

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

BERKELEY UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018020102

AMENDED DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on February 1, 2018, naming Berkeley Unified School District. Student's complaint was amended twice. The matter was continued for good cause on June 11, 2018.

Administrative Law Judge Cynthia Fritz heard this matter in Oakland, California, on June 26, 27, 28, and 29, and on July 3, and 5¹, 2018.

Betsy Brazy and Mitchell Chynette, Attorneys at Law, represented Student. Student's mother attended each day of the hearing². Student's other mother, attended the hearing on June 26, 28, and 29, and July 3, 2018. Student did not attend the hearing.

David Mishook, Attorney at Law, represented Berkeley. Elizabeth Schwartz, law

¹ This Amended Decision corrects only the date of the last day of hearing. There are no other changes to the previously issued Decision.

² Mother refers to Student's mother who attended the entire hearing.

clerk, observed the hearing on June 26, 2018. Lisa Graham, Berkeley Special Education Director, attended the hearing on its behalf. Two other Berkeley staff members attended the hearing for short periods of time, in Ms. Graham's absence.

At the parties' request, OAH granted a continuance until July 27, 2018, for the parties to file written closing arguments. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES³

1. The statute of limitations does not apply because:
 - a. Berkeley withheld key information, procedural safeguards, for nearly a year from Parents;
 - b. Berkeley misrepresented to Parents that they solved Student's placement problem, preventing them from filing due process with OAH; and
 - c. alternatively, the statute of limitations extends to 2012 under *Avila* because Parents discovered on May 4, 2014⁴, that Student was entitled to appropriate placement.
2. Did Berkeley deny Student a free appropriate public education (FAPE) during the 2012- 2013 school year, by:
 - a. failing to respond to Parents' assessment request within 15 days; and

³ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

⁴ The prehearing conference order states May 14, 2014. This is a typographical error and is corrected in conformity with Student's Second Amended Complaint to May 4, 2014.

- b. failing to assess Student (child find)?
- 3. Did Berkeley deny Student a FAPE during the 2013-2014 school year, by:
 - a. failing to assess Student in all areas of suspected disability including autism, central auditory processing disorder, mental health, social emotional, and assessments related to attention deficit hyperactivity disorder (ADHD);
 - b. failing to design an appropriate program that included peer social pragmatics, self-regulation, auditory processing, and processing in a noisy environment;
 - c. failing to timely schedule and convene an impartial mediation; and
 - d. failing to timely file an IEP team meeting?
- 4. Did Berkeley deny Student a FAPE during the 2014-2015 school year, by:
 - a. failing to assess Student in all areas of suspected disability including autism, central auditory processing disorder, mental health, speech and language, and assessments related to ADHD;
 - b. failing to design an appropriate program that included peer social pragmatics,
 - c. behavior, and a transition plan individualized to Student; and failing to create goals in social pragmatics, and failing to have measurable goals in math and prioritizing tasks; and
 - d. failing to consider the continuum of placements?
- 5. Did Berkeley deny Student a FAPE during the 2015-2016 school year, by:
 - a. failing to assess Student in all areas of suspected disability including (i) autism and (ii) central auditory processing disorder; and
 - b. failing to design an appropriate program?
- 6. Did Berkeley deny Student a FAPE during the 2016-2017 school year by:
failing to assess Student in all areas of suspected disability including (i) autism and (ii) central auditory processing disorder;
 - a. failing to design an appropriate program that (i) included goals in reading,

- writing, and mathematics, and (ii) failing to design a transition plan individualized to Student;
 - b. failing to protect Student from bullying, and failing to provide a safe learning environment; and
 - c. failing to initiate due process to assert Berkeley's placement as FAPE?
7. Did Berkeley deny Student a FAPE during the 2017-2018 school year by:
- a. failing to conduct timely triennial assessments;
 - b. failing to convene a timely IEP meeting; and
 - c. failing to initiate due process to assert Berkeley's placement as FAPE?

SUMMARY OF DECISION

Student's claims prior to February 1, 2016, are barred by the two-year statute of limitations. Despite reading procedural safeguards prior to May 4, 2014, and knowing the facts forming the basis of Student's educational problems by July 2013, Parents failed to file a complaint until February 1, 2018. Thus, all claims prior to February 1, 2016, are time barred.

Student proved that Berkeley denied her a FAPE when it failed to offer goals in reading, writing and mathematics, and an individualized transition plan, in the February 2017 IEP offer. Berkeley also denied Student a FAPE when it failed to conduct Student's triennial assessments and hold a timely IEP team meeting in February 2018. Student failed to meet her burden on all other claims.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is an 18-year-old woman who resides with Parents within Berkeley's boundaries. Student was initially determined eligible for special education on September 27, 2013, at age 13, under the category of specific learning disability with

discrepancies in math calculation and writing expression, related to attention processing.

2. Student lived in an orphanage in Cambodia at the time Parents adopted her at four months. She attended school in Oakland, California, from kindergarten through third grade. In fourth and fifth grade, Parents placed Student at Aurora, a private school, and moved into Berkeley's boundaries. While at Aurora, in 2010, Dr. Carina Grandison, a developmental neuropsychologist, performed a neuropsychological assessment on Student at Parents' request.

3. Dr. Grandison diagnosed Student with Mixed Expressive Receptive Language Disorder and also noted that Student struggled with social pragmatics, reading and writing. At that time, Dr. Grandison neither suspected Student had autism, nor tested for it, and did not determine that Student had an auditory processing deficit.

4. Parents then placed Student at Raskob Day School, a private school in Oakland, for students with disabilities. Student attended Raskob for sixth, seventh and eighth grade.

5. By sixth grade, Student was diagnosed with ADHD and prescribed an antidepressant and mood stabilizer. She began seeing a psychiatrist monthly.

