Rowley,* the Supreme Court placed great emphasis on the importance of the procedural protections of the IDEA, especially those that guarantee participation by parents: "[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of

[8] At hearing, Manhattan Beach staff forthrightly and commendably acknowledged that the better course would have been for them to offer to provide intensive therapy to replace the parentally-funded service and that they would have been able to so do.

participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard. (*Rowley*, *supra*, 458 U.S. at pp. 205-206.)

28. Parents were not informed of the full reasoning behind Manhattan Beach's decision not to offer Student intensive counseling, lacking a description of the factors relevant to the school district's refused action. As a result, Parents were significantly impeded in their opportunity to participate in the decision making process regarding the provision of FAPE to Student. This constitutes a denial of FAPE. Student has carried her burden of proof for Claim 3c.

Issue Four: Failure to Consider Input, Predetermination of placement, and Failure to Provide Proper Notice in May 2017 IEP Meeting

29. Regarding the May 5, 2017 IEP team meeting, Student contends that Manhattan Beach failed to take Parents' concerns into consideration in the formulation of Student's IEP, failed to consider relevant evaluations, predetermined Student's placement, and failed to provide required prior written notice.

30. Parents take the position that an IEP which included a final offer of FAPE was developed at the May 5, 2017 IEP team meeting. However, the meeting was not completed. The IEP team agreed Parents would tour Success Learning Center and the team would meet again on June 8, 2017, to continue the IEP discussion. The meeting ended with all parties aware that it would resume on that date after Parents toured Success Learning Center.

31. The follow-up IEP team meeting did not take place. Finding Success Learning Center unacceptable as a placement, Parents did not return to an IEP team meeting to explain their discomfort with the placement. Instead, counsel for Parents informed Manhattan Beach that they would not attend the scheduled June 8, 2017 meeting. Parents contended both in briefing and in a letter sent to Manhattan Beach on May 24, 2017, that the May 5, 2017 offer of Success Learning Center as a placement was a final offer and that Manhattan Beach staff explicitly refused to keep the IEP offer open to allow parental input. However, that characterization is not supported by the evidence.

32. The IEP notes clearly continued the meeting by a month to allow the team to review the results of Parents' tour of Success Learning Center. In addition, Manhattan Beach reiterated the point in its responsive letter of June 13, 2017, stating that "the team agreed that they would reconvene on June 8, 2017 to discuss parents' input regarding placement options." Manhattan Beach offered at that time to reach a mutually-agreeable date to allow Parents to explain their position and complete the meeting. Parents refused that offer. It is not credible, based upon the testimony at hearing and the evidence in the record, that Manhattan Beach was refusing to consider parental input on Student's placement and was unwilling to change or modify its offer of FAPE.

33. Manhattan Beach was entitled to hear and react to Parents' objections to the proposed Success Learning Center placement. The justification offered at hearing for

refusing to attend because Parents could not or did not want to pay their advocate to accompany them to the meeting is not at all persuasive. Parents could attend without counsel or an advocate. Student offers no persuasive authority for the proposition that Parents' inability to pay for a representative to attend an IEP team meeting is justification for refusing to participate in the IEP process.

34. Likewise, the argument that the meeting would not be fruitful because Manhattan Beach had presented all possible placements is not compelling. Parent sent Manhattan Beach a list of 14 non-public schooling options in the April 3, 2017 email and asked for any other "viable options," but the record does not include any showing that Manhattan Beach represented that there were no other possible placements than those already presented. Testimony by Parent at hearing revealed that at some point the options on that list went from being placements under consideration to ones Parents had ruled out.

35. Most importantly, Parents' subissues here raise claims of procedural violations in the formation of an IEP plan. By refusing to participate in the IEP team process, Parents prevented the formulation of a final IEP plan, and no final offer of FAPE existed to be evaluated for deficiency. Since Parents acted to prevent the completion of the IEP process, they cannot be granted remedy for technical violations of incompleteness. Similarly, an offer which is not final cannot be found to be predetermined. Issue 4 is denied in all subparts.

Issue Five: Failure to Properly Conduct the September 20, 2017 IEP Team Meeting

36. Parents contend that Manhattan Beach committed procedural violations in the September 20, 2017 by failing to take their concerns and those of their expert into consideration and by predetermining Student's placement.[9]

ISSUES 5A AND 5B: FAILURE TO CONSIDER INPUT

37. As noted in the discussion of issue 2 above, parents have participated if they attend, are informed of the child's problems, are allowed to express their disagreements to the team, and are allowed to request revisions to the IEP plan. Parents contend that a procedural violation occurred because the team did not adopt their recommendations or those of Dr. Giti to create a highly individualized program to address Student's needs. Parents assert that Manhattan Beach did not consider the requests that Student be provided with one-to-one academic instruction and individual psychotherapy.