6. In July 2012, while Student was entering seventh grade, Mother requested Berkeley assess Student for special education eligibility. Mother received no response. Mother solicited an assessment from Berkeley two more times during the 2012-2013 school year. On July 11, 2013, the fourth attempt requesting assessment, Mother stated she was seeking legal assistance for Berkeley's non-compliance with federal law. At that point, Mother understood and had knowledge of a suspected problem, Berkeley's failure to respond to her request to assess Student. She also realized she had a possible legal claim against Berkeley. Shortly thereafter, Berkeley conducted academic, speech and language, and psychoeducational assessments of Student.

2013-2014 SCHOOL YEAR- EIGHTH GRADE

7. Andrew Peregoy, a school psychologist fully credentialed in counseling and school psychology, conducted Student's psychoeducational assessment. It was his first year as a school psychologist, and he previously performed approximately 70 assessments under clinical supervision.

8. During testing, Mr. Peregoy utilized the Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2) to measure Student's auditory processing. On the Phonological Awareness Composite, Student scored in the average range at 105. Student's Phonological Memory Composite score was in the below average range at 88, but Mr. Peregoy did not consider it a concern. Student's score on the Rapid Naming Composite was in the very poor range at 61.

9. Mr. Peregoy opined that Student's processing speed was a significant area of concern and may be limiting Student's ability to be academically successful. Mr. Peregoy also concluded that Student did not suffer from an auditory processing disorder which would necessitate the need for further assessment, although he admitted concerns. Rather, Student exhibited a disability in visual working memory as well as attention concerns. He also agreed that Student's behavioral issues were related to anxiety.

10. Further, Mr. Peregoy observed Student at Raskob and noted that Student had appropriate social skills, including appropriate reciprocal interactions in the classroom with other students. He found Student socially engaging and friendly, and noted that she was described as popular among her peers and well-liked by staff. Mr. Peregoy found that Student functioned at an age-appropriate level in peer relations in the school environment. Through his testing, interviews, observations and records review, Mr. Peregoy did not suspect Student of autistic-like behavior. Instead, he believed that her behaviors could be attributed to other disabilities, such as ADHD.

11. The Berkeley educational specialist, Jane Kaer, concluded Student had needs in math computation skills, math concepts, math fluency, and written language, and presented her findings at September 27, 2013, IEP team meeting.

12. On September 27, 2013, the IEP team found Student eligible for special education under the eligibility category of specific learning disability, with a severe discrepancy in mathematical calculation and written expression related to attention processing. Parents attended the IEP team meeting. Berkeley provided procedural safeguards to Parents and made an offer of FAPE, which Parents declined. Berkeley also offered mental health assessment that Parents declined.

13. The procedural rights provided to Parents contained an overview of the procedural safeguards under the Individuals with Disabilities Education Act and the California Education Code, and included reference to the laws containing the specific procedural safeguards. The procedural safeguards provided to Parents listed the name and contact information of the Office of Administrative Hearings as the agency to file and learn more about mediation and due process hearings.

14. On May 4, 2014, Mother requested Berkeley schedule a mediation, citing to the procedural safeguards, further confirming that Parents received a copy of their procedural safeguards at the initial IEP meeting. Mother additionally admitted that she reviewed the procedural safeguards prior to requesting mediation on May 4, 2014. On May 7, 2014, Berkeley responded by sending Mother another copy of the procedural safeguards, explaining that it described how to file for mediation.

15. On July 8, 2014, Parent met with Kay Altizer, Berkeley's then Special Education Executive Director, to discuss Student's high school placement. The meeting was not about mediation. In the meantime, Parents enrolled Student in a residential summer program in Massachusetts called Landmark, a school for children with disabilities. Student participated in their summer program, but Landmark declined to

accept Student for high school, because of tardiness to class and difficulty interacting with peers. As a result, Parents enrolled Student in Mentoring Academy for ninth grade, and sent the Landmark report to Berkeley for review. On August 22, 2014, Ms. Altizer suggested convening an IEP team meeting.

2014-2015 SCHOOL YEAR – NINTH GRADE

16. Mentoring Academy is a private non-therapeutic high school, with small student to teacher ratio that provided individualized learning strategies for students. John Muster, the Mentoring Academy director, described Student as having issues with academics. Student withdrew from English and history classes the first semester, despite receiving a lot of attention. She disrupted the classroom when she felt stuck with classwork, with behavioral outbreaks that other students feared. She did have some friends. She also was verbally abusive and threw objects at times. Mr. Muster further characterized Student as inventing things that did not happen, theorizing that her stories were attention-seeking and driven by anxiety. Student had attendance issues that he was unconcerned about. By the second semester at Mentoring, Mr. Muster believed that the school was not a good fit for Student and it was unable to meet her needs, believing she needed more individualized attention. Around that time, Student exhibited behaviors at home such as stabbing a wall with a knife, ripping up papers, and toppling a bookcase.

17. On October 22, 2014, Mother inquired about the IEP team meeting and informed Berkeley that she was seeking “legal advice and advocate support for Berkeley’s non-compliance to policy and federal mandate dating back to July 2012.” On November 12, 2014, Mother informed Berkeley that Student was seeking “restitution” for her private school. Mother understood and had knowledge of a suspected problem, Berkeley’s failure to hold an IEP team meeting and that it was not solving Student’s placement problem. She also realized she had possible legal claims against Berkeley at

this time. Yet, Mother testified that until she consulted with her attorney in 2017, she failed to realize that she could file with OAH for mediation or due process hearing. Mother's testimony denying knowledge of her rights was not credible in light of her testimony and evidence that showed she received and reviewed copies of the procedural safeguards in 2013 and 2014, and suspected Berkeley as early as July 2013, through February 2015, of legal violations. Shortly after receiving Mother's November 2014 correspondence, Berkeley conducted academic and psychoeducational assessments and set up an IEP team meeting.