38. Both elements were available at Success Learning Center and were part of the offer presented to Parents. The IEP plan developed at this meeting offered Student 60 minutes per week of individual counseling and 240 minutes per month of intensive counseling. Manhattan Beach members of the IEP team testified at hearing that Success

[9] Certain issues appearing in the prehearing conference order were not discussed in final briefing, and they are separately evaluated below.

Learning Center was able to offer some one-to-one instruction because of its low student-teacher ratio. The recommendations put forth on behalf of Student were adopted by the team. Parents disagree that the substantive benefits of the counseling and Success Learning Center placement are sufficient to meet Student's needs, but they have not presented persuasive evidence that their input or that of Dr. Giti was not considered by the team. District prevails on issues 5a and 5b.

ISSUE 5C: PREDETERMINATION OF PLACEMENT

39. Predetermination of a student's placement is a procedural violation that deprives the student of a FAPE. (*Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ*. (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*Target Range, supra*, 960 F.2d at p. 1084*; J.G. v. Douglas County School Dist*. (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

40. Parents assert that the offer of Success Learning Center as a placement at this team meeting was predetermined because it was the same offer made at the prior meeting, which Parents contend was also predetermined. In support of that argument, Parents contend that Ms. Fong, the non-public agency employee providing intensive counseling to Parents, testified[10] that she could not mention Success Learning Center as a possible appropriate placement for Student because it was going to be offered at the IEP team meeting. In addition, Parents assert, contrary to the notation in the IEP team meeting notes, that Manhattan Beach refused to recess the May 5, 2017 IEP team meeting because Success Learning Center was their final placement offer, showing that they had predetermined it as a placement.

41. Parents' depiction of the May meeting as complete has previously been addressed and not adopted. Likewise, the view that placement had been predetermined because Ms. Fong believed Success Learning Center would be offered at the meeting is unpersuasive. The IDEA does not require that participants enter an IEP without ideas or opinions, just that they not arrive with closed minds. (*Doyle v. Arlington Cnty. Sch. Bd.* (E.D.Va.1992) 806 F.Supp. 1253, 1262 (noting that school officials must come to an IEP meeting with "an open mind" but may have given thought to placement).) The notes in the September 20, 2017 IEP team meeting report disclose that the team discussed at least four placements. Rather than present Parents' with a take-it-or-leave-it offer of placement at Success Learning Center, Manhattan Beach scheduled a meeting to discuss placement issues

[10] Ms. Fong testified at the second day of hearing that she discussed Success Learning Center as a placement with Parents prior to the IEP meeting, although she then qualified the statement to say that she "might have had reservations stating a specific name if it was going to be named at the IEP."

with Parents after their tour. There is no persuasive evidence that Manhattan Beach predetermined the offer of placement at Success Learning Center or that it was not willing to discuss other placements. Parents have not carried their burden of proof on Issue 5c.

Issue Six: Failure to Hold IEP Team Meeting or Provide Written Notice in February 2018

42. After Student had a marked decline in mental health in late January 2018, Parents requested an IEP team meeting by letter dated February 6, 2018. Parents contend that Manhattan Beach committed procedural violations by failing to hold an IEP team meeting within the statutory timeline and by failing to provide prior written notice of their decision not to change Student's IEP plan in response to her emergent needs.

43. An IEP team meeting requested by a parent shall be held within 30 days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days, from the date of receipt of the parent's written request. (Ed. Code, § 56343.5.) If a parent makes an oral request, the local educational agency shall notify the parent of the need for a written request and the procedure for filing a written request. (*Ibid*.) Failure to do so is a procedural violation of the IDEA, and relief for a procedural violation requires a resulting significant impedance of parental participation, deprivation of educational benefit, or impedance of a student's right to a FAPE.

44. Manhattan Beach responded to Student's request by email on March 2, 2018, 24 calendar days after the request. Manhattan Beach suggested March 8 or 9 for the meeting, the former date being 30 calendar days after the request.[11] Student did not respond to the offer. Manhattan Beach wrote again on March 8, and was told that Student's counsel could not attend until the last week of March. When Manhattan Beach attempted to set a date then, it was told that Parents were not interested in participating.