18. Rani Dutta, a school psychologist for 14 years, with credentials in counseling and school psychology, and having completed over 4,000 assessments, conducted Student's psychoeducational assessment. Ms. Dutta conducted a file review, interviewed Student, teacher and principal, and observed Student. She also relied on Mr. Peregoy's previous 2013 tests results for her assessment.

19. Ms. Dutta noted Student's prior scores on the CTOPP-2 from 2013. Her report indicated, under the "auditory processing" section of the report, that processing speed was a significant concern that may be limiting Student's ability to be academically successful.

20. Ms. Dutta observed Student at Mentoring School show up tardy for class, and socialize with others when she was not supposed to. During the interview, Student engaged readily with the assessor. Her thought processes were coherent as Student discussed her dissatisfaction with Mentoring School, the lack of structure, and lack of belonging she felt at the school. Ms. Dutta noted previous reports of anxiety, attention-seeking behavior, disruptiveness, inventing her own reality, and lacking focus and attention in class. Ms. Dutta did not suspect or assess for autism. She suggested continued therapy and counseling for Student's anxiety and frustration.

21. IEP team meetings were held on February 19, 2015, and February 23, 2015.

Berkeley provided procedural safeguards to Parents and made an offer of FAPE, including a primary placement in the resource program with counseling support at Berkeley High School. The IEP team determined that Student met the criteria for specific learning disability, with severe discrepancies in mathematics calculation, mathematics problem solving, listening comprehension, and reading comprehension, related to attention and auditory processing issues. Parents consented to Berkeley's FAPE offer on March 2, 2015, and Student started at Berkeley High School that month.

22. In April 2015, Berkeley instituted a behavior intervention plan due to Student acting as the teacher, loudly pointing out misbehavior of other students, and disrupting students. Her special education teacher, Susannah Bell Fishman, had concerns about oversharing and exaggeration as well. Afterward, Berkeley placed Student in the counseling enriched program with a therapeutic component for the extended school year, and initiated a mental health assessment.

2015-2016 SCHOOL YEAR – 10TH GRADE

23. The completed mental health assessment conducted by Alameda County Mental Health Services, confirmed that Student required a therapeutic placement. The assessment noted concerns with depression, anxiety, mood lability, attention and focus, and academic focus. Student met the criteria for educationally related mental health services. The report also noted that Student's behaviors could be attributed to a personality disorder, but she was too young to be diagnosed. Student was previously diagnosed by her treating psychiatrist with Mood Disorder NOS and Impulse Control Disorder NOS, and that Parents described a honeymoon period in new settings and then gradual displays of inappropriate behavior. There was no suspicion of or testing for autism spectrum disorder. No psychologist, psychiatrist or speech and language pathologist, engaged by Parents, from the Alameda County Mental Health Services, or from Berkeley, noted any suspicion of autistic-like behavior, despite the consistent

descriptions of Student's social difficulties and inappropriate behaviors. Instead, clinicians and educational staff across placements and assessments consistently attributed these behaviors to mental health issues.

24. Berkeley placed Student, through a November 2015 IEP amendment, into the counseling-enriched program with therapeutic support for the school year and instituted an emergency prevention and intervention plan for Student's anxiety issues. Student's established emotional and behavioral needs, and her inability to be successful in the Berkeley resource program with counseling support, suggested a more restrictive placement might be appropriate. Berkeley provided extensive psychological, social and emotional support by placing Student in the Berkeley High School counseling enriched class (CEC).

25. The purpose of the CEC was to foster students' academic success by providing emotional support. The two CEC classrooms located on the Berkeley High School campus were among regular education classrooms. Credentialed special education instructors instructed the CEC students in all core academic subjects. Each class had two mental health counselors with bachelor's degrees, trained in trauma and de-escalation intervention. Two master's level marriage and family therapists oversaw the mental health counselors and provided individualized counseling to the CEC students and consulted with classroom staff. The therapy office was located in the same hallway. The CEC was self-contained with a small student to teacher ratio. Students in the program exhibited externalizing and internalizing behaviors and some exhibited both behaviors.

26. The CEC staff provided an integrated approach to determine when CEC students exhibited distress and when to provide support during crisis. It promoted quick therapeutic response to students exhibiting signs of need while continuing with academic lessons. It also provided an environment in which peers could interact and

experience conflict or stress. The model's design assisted students in learning how to cope with experiences, instead of promoting avoidance. When stress or conflicts occurred, staff used non-verbal communication, redirection, staff or counselor proximity, removal from class, or one-on-one counseling to resolve issues.

27. Berkeley held an IEP team meeting on February 19, 2016. Student met two out of her six previous goals in the areas of math calculation and punctuality, and made progress on the four goals in the areas of written language, prioritizing tasks, decreasing anxiety, and reading comprehension. Student progressed at 75 percent accuracy for generating five paragraph essays, 87 percent accuracy with prioritizing goals and completing assignments on time, 70 percent accuracy in accessing strategies with teacher or support staff for anxiety, and 75 percent accuracy for reading comprehension.

28. At that time, Student's present levels of performance and progress on prior annual goals identified weaknesses in reading comprehension, organization in writing tasks, general math calculation, executive functioning and prioritization of tasks, and coping with anxiety.

29. Berkeley developed five new annual goals in Student's areas of need. Student's goal number one, in the area of need of writing, sought to improve Student's writing skills by writing informative and explanatory text. Goal number two, concerning math calculation and application needs, worked on math problems using all operations with use of a calculator. Goal number three, involving reading comprehension, text comprehension and analysis need, focused on analyzing informational and expository text demonstrating an understanding of the claims throughout the texts. Goal number four, dealing with organization and executive functioning, used the student planner and use of computer applications for lessons and activities around organization. Goal number five, in the area of need of coping skills and accessing classroom support, suggested Student ask for a break outside of the classroom to refocus in order to work

on coping skills. All goals described a percentage amount for accuracy to reach the goal, and how that would be measured. The goals were appropriate and measurable.