45. Manhattan Beach did not hold an IEP team meeting within the statutory deadline, but this was due in part to Parents' delay in responding. Further, relief cannot be granted on a procedural violation without a resulting denial of a FAPE. Parents have not explained how the delay meets any of the prongs of the test for a FAPE denial, particularly given that Parents did not respond to Manhattan Beach's offer to hold an IEP team meeting within the statutory timeframe and were unwilling to even attend a delayed meeting when one was proposed by Manhattan Beach.

46. Likewise, Manhattan Beach has not denied Student a FAPE by its failure to provide prior written notice why it did not offer services or residential placement in response to Dr. Cowart's letter of February 6, 2018. Dr. Cowart was not Student's Parent or guardian and was not even a member of the IEP team. She had no standing to demand changes to Student's IEP. Parents' letter asked only for an IEP team meeting to review Student's

[11] Manhattan Beach's schools were out of session for five school days from February 19-23, 2018.

current status, which Manhattan Beach eventually attempted to schedule. Parents refused to accept the offer. There was no refusal to act or positive action requiring prior written notice by Manhattan Beach, and no obligation triggered to provide prior written notice.

47. Manhattan Beach's response to the letter was less prompt than called for by events, but, as Manhattan Beach points out in its briefing, there is no provision in the IDEA or regulations for an emergency IEP team meeting. Parents have not shown entitlement to relief on Issue Six.

Issue Seven: Substantive Violations from October 2015 through the September 2017 IEP

48. Parents assert that Student was denied a FAPE by Manhattan Beach's failure to meet her needs for mental health support, social skills improvement, individualized instruction, appropriate placement, and extended school year services.

49. As noted above, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *(Endrew F, supra,* 137 S. Ct. at p. 999.) An IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so as to enable the child to make progress in the curriculum, taking into account the child's potential. *(M.C., supra,* 858 F.3d at p. 1201.)

50. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid*.) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid*.)

51. The Supreme Court has noted that, "[t]he core of the [IDEA] … is the cooperative process that it establishes between parents and schools." (*Schaffer, supra*, 546 U.S. 56 at p. 53.) However, a school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*See, N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885.) Nor must an IEP conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parents' desires."], citing *Rowley*, supra, 458 U.S. at p. 207.)

52. The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, *supra*, 458 U.S. at p. 208; *Adams, supra,* 195 F.3d 1141 at p.1149; *Pitchford v. Salem-Keizer School Dist*. (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology.

THE APRIL 2016 IEP

53. Parents contend that the April 15, 2016 IEP did not meet her needs for mental health support, social skills improvement, one-to-one instruction, and extended school year services.

54. Student's prior IEP provided her with 40 minutes per month of instructional service counseling and 370 minutes per week of specialized academic instruction. That level of service was left unchanged by an amendment IEP meeting held in January 2016 to address Student's increasing difficulties with school.

55. The main focus of the IEP team meeting held on April 15, 2016, was to prepare Student for the transition to middle school. In addition, however, Dr. Tangeman described Student's increasing frustration with school and her mounting level of anxiety. In contrast, the team was told by Ms. Cusick that Student was meeting her instructional service counseling goals and had good social relationships, although she did note that Student had academic difficulties and was triggered into anxiety by a number of causes. Parents, too, shared their concerns about Student's increased anxiety and her ability to cope with middle school.

56. The FAPE offer resulting from that meeting doubled Student's instructional service counseling and more than doubled her academic support through specialized academic instruction. Although Mr. Ojeda proposed that Manhattan Beach hire his firm's services to support Student in math and reading, Manhattan Beach did not choose to employ it.

57. Parents assert that this represents "substantially the same program," and notes that Student's instructional service counseling would drop by five minutes per week once she began middle school. They contend that it was evident that Student needed both one-to-one instruction and psychotherapy, as well as extended school year services to prevent regression.

58. Manhattan Beach counters that Student's achievement of her instructional service counseling goals showed that she was making progress and that there were no worrying behaviors beyond her anxiety that were exhibited during the 2015-2016 school year. Since Student's anxiety was primarily rooted in academic frustration, Manhattan Beach argues that the team appropriately responded by greatly increasing the amount of academic support she would receive, as well by adding to her instructional service

counseling. There was no need for summer school, Manhattan Beach argues, as Mr. Ojeda's views of Student's academic needs are entitled to much less weight than those of Manhattan Beach staff. Student may, like nearly all children, benefit from one-to-one instruction, and Parents desired that she receive it, but it was not necessary to her education at this time that she receive it.