30. The IEP document noted that processing speed and working memory continued to impede Student's ability to access the curriculum. The IEP team offered modifications and accommodations to support Student's needs such as: reduced and shortened assignments, note taking support, highlighting textbooks and notes, audiobooks, calculator use, access to technology, preferential seating, short breaks between assignments, notebook planner, home school communication system, present one task or direction at a time, instructions repeated, rephrased, check for understanding, extended time to complete assignments, and large assignments broken down into chunks. For assessments, Student received open book, use of notes, calculator, flexible setting and time for assessments. Student also received test retakes on grades of D or lower.

31. The February 19, 2016 IEP included a transition plan. Student turned 16 in October 2015, thus, the plan was designed to consider post-secondary goals and needs for transition services. Prior to its draft, Student completed an interest inventory and expressed interest in hospitality, tourism and recreation, arts and communication, and law and public safety. The transition plan generally delineated the courses and the number of credits required for Student to graduate from high school. It had three sections: training or education, employment, and independent living. The transition plan's goal number one for training or education, consisted of pursuing training or education in a preferred field of study at a post-secondary institution. The transition services related to this goal amounted to: pursuing academic choice courses of study, participating in online college research, and an introduction to Berkeley career center on campus. In terms of related community experience, the plan provided that staff may also walk Student to the local community college. It also offered as a related service,

counseling and guidance. The transition plan's goal number two for employment, comprised of pursuing a career in a preferred field, possibly the arts. The education transition services included: working with career inventory materials, using the internet with the help of staff to explore programs such as Career Locker and Career Zone, and directed to sites of art institutions. It also offered the related service of counseling and guidance. No goals were set out for services related to independent living, yet no evidence solicited at the hearing suggested that this was a need at the time the February 2016 IEP was drafted. The transition plan was appropriate and individualized to Student's unique needs at the time it was offered.

32. Berkeley offered Student 1,375 minutes weekly of specialized academic instruction in the CEC program with modifications of grade level curriculum in reading, writing, math skill instruction and homework. The offer included the use of cues and prompts, reminders and praise to maintain interactions with peers and staff, two mental health counselors present in the CEC classroom, and an emergency prevention and intervention behavior plan. It also included weekly individual and group counseling, monthly college and career awareness, parent counseling as needed, and extended school year. The offer determined that Student would spend 83 percent of her time out of the regular classroom and 17 percent in the regular classroom. Both Parents attended the IEP team meeting, received procedural safeguards, and consented to the IEP offer. Mother testified that the CEC program was initially helpful to Student.

33. At the end of the 2015-2016 school year, Student received four A's, six B's, and two C's in her classes with a 3.17 grade point average. During the 2015-2016 school year, Student progressed academically and emotionally, with good grades, reaching and progressing on her academic and social-emotional goals. Parents, however, declined to send Student to the extended school year program in the summer, citing that Student's honeymoon period was over and that she was expressing somatic complaints.

2016-2017 SCHOOL YEAR – 11TH GRADE

34. Student started the school year with school engagement difficulties including increased school refusal, somatic issues, and bullying complaints.

February 14, 2017 IEP

35. Berkeley held an IEP team meeting on February 14, 2017. The IEP team reviewed Student's goals and she failed to meet any of her five previous annual five goals but made progress on all of them. Student progressed at 60 percent accuracy in writing, 70 percent accuracy for mathematics, less than 70 percent accurate for reading comprehension, less than 70 percent accuracy for organization and executive functioning, and less than 70 percent accuracy for coping skills. Berkeley attributed the lack of further progress on Student's 2016 annual goals, in large part, to attendance issues and social emotional issues. The IEP team suggested that all unmet goals may be carried forward as new annual goals. Yet, Berkeley neither carried forward any of the failed academic goals nor created new academic goals for Student in the February 2017 IEP.

36. Instead, Berkeley determined that Student's present levels of performance and progress on prior annual goals identified weaknesses in attendance, engagement/on task behavior, self-advocacy, emotional support, and transition planning but not academics. Berkeley developed four new goals. Student's goal number one, in the area of need of attendance, sought to increase school attendance for four out of five days of the school week. Goal number two, concerning academic engagement and on-task behavior needs, worked on Student staying on task and ultimately completing her work on time, requesting assistance if needed, and advocating for herself for IEP accommodations if she needed more time to finish an assignment. Goal number three, involving self-advocacy and emotional support need,

focused on asking for a class break if she was struggling with a task or with interactions with staff or peers, in order to refocus and reenter the classroom to successfully return to a lesson or assignment. Goal number four, dealing with a transition planning need, will work with staff to visit the Berkeley High School college and career center at least once a month to research the various resources for college and career counseling. It noted that Student failed to access the Berkeley career and college counseling center and failed to contact the counseling staff to help with getting a part-time job the previous year. Student was at a 0 percent baseline on her transition plan goals the previous year.

37. In essence, Berkeley carried over one of Student's previous unmet goals for emotional support. It added three goals in attendance, on-task behavior, and transition, and omitted all academic goals in the February 2017 IEP.

38. Ms. Carrie Blanche, educational consultant, and former special education coordinator, resource specialist and art teacher, opined that Berkeley should have added academic goals to the 2017 IEP offer because Student continued to have academic needs. She did not meet her previous academic goals, and her grades dropped the first semester of the 2016-2017 school year, before the time of the February 2017 IEP team meeting. Berkeley suggested that the goals may be carried over but were not. Further, the prior assessments showed a specific learning disability with deficits in math and writing. If Berkeley believed that academic goals were unnecessary at this juncture, they could have reassessed Student to determine if Student's need in academics changed. Instead, Student's IEP team dropped all academic goals without testing or recommendations. Moreover, poor attendance was not the sole cause of failing goals in reading, mathematics and writing. As Berkeley staff confirmed, they allowed CEC students to make up missed work. Student needed continued academic goals in reading, writing and mathematics.