59. A child requires extended school year services if the child's disabilities are likely to continue indefinitely or for a prolonged period, interrupt the child's educational program and cause regression which, when coupled with limited recoupment capacity, render it impossible or unlikely that the child will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.) The services a child receives during the extended school year must be comparable to those he receives during the regular school year. (Cal. Code Regs., tit. 5, § 3043, subd. (g)(2).)

60. Applying the snapshot rule to the IEP team's knowledge of Student's needs in April of 2016, the IEP plan created for Student at that time was reasonably calculated to enable Student to make progress appropriate to her potential. The only signifier of trouble with social skills is Parent's remark at the IEP that Student "does struggle socially somewhat." The team addressed the areas of need of which it was aware. Parents, with the benefit of hindsight, argue it would have been better to put Student in an intensive math and reading program with an outside provider, provide intensive counseling, and add extended school year to her program. Likewise, no information before this IEP compelled the conclusion that Student's disability would cause regression which Student was unlikely to or incapable of remediate. Those things were not required based upon the information available to the IEP team. The April 16, 2016 IEP plan offered Student a FAPE.

THE OCTOBER, NOVEMBER, AND DECEMBER 2016 IEPS

61. Parents presented these three IEPs as a unit and asserted that Student was denied FAPE because these IEPs failed to meet her needs for mental health support and an appropriate placement.

62. Student's escalating anxiety and recurring panic attacks were affecting her ability to learn and impacting her classmates. Parents argue that it was apparent at this time that Student needed to be put into a more restrictive placement. She was frequently absent from class due to her anxiety and as a consequence falling behind academically. By December 2016 when Manhattan Beach completed its intensive counseling assessment of Student in response to a situation that had needed response since October, Parents assert it had been "abundantly apparent" that Student needed a more restrictive environment.

63. Manhattan Beach notes that the team acted rapidly to the situation by offering Parents intensive counseling in November 2016. In addition, Ms. Questin had been coordinating with Dr. Goldwater to employ Dr. Goldwater's coping strategies for Student in the school setting. The IEP team acted effectively at the December meeting, deciding to

eliminate Student's trigger of changing classrooms and decrease the anxiety she felt from peer interaction by moving her to a smaller, one-room special day class. Manhattan Beach argues that these responses, taken as a whole, constituted a FAPE for Student.

64. Manhattan Beach's presentation is unpersuasive. Dr. Budding appeared at the October 17 IEP team meeting to report on her assessment and delivered the warning that if significant educational therapy interventions were not done, Student would need outside intervention and a placement in a special school. Dr. Budding informed the team that Student was an atypical case, with an uncontrolled emotional tone in need of substantial behavioral assistance. She joined Dr. Tangeman in his recommendation that Student be recognized as emotionally disturbed. Instead of a proportionate response, the Manhattan Beach IEP team adjusted Student's accommodations.

65. Three weeks later began the emergency IEP team meetings. Student's panic attacks began. Hypervigilant, she became embarrassed easily and then lacked the self-regulation to keep herself from acting out. She developed severe school refusal, became disruptive, and would descend into tears. At the first emergency meeting, the team discussed conducting an intensive counseling assessment, conducting a functional behavior analysis, and adding behavior services or an aide to Student's classroom. The team discussed having Student join the Girl's Club. The team did put the intensive counseling assessment into motion, but no changes were made to Student's placement or services. At this point District should have acted in response to Student's worsening condition.

66. Student still received 15 minutes of instructional service counseling. Ms. Questin was actually providing Student with more service than that because of Student's worsening condition. However, that fact was never introduced at the IEP team meetings, was not added to Student's IEP, and did not spark immediate intervention for Student's mental health needs.

67. A second emergency meeting was called on November 16, 2016. Student was nearly in free-fall. The team added 30 minutes per month of behaviorist time to consult with Student's teachers and develop a behavior and sensory plan. Parents were provided with 120 minutes per month of intensive counseling, without having to await the intensive counseling assessment required for Student before she could receive the service. No new direct services were provided to Student.

68. Ms. Questin's intensive counseling assessment was delivered at the December 16, 2016 IEP team meeting. As Manhattan Beach points out, the team did act at this time and took some steps that might have been effective much, much earlier. However, a child with extreme sensitivity to shame and high awareness of her own condition was being pulled out of class mid-year and assigned to a special day class. Manhattan Beach has been slow to respond to Student's needs and timid in its actions when it did rouse itself.

69. It is not surprising that Student finally broke in January of 2017. Despite ample warning by specialists, in-school demonstrations, and diligent efforts by Parents,

Manhattan Beach did not recognize Student's needs for educationally-related mental health support and failed to add the services to Student's IEP. As a consequence, Student was denied a FAPE from November 8, 2016.

THE MAY AND SEPTEMBER 2017 IEP TEAM MEETINGS

70. As set out above in the discussion of Issue 4, Parents refused to participate in the IEP process following the May meeting. Accordingly, Parents may not attack the appropriateness of an IEP which they declined the opportunity to improve and whose completion they prevented. Although the record does not set out the process by which the September IEP team meeting was called, it completed the process begun at the May meeting and offered the same substantive educational program, with the addition of a full-time behavior intervention aide.

71. A district is not relieved of its obligation to hold an IEP team meeting and develop an IEP plan for a Student by parental non-cooperation. *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047 (District may not cease development of IEP plan because parents obtained stay-put order maintain current placement); *Target Range, supra*, 960 F.2d at p. 1486 (Responsibility for preparing an IEP lies primarily with the educational agency).) However, Manhattan Beach did not abandon the IEP process upon being notified that Parents refused to return to continue the IEP process. The record shows that Manhattan Beach responded to Parents' letter, clarified that the placement offer was not final, and again offered to reconvene at a mutually agreeable date.

72. The purpose of the reconvened meeting was to receive Parents' impression of the Success Learning Center placement and take their input as to what, if any, of Student's needs were not met by the placement. Parents refused to return to meet and communicated only through counsel. Unlike the district in *Anchorage*, Manhattan Beach continued to attempt to hold an IEP team meeting, and did succeed in so doing by September. Parents have not contended in their due process complaint that Manhattan Beach failed to meet procedural deadlines to hold an IEP team meeting or to have an IEP plan in place. They charge that the May 5, 2017 IEP offer did not suffice to offer Student a FAPE. Given that Parents would not meet following their visit to Success Learning Center to explain how that placement was inadequate to Student's needs, Manhattan Beach was not objectively unreasonable in proposing it. (*Adams, supra,* 195 F.3d at 1149.) Furthermore, the offer was not final: as a work in progress, it cannot be evaluated for completeness. Manhattan Beach's offer of FAPE from the September 20, 2017 IEP team meeting is the complete and final offer for this time period.

THE SEPTEMBER 2017 IEP

73. Parents assert that the September IEP contained all the shortcomings of the prior IEP, and, for that reason, should be found to be deficient. Manhattan Beach argues that the offer of services and of placement at Success Learning Center was appropriate and constituted an offer of FAPE for Student.

74. Manhattan Beach notes that placement at Success Learning Center offered Student small group instruction, embedded social and emotional support. A psychologist was on-site three days a week and nearby on an on-call basis when not physically present. A behaviorist was also on-site three days a week. The IEP plan also offered Student 60 minutes per week of instructional service counseling, as well as 240 minutes per month each of intensive counseling for Student and Parents.

75. Although one-to-one instruction was available at Success Learning Center, it was not a specific term in the offer of placement at Success Learning Center. Success Learning Center did not offer exclusively one-to-one instruction for entire subject blocks as did Pacific Point Academy, but none of the experts heard by the IEP team or testifying at hearing recommended that Student receive exclusively one-to-one instruction. Dr. Budding, who evaluated Student before her condition significantly worsened, stated that Student would benefit from both one-to-one and small group instruction. Ms. Earlix's letter recommended a school with a "1:1 individualized approach" to education. Although Ms. Earlix testified at hearing that Student needed one-to-one instruction or she would lose focus, that opinion was not before the September 2017 IEP team.

76. Dr. Giti recommended individualized and one-to-one teaching interwoven with small class instruction. Dr. Giti did recommend at the IEP team meeting that Student be maintained in her placement at Pacific Point Academy, and that fact was noted on the IEP document. The inputs by these experts do not conflict with Manhattan Beach's vision of available instruction at Success Learning Center, and, as noted in Issue 2, the fact that the positions of independent experts or evaluators were not adopted by the district IEP team does not mean that their opinions were not considered or that Parents were denied participation in the process. The concerns raised by Parents and Dr. Giti were considered at the September 20, 2017 IEP team meeting, as were Dr. Budding's earlier recommendations.

77. Student's assessors, treating professionals, and advisors all found that she would benefit from one-to-one instruction, but none said that it was necessary that she receive only one-to-one instruction to make meaningful educational progress or to address her mental health concerns. Parents' preference for one-to-one instruction is not an element of FAPE; parents may not dictate the methodology of instruction.