39. The February 2017 IEP also included a transition plan. Berkeley conducted a career interest inventory before developing the transition plan and Student's interests showed marketing, finance, and business management and administration. These interests contrasted starkly from Student's interests from the previous year. However, despite the new interest inventory, there was little difference between this transition plan and the transition plan offered in the February 2016 IEP. The transition plan's goal number one for training or education, consisted of pursuing training or education in a preferred field of study at a post-secondary institution which was identical to the previous year. The transition services related to this goal amounted to pursuing academic choice courses of study, participating in more focused online college research, and an introduction to Berkeley career center on campus. In terms of related community experience, the plan provided that staff may also walk Student to the local community college. It also offered as a related service, counseling and guidance. The transition services were identical to the previous year and didn't offer anything new to Student. The transition plan's goal number two for employment, comprised of pursuing a career in a preferred field, possibly the arts. Despite Student's recent inventory assessment with varying interests, Berkeley failed to change or expand this goal to include other interests. The education transition services included continuing to working with career inventory materials, using the internet with the help of staff to explore programs such as Career Locker and Career Zone, and directed to sites of art institutions. It also offered the related service of counseling and guidance. Again, the transition services were identical to the previous year with nothing added. No goals were set out for services related to independent living.

40. Further, Berkeley failed to update the transition plan with modifications, accommodations or supports to help meet the proposed transition goals and services that Student not only failed to meet the prior year but did not access at all. Further,

Berkeley failed to offer a community experience in employment, yet mentioned in the annual IEP annual goal that Student failed to access the counselors to help find a part-time job. Student's transition plan lacked updating of goals and services and failed to meet Student's individualized needs to prepare her for transition after high school. The goals, services and community experience for training and education and for employment were the identical language from the February 2016 transition plan. Nothing in the goals changed and the information was not updated based upon the Student's updated annual IEP goals or her assessment. The transition plan was generic and failed to meet Student's needs.

41. The February 14, 2017, IEP, offered the identical specialized academic instruction in the CEC placement as the previous IEP offer, with two mental health counselors present in the CEC classroom, weekly individual and group counseling, monthly college and career awareness, parent counseling as needed, and extended school year. The IEP team again offered Student 83 percent of her time in a special education setting and 17 percent in a general education setting.

42. Parents participated and consented to the February 2017 IEP. Parents neither revoked consent nor requested another IEP at any time before Student left Berkeley. Student's 11th year grades declined to four C's and one F in science, with a grade point average of 1.6.

February 24, 2017

43. On February 24, 2017, Student came home with blood on her sleeve and told Parents she broke up a fight between two other Students. An observing witness, Hadley Davis, contradicted Student's account, and established that Student did not intervene but was comforting one of the participants after the fight.

44. In February 2017, Mother wrote correspondence to Ms. Davis, Student's CEC counselor, which discussed violence in the CEC referring to the February 2017

altercation, between two other students.

April 14, 2017, Unilateral Private Placement⁵

45. Parents notified Berkeley on April 14, 2017, of their desire to privately place Student at Tilden Preparatory School, located in Albany. Parents continued to live within Berkeley's boundaries and did not revoke consent for Berkeley's special education services. On April 17, 2017, Berkeley sent a prior written notice to Parents stating that the February 2017 IEP offer, was FAPE.

2017-2018 SCHOOL YEAR – 12TH GRADE

46. Parents enrolled Student in a private school outside of Berkeley because they were increasingly concerned about Student's safety. Although Parents did not voice these concerns at the February 14, 2017 IEP team meeting, they did voice their concerns to Student's counselor, Ms. Davis.

47. Tilden is a high school that offers general secondary education classes and college preparatory classes. It is not certified by the state as a non-public school, but it is accredited by the Western Association of Schools and Colleges. Tilden is a non-therapeutic school that uses a tutorial style approach to teach students one-to-one, working at a student's individual pace. Tilden charged Parents \$80 per hour for services and it typically takes about 30 hours to complete one course.

48. Student began Tilden over the summer with three classes in drawing and painting, modified United States history, and modified English. Student's classes were

⁵ "Parentally-placed private school children with disabilities" is a defined term that means children with disabilities enrolled by their parents in private schools or facilities. (Ed. Code, § 56170; 34 C.F.R. § 300.130.) It is also referred to as unilateral placement. The terms are used interchangeably throughout the Decision.

modified by lowering grade level requirements. She received an A- in drawing and painting and English. Student did not complete history. For the first semester of the 2017-2018 school year, Student took modified geometry, modified history and modified English. Student passed geometry with a B+ but did not complete the other two courses. Student took modified history again, English 12, and a science class in 2018. She passed history and withdrew from English 12.

49. Karen Hobbs, Tilden's Co-Director testified and established that Student's day-to-day attendance was marked by a significant number of absences. Parents continued to get charged for missed and cancelled instruction. It was estimated that Student attempted to get to class physically through winter 2018, with significant absences, then exclusively accessing her education online at home by March 2018. Ms. Hobbs had concerns because of Student's attendance. Student needed remediation for coursework, and appeared to be moving in the wrong direction, and not making progress toward graduation at Tilden.

50. Christina Tenuto, Student's teacher, described that Student initially adapted to Tilden, had friends, interacted with peers and teachers, and engaged in some social activity. She loved to talk to teachers and students but the conversations appeared one-sided, and sometimes she jumped around when speaking, and missed social cues. Similar behaviors as seen at Berkeley, including complaints of bullying and problems with school absences, began to occur at Tilden. Student started missing classes, and her school refusal became more frequent. By March 2018, Student was taking one course over the internet via Skype and Google Hangouts.

51. Because of the attendance problems, Ms. Hobbs wanted to see Student physically return to classes and was unsure if Tilden was appropriate for her if she did not. Dr. Michelle Horton, Student's private psychologist, opined that Student needed a structured therapeutic program due to her significant mental health issues, and that

Tilden further isolated her once she stopped physically attending classes. Further, Ms. Blanche conceded that Student needed more social interaction in her school placement than Tilden. Student made some educational progress at Tilden initially but by March 2018, she was not receiving educational benefit.

52. Although Tilden did not provide any mental health services, Student received private psychological counseling through Dr. Horton at that time. Dr. Horton is a licensed clinical psychologist with a doctorate in clinical psychology. Parents also provided a private tutor, Ms. Blanche, for academic support.

Private Assessments

53. After Parents placed Student at Tilden, Dr. Grandison performed a neuropsychology assessment at Parent's request, and diagnosed Student with autism spectrum disorder on June 30, 2017. Dr. Horton, Student's treating psychologist, referred Student to an audiologist for testing. Dr. Dimitra Loomis diagnosed Student with central auditory processing disorder on November 17, 2017. Dr. Horton completed a psychological assessment of Student on June 2, 2018.

54. Parents notified Berkeley of Student's new diagnoses on February 1, 2018, when they filed the complaint, and provided the assessments in June 2018.

55. Dr. Grandison affirmed that her focus in her 2010 neuropsychology assessment was on Student's receptive and expressive language difficulties, not social pragmatics and auditory processing issues. As Student's profile changed over time, however, her autistic symptoms emerged, according to Dr. Grandison. This explanation for the failure to suspect autism in 2010, was not persuasive. No other assessors performing psychoeducational, psychological, or speech and language assessments, including Parents privately contracted assessors, detected autism-like behavior until the June 2017 assessment. The evidence established that Student's behavior was not indicative of autism as a suspected disability during the applicable statutory time period.

Less weight was given to Dr. Grandison's testimony for those reasons.

56. Dr. Loomis diagnosed Student for central auditory processing disorder but did not testify at hearing and no audiologist testified at hearing. Thus, no persuasive evidence was presented explaining the results of the testing and what symptoms, if any, were known or should have been known to Berkeley staff in order to suspect Student of a central auditory processing disorder during the 2015-2016, and the 2016-2017 school years, and what, if any, interventions were needed for Student.

57. Dr. Horton's assessment confirmed what was already known through prior assessments without any additional diagnoses. Dr. Horton, however, did suggest a number of interventions, including some for an educational setting, and that Student needed to physically attend classes. She also endorsed Dr. Grandison's autism spectrum disorder diagnosis, stating that Student is high functioning with a complex profile, and autism could easily be missed under those circumstances.

58. Parents did not suspect autism or a central auditory processing disorder before obtaining independent assessments. Accordingly, they did not request Berkeley assess Student in autism or central auditory processing disorder at any time.

February 2018 IEP Team Meeting and Triennial Assessments

59. Berkeley failed to conduct Student's triennial assessments and hold an IEP team meeting by February 14, 2018. Lisa Graham, Executive Director of Special Education, acknowledged that Berkeley erroneously believed it was relieved of its obligations to Student once Parents unilaterally placed her in private school and that it should have started the assessment process in December 2017. Once Berkeley determined that an IEP team meeting should be convened and assessments conducted, it drafted an assessment plan and noticed an IEP team meeting for April 17, 2018. Parents refused to participate in the IEP meeting and delayed consent for the assessment plan until May 30. Despite Parents uncooperativeness with the process,

Berkeley continued to have an obligation to revise Student's outdated IEP, and conduct triennial assessments months before. Berkeley presented no evidence that Parents would have been uncooperative at that time.

HEARING TESTIMONY

60. Student complained to Mother of physical fights in the Berkeley CEC hallway, and that students stared and made fun of her. Mother testified that Student's fear of school drove her attendance issues and it was regularly discussed with school staff. The evidence, however, did not support Mother's version of what occurred in the CEC program or that Mother regularly discussed safety issues with school staff. Other than Mother's February 2017 correspondence concerning the altercation between other students, other correspondence did not refer to fear or violence in the classroom or with any peer interactions. Mother's reflection of Student's complaints of bullying and unsafe environment was unpersuasive.

61. Student confided to Ms. Blanche that she feared going to Berkeley CEC and believed students were staring at her and did not feel physically safe. Student did not complain of any physical aggression toward her at school. Ms. Blanche failed to give any further specificity about Student's complaints and thus the information was unpersuasive.

62. Ms. Davis, a licensed marriage and family therapist, was Student's CEC counselor. She established Student was sensitive and sometimes had perceptions that were clouded by her emotions. Student had issues with anxiety, depression, speaking longer than necessary, and told inappropriate stories. Yet, Student advocated for herself while at the CEC. Student's school refusal was a problem and Berkeley attempted to set up an attendance plan; Ms. Davis also tried to pick her up at home and take her to school for a short time period. The school also tried to help her makeup missed assignments and find alternatives for classwork.

63. Ms. Davis confirmed that Student expressed fear of the CEC but was not bullied or that the CEC was unsafe. Rather, Student's fear and overall anxiety issues were a manifestation of her disabilities. Ms. Davis was with Student when they observed another student push her friend to the ground in the CEC hallway. Student did not intervene during the incident but comforted her friend afterward. Ms. Davis admitted that some students threw paper and pencils in frustration in class at least weekly, but it was never directed at Student. Ms. Davis attributed Student's school change to social disconnection, loneliness, anxiety, and chemical changes. Ms. Davis was forthright and insightful, and her testimony was given great weight.