78. The September 20, 2017 offer of FAPE called for Student to receive instructional service counseling and intensive counseling as set forth above, and for Parents to receive 240 minutes per month of intensive counseling. Student would be provided with a full-time aide who would be supervised for 120 minutes per month by a board certified behavior analyst.

79. Student would receive 314 minutes per day of small group instruction at Success Learning Center. These aspects of Manhattan Beach's September 2017 offer of FAPE met Student's needs. However, the offer failed to include a plan to meets student's mental health needs and issues as she transitioned from her private placement to the public school placement at Success Learning Center.

80. If appropriate, an IEP must also include a provision for the transition of a child from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day, including a description of the activities provided to transition the child into the regular program. (Ed. Code, § 56345(b)(4); See *T.B. ex rel Brennise v. San Diego Unified School District (9th Cir. 2015) 806 F.3d 451, 462-463 (civil rights action).)*

81. There is extensive evidence in the record of Student's fragility, her resistance to change, and her lack of ability to sustain effort and attention. Student struggled to complete slightly more than three hours of attendance at Pacific Point Academy, where the overwhelming majority of her time was spent in the presence of a single adult. Manhattan Beach's school psychologist presented an assessment report at the September 20, 2017 IEP team meeting that reported on the length and makeup of Student's program at Pacific Point Academy. Manhattan Beach was also aware of Student's inability to sustain attention and her fears of her peers from her time in Manhattan Beach. Most particularly, Manhattan Beach had knowledge of Student's extreme resistance to and fear of change, even in such minor ways as changing classrooms within one school.

82. Despite this knowledge, Manhattan Beach failed to offer any plan for Student's transition from Pacific Point Academy to Success Learning Center. As presented, Student would leave her three-hour per day school program in a predominately one-to-one adult-centered environment and begin a more than six-hour day in the company of as many as seven other students. Given Student's severe and unique needs, the placement at Success Learning Center would be an immediate disaster without a plan in place for that transition. There were no plans made for the physical transition between programs, for dealing with Student's anxiety with change, or for any gradual increase in Student's academic day. As Dr. Giti testified at hearing, the IEP team could undo all the work done to improve Student's dysregulation by putting her in an inappropriate placement for five minutes. Given Student's limitations and as demonstrated by her subsequent emergency in January of 2018, there was no reasonable possibility that the IEP plan developed at the September 20, 2017 IEP team meeting would meet her educational needs.

83. The plan developed at the September 20, 2017 IEP team meeting did not provide Student a FAPE because it failed to meet her needs for mental health support.

THE FEBRUARY 2018 IEP

84. Student contends that Manhattan Beach denied Student a FAPE by failing to convene an IEP team meeting and prepare an offer of programs and services in response to the psychotic episode brought to their attention on February 6, 2018. As set out in response to Issue Six above, Manhattan Beach responded adequately to notice of Student's episode and was relieved of any obligation to hold an IEP team meeting by Parent's refusal to participate.

Issue Eight: Actions after February 2018

85. At hearing Manhattan Beach objected to consideration of any claims that were not present in or arising from allegations in the due process hearing request. By its terms, Issue 8 raises factual issues not alleged in the hearing request as amended on February 26, 2018. This claim was not addressed by Parents in final briefing, is beyond the period covered by this case, and is therefore denied.

Issues Not Addressed in Briefing

86. Issue 5 contained assertions at issue 5b that Manhattan Beach failed to consider the results of independent evaluations and at issue 5d that Manhattan Beach failed to provide required prior written notice at the September 2017 IEP team meeting. No briefing of those claims appears at pp. 44-45 of Parents' briefing, which otherwise deals with Student's claims of impeded parental participation at the September 2017 IEP team meeting, nor is evident anywhere else in Parents' briefing.

87. The evidence and testimony in the record has been reviewed in regards to these issues as presented in the due process hearing request, and Parents have failed to carry their burden of proof as to those issues. Student did not establish that Manhattan Beach failed to consider the results of the independent assessments or failed to provide written notice at the September 2017 IEP team meeting. Accordingly, those issues are denied on the merits.