64. Danielle Elliott, a first-year CEC teacher, did not return after the 2016-2017 school year. She described regular physical fights in the hallway outside of the CEC classroom but failed to give any specificity of dates, times, and descriptions. She accused Berkeley of inflating Student's grades, yet no other witness confirmed this. Moreover, Student's grades, including an F in science, and C's, do not reflect grade inflation. Ms. Elliott's hearing demeanor was hostile, with much of her statements unconfirmed. Her testimony was given less weight.

65. Ms. Fishman was an experienced fully credentialed special education teacher and Student's case manager during March 2015 through May 2015, when she first entered Berkeley High School. Incidents of bullying were addressed through restorative justice, and an incident report and discipline if serious enough. Ms. Fishman established that Student reported only two incidents during spring where peers stared at her or called her names which did not rise to the level of needing intervention.

66. Ms. Fishman was later promoted to program manager and supervised the CEC teachers and observed Student in the CEC. Student had difficulty appropriately responding to peers in some social situations but Ms. Fishman did not suspect autism. After Student attended Tilden, Ms. Fishman saw Student at the Berkeley High School

prom, where she interacted with her friends and other students, danced to music and was having a good time. Ms. Fishman established the CEC was a safe environment. Ms. Fishman was credible and informed. Her testimony was given great weight.

67. Dr. Horton counseled Student starting December 2017. Student made eye contact, held a conversation, but sometimes restricted her conversation to topics of interest and appeared hyper-focused. Dr. Horton established Student became increasingly isolated, especially with the school situation at Tilden. Student was over sensitive and paranoid at times, with significant anxiety and depression. She fabricated stories on occasion and coped through withdrawal and avoidance. Dr. Horton was knowledgeable about mental health issues, and Student specifically. She was sincere in her testimony about Student.

68. Dr. Horton found Berkeley's CEC to be "sensory overload" for Student. Dr. Horton believed it a traumatic setting for Student. Student complained to Dr. Horton that she felt the kids at Berkeley made fun of her and thought she was weird. No incidents, specifics, dates or names were established at hearing. Student also complained to Dr. Horton about Tilden students for similar reasons. Dr. Horton believed Student had not been successful at any school setting, and needed a more restrictive protective environment to meet her needs. Dr. Horton's opinions were shaped exclusively by Student's reports as she never observed the Berkeley CEC. Accordingly, her opinions regarding it were given less weight. Both Dr. Grandison and Ms. Blanche believed Berkeley CEC to be inappropriate as well. Since they never observed the Berkeley CEC, their opinions regarding the CEC were also given less weight. Further, the hearsay statements regarding bullying at Berkeley were deemed less persuasive due to their second-hand nature, lack of particularity, and determined inaccuracy.

69. Roberto Morales, a fully credentialed special education teacher working in the Berkeley CEC program for the last 10 years, is the lead teacher in the program. Mr.

Morales observed Student engaging in conversational tangents but he did not suspect autistic-like behavior. Student advocated for herself in the classroom, had friends, and never expressed any fear of the CEC to him. Student appeared over-sensitive and her perception skewed. She had difficulty getting to school and had behavioral problems when she was struggling in class. Yet, Berkeley allowed students, including Student, to make up work in the CEC program for missed classes. Mr. Morales recalled one physical altercation between two other students during the 2016-2017 school year but believed the CEC environment was safe. Mr. Morales' testimony was precise, thoughtful and corroborated by other witnesses. He was a credible witness and his testimony was given substantial weight.

PARENTS' EXPENSES

70. Student claims \$57,980 in expenses during the statutory time period. Student claims Tilden cost \$31,750 in 2017, and \$7,205 in 2018. Out of the \$38,955 claimed for Tilden tuition, only \$7,000 was substantiated at hearing. Student failed to provide billing statements for Tilden and did not delineate which class sessions were cancelled and which class sessions Student attended. Student proved the following costs: Dr. Horton's therapy for \$4,860, Ms. Blanche's tutoring services for \$7,140, Dr. Grandison's assessment for \$4,775, Dr. Loomis' assessment for \$755, and Dr. Horton's assessment for \$1,500.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁷ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A free and appropriate public education 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

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

4. In *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. __ [137 S.Ct. 988, 996], the Supreme Court clarified that "for children receiving instruction in the regular classroom, [the IDEA's guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" The Court went on to say that the *Rowley* opinion did not "need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level." (*Id.* at 1000.) For a case in which the

student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances” (*Ibid.*) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) “[T]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (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]; *see* 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) By this standard, Student had the burden of proof.

ISSUE 1: STATUTE OF LIMITATIONS.

6. Student contends that she is entitled to relief for claims dating back to July 2012, based on the exceptions to the two-year statute of limitations and the discovery rule. Specifically, Student claims that Berkeley: (1) withheld procedural safeguards from Parents between July 2012 through September 27, 2013, entitling Student to relief dating back to July 2012; (2) misrepresented to Parents from May 4, 2014, through February 19, 2015, that it solved Student’s placement problem, preventing them from filing due process and entitling Student relief dating back to 2014; and (3) Parents did not discover until May 4, 2014, that Student was entitled to appropriate placement and

is entitled to relief dating back to 2012. Because of this, Student contends that its initial due process complaint, not filed until February 1, 2018, was timely and that the statute of limitations does not apply.

7. Berkeley claims that Parents were aware of their procedural rights since September 27, 2013, and had knowledge of the facts that formed a basis for a legal claim since May 4, 2014. Therefore, Berkeley contends Parents should have filed their complaint by, at the latest, September 2015 or May 2016, i.e. two years from their knowledge, and that there is no basis to extend the statute of limitations.

8. IDEA has a two-year statute of limitations period. (20 USC 1415(b)(6)(B) and 1415(f)(3)(C).) A due process complaint: "must allege a violation that occurred not more than two years before the date the parent or public agency *knew or should have known about the alleged action* that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law." (34 C.F.R. § 300.507(a)(2) (emphasis added).) Thus, states are permitted to adopt their own statute of limitations, and California has done so.

9. The statute of limitations for the filing of due process requests in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) An action must be filed within two years from the date a party knew or had reason to know of the facts underlying the action. (Ed. Code, § 56505, subd. (l), see also 20 USC§ 1415(f)(3)(C) ["knew or should have known about the alleged action that forms the basis of the complaint."].) The law contains exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required to be provided

to the parent. (20 U.S.C. § 1415(f)(3)(D)(i) and (ii); Ed. Code, § 56505, subd. (l)(1) and (2).) The Ninth Circuit recently reaffirmed this rule. (*Avila v. Spokane School Dist.* 81 (9th Cir. 2017) 852 F.3d 986.)

10. Consequently, both federal and California law contain a two year statute of limitations for special education administrative actions that requires a finding of when the parent knew of the facts which form the basis of the claim. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Ed. Code, § 56505, subd. (l).) California, however, has adopted its own manner of applying this discovery rule.

11. California has held that a claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09– 4624, 10–04223 SI) 2012 WL 398773, ** 17 – 19 (*M.M.*), *affd.* in part and *revd.* in part on other grounds by *M.M. v. Lafayette School Dist., et al* (9th Cir. 2014) 767 F.3d 842, 859.) The statute of limitations begins to run when a party is or should have been aware of the facts that would support a legal claim, not earlier, when the act occurred, and not later, when a party learns that it has a legal claim. (*El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039).

12. Invoking the exceptions to the statute of limitations requires a showing that the school district’s misrepresentation or withholding of information caused the failure to file the due process complaint *on time*. Thus, where the evidence shows that the parents were fully aware of their procedural options, they cannot excuse a late filing by pointing to the school’s failure to formally notify them of those options. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 246-247.)

13. Mother contends that she was unaware of her ability to file a complaint with OAH until seeking legal advice in 2017, because Berkeley withheld procedural safeguards from July 2012 through September 27, 2013. This argument is rejected.

Mother notified Berkeley on July 11, 2013, that it was violating the law by not responding to their request to assess Student. By that time, Mother had knowledge of facts underlying a claim against Berkeley. Berkeley established that Parents received procedural safeguards at the September 27, 2013 IEP meeting. Mother admitted at hearing that she reviewed the procedural safeguards before May 4, 2014. Mother was aware at that time of her procedural rights, including the right to file a complaint or mediation with OAH.

14. Parents also claim an exception to the statute of limitations on the basis that Berkeley misrepresented information to them. Specifically, Parents contend that between May 4, 2014, and February 19, 2015, they repeatedly asked Berkeley for mediation to discuss Student's placement, and later inquired about an IEP team meeting. Because they believed mediation or an IEP team meeting would occur, it lulled them into believing that Student's placement problem was solved and prevented them from filing a due process complaint until February 1, 2018. The evidence, however, is contrary to their contentions.

15. The evidence established that Berkeley did not agree to mediation or set up mediation between May 4, 2014, through February 19, 2015. Instead, Berkeley offered another copy of the procedural safeguards informing Parents of their right to file for mediation. Berkeley further failed to set up an IEP team meeting until February 19, 2015. On October 22, 2014, Mother informed Berkeley that she was seeking legal support for its non-compliance to federal laws dating back to July 2012. Again, on November 12, 2014, Mother informed Berkeley that she was seeking restitution. It is unreasonable to believe that Berkeley's behavior suggested that it was lulling Parents into believing that Student's placement was solved. The evidence establishes otherwise. Mother was threatening to take legal action against Berkeley because of its lack of response. Parents, at this point, had knowledge of educational inadequacies, were aware

of their rights, had multiple copies of the procedural safeguards, and had knowledge of facts of a suspected claim against Berkeley. This happened well before February 1, 2016, two years before Student filed a complaint. Student did not show by a preponderance of the evidence that Berkeley withheld information from Parents. Even if Berkeley had withheld information, Parents were not prevented from filing a complaint within the applicable statutory timeframe upon discovery in 2014.

16. Student, therefore, did not prove any exception to the statute of limitations or lack of discovery to extend the time period in this case. Thus, Student's claims related to facts and circumstances occurring before February 1, 2016, are barred.

ISSUES 2, 3, 4, AND ISSUE 5 FOR THE 2015-16 SCHOOL YEAR PRIOR TO FEBRUARY 1, 2016

17. Issue numbers 2, 3 and 4 are outside the statute of limitations and barred based upon the ruling on issue number 1.

18. As to issue 5, which encompasses the entire 2015-16 school year from approximately August 2015 to approximately June 2016, the time period prior to February 1, 2016 is also time-barred.

ISSUES 5A AND 6A: FAILURE TO ASSESS FOR THE 2015-2016 AND 2016-2017 SCHOOL YEARS⁸

19. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify

⁸ In light of this Decision's rulings on the statute of limitations, when referring to the 2015-2016 school year, the time period encompasses only February 1, 2016, through the end of the 2016 school year.

the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)⁹

20. Reevaluations must be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary.¹⁰ (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

21. A child must be assessed in all areas related to suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).)

⁹ Evaluations under IDEA are referred to as "assessments" under California law. (Ed. Code, § 56302.5.) The terms are used interchangeably throughout the Decision.

¹⁰ Three year reevaluations are commonly referred to as triennial evaluations or triennial assessments. The terms are used interchangeably throughout the Decision.

22. A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119.) A district cannot circumvent that responsibility by way of informal observations or the subjective opinion of a school employee. (*Ibid.*) A school district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Ibid.*) Notice may come in the form of concerns expressed by parents about the child