88. Similarly, the due process hearing request and the revised statement of issues presented by Parents as issue 7 in the PHC order contained claims of the substantive denial of a FAPE to Student which do not appear to be raised in Parents' final briefing. Specifically, subissue 7d, as regards the April 2016 IEP team meeting charges failure to offer an appropriate placement, subissues 7b and 7e, as related to the Fall 2016 IEPs assert failure to meet Student's needs for social skills training and summer schooling, subissues 7b and 7e, as applied to the May 2017 IEP team meeting also assert failure to meet Student's needs for social skills training and failure to offer summer schooling, as do subissues 7b and 7e, as related to the September 2017 IEP team meeting, and subissues 7b, 7c, 7d, and 7e, as related to the IEP team meeting requested in February 2018 assert failure to meet Student's needs for social skills training, failure to offer a one-to-one individual instructional setting, failure to offer an appropriate placement, and failure to offer summer schooling. These issues were not clearly or sufficiently addressed in Parents' final briefing.

89. The evidence and testimony in the record has been reviewed in regards to the above-listed issues as presented in the due process hearing request, and Parents have failed to carry their burden of proof as to those issues. Student did not establish that Manhattan Beach failed to meet Student's needs for social skills training, failed to offer a one-to-one individual instructional setting, failed to offer an appropriate placement, or failed to offer summer schooling. Accordingly, those issues are denied on the merits.

REMEDY

1. Parents seek reimbursement for the costs for Student to attend Pacific Point Academy, for other ancillary costs incurred during her stay at Evolve, for services provided at Parents' expense for therapy, and for transportation costs incurred. Costs not covered by Parents' insurance for the treatment at Evolve, mental health services funded by Parents, and necessary transportation to those services represent replacement for services that Manhattan Beach would have and should have provided to Student through the IEP process, and are proper consequential expenses to be awarded as remedy. Parents, however, have not set out any argument on behalf of the propriety of the services, and have only presented bills which were entered into evidence by stipulation between the parties. District has not challenged Parents' right to reimburse in the event they prevailed at hearing, except as to reimbursement for tuition at Pacific Point Academy. Student has proven entitlement to recovery for services and costs beginning on November 8, 2016.

2. Private school tuition reimbursement is available as a remedy under the IDEA where a court or hearing officer finds that the public agency did not make FAPE available to the student in a timely manner prior to the private enrollment and the private placement is appropriate. (34 CFR 300.148 (c), See also *Letter to Chamberlain*, 60 IDELR 77 (OSEP 2012.) The determination of whether to award reimbursement and how much to award is a matter within the discretion of the court. (*School Committee of Burlington v. Department of Ed*. (1985) 471 U.S. 359, 369.)

3. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)C(ii); 34 C.F.R. § 300.148(c). The determination of whether to award reimbursement and how much to award is a matter within the discretion of the court. (*School Committee of Burlington v. Department of Ed*. (1985) 471 U.S. 359, 369.) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S. Ct. 36, 1126 L. Ed. 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable).)

4. Reimbursement for the costs of a private school may be reduced or denied in any of the following circumstances: (1) at the most recent IEP meeting the parents attended before the student was removed from public school, the parents did not provide notice rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (2) the parents did not give written notice to the school district ten business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (3) before the parents removed their child from the public school, the school district gave the parents prior written notice of its intent to evaluate the student, but the parents did not make the student available for evaluation; or

(4) the parents acted unreasonably. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

5. There is broad discretion to consider equitable factors when fashioning relief. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) Factors to be considered when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*Target Range*, *supra,* 960 F.2d at p. 1487; Glendale Unified School Dist. v. *Almasi*, (CD CA 2000) 122 F.Supp.2d 1093, 1109.)

6. Parents' placement of Student at Pacific Point Academy was appropriate and reimbursable. Parents provided adequate notice of their intent to place Student and seek reimbursement. Student received an appropriate education given her restrictions. She received treatment for her emotional problems which interfered with her ability to attend school and benefit from special education services. Student's placement supported her education by supplying and imposing structure, discipline, and consistency; her emotional problems were reasonably understood to arise from issues at school; and the placement was primarily occasioned by the need to aid her so that she might benefit from special education. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 643.)

7. Parents' recovery will be limited, however. No recovery will be had for tuition or attendance costs for the time period between Parents' refusal to complete the IEP team meeting on May 5, 2017, and the IEP team meeting on September 20, 2017. Weighing the equities, Parents were more at fault for the failure to complete an IEP offer at the May 5, 2017 IEP team meeting, as Parents' conduct in refusing to meet with Manhattan Beach was unreasonable. Although Manhattan Beach's FAPE offer of September 20, 2017 was not adequate, their actions in this matter were not adversarial or antagonistic. It appears that the extent of Student's mental health challenges was unusually extreme for such a young child and this contributed to Manhattan Beach's tendency to respond slowly or inadequately. No finding was made that Manhattan Beach acted in bad faith at any stage in this proceeding. Student shall recover tuition expenses from September 20, 2017, to the February 21, 2018 date of amendment of this action.

8. An ALJ may not make a prospective placement of a student at a nonpublic, nonsectarian school if the school has not been certified by the state of California for such placements. (Ed. Code § 56505.2(a).) Pacific Point Academy is not so certified. Accordingly, Manhattan Beach cannot be ordered to place Student at Pacific Point Academy. Parent will be granted reimbursement for additional tuition expenses at Pacific Point Academy from February 21, 2018 date of amendment only until the date that a new annual IEP team meeting was held and an offer of FAPE provided to Student.

ORDER

1. Within 45 days of the date of this Order, Manhattan Beach shall reimburse Parent $45,221.75, calculated on the following basis:

a. Tuition at Pacific Point Academy for two-thirds of the month of September 2017 and the months of October through and including January 2018, totaling $29,853.34;

b. $6,000 for non-covered expenses from treatment at Evolve;

d. $157.50 for a visit to Dr. Goh on November 11;[12]

e. $2240 for services from Dr. Goldwater;

f. No reimbursement is granted for travel to Dr. Goh, as neither address given in the Google Maps printout matches the address on the invoice. Similarly, no reimbursement is given for travel to treatment by Dr. Goldwater because no address appears on the account statement entered into evidence.

g. $4185 for services from Dr. Cowart;[13]

h. $51.84 for 6 miles (one round-trip) of mileage reimbursement per day of service from Dr. Cowart at the blended prevailing IRS reimbursement rate of 54 cents per mile for 16 visits;

i. $2250 for services from Dr. Giti;[14]

j. $56.18 for 7 miles (one round-trip) of mileage reimbursement per day of service from Dr. Giti at the 2017 IRS reimbursement rate of 53.5 cents per mile for 15 visits;

k. $405 for nine sessions of Girl's Group therapy;

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[12] As Parents have not broken down their entitlement to reimbursement, the bills presented are examined conservatively. The total charge for the visit was $350, less a $140 adjustment. Insurance appeared to have covered one-quarter of the total fees charged by Dr. Goh, so the reimbursement amount was set accordingly.

[13] Student requested reimbursement of $14,180 for those services. The submitted bills for 16 service dates, ranging in cost from $200 to $380 per date, do not closely approach the requested amount.

[14] The sole invoice from South Bay Child and Family Therapy, Inc., at which Dr. Giti is the clinical director, lists a total fee in that amount. Parents sought $14,850 in reimbursement for services.

l. $22.89 for 6 miles (one round-trip) of mileage reimbursement for seven[15] days of attendance at Girl's group at the 2018 IRS reimbursement rate of 54.5 cents per mile;

2. The following items of reimbursement require calculation by the parties. Reimbursement shall be provided to Parents within 45 days of this order, calculated according to the guidelines set out below:

a. Tuition at Pacific Point Academy for the months following January 2018 until the holding of an annual IEP team meeting[16] in the amount of $6500 per month and any fractional part thereof;

b. Mileage reimbursement for 22 miles (one round-trip) at the then-prevailing IRS mileage reimbursement rate for each day of actual attendance at Pacific Point Academy from and including September 20, 2017, to the date following the completion of an annual IEP team meeting subsequent to the September 20, 2017 IEP team meeting; and

c. Mileage reimbursement for 32 miles (one round-trip) at the then-prevailing IRS mileage reimbursement rate for each day of actual attendance at Evolve Treatment Center.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issue 3c and on Issue 7a regarding the fall 2016 IEPs and regarding the September 20, 2017 IEP. Manhattan Beach prevailed on Issues 1, 2, 3a, 3b, 4, 5, 6, and the remaining subissues in Issue Seven. No finding was made as to Issue 8.

RIGHT TO APPEAL

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[15] Dr. Cowart shares an address with the location of the Girl's Group therapy, and two of the dates of service overlap. Absent explanation, it will be assumed that the transportation has been double-billed.

[16] Exhibit 201, received into evidence, is an IEP team meeting report that appears to be for an annual team meeting held on May 11, 2018, which was not at issue for this hearing. The parties have not addressed this issue, but if this was the date of Student's subsequent annual IEP, the tuition reimbursement under this order shall terminate as of that date. Nothing in Decision prevents Student from challenging the adequacy of that IEP and to seek reimbursement for Pacific Point Academy for attendance after that date.

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

DATED: October 10, 2018

CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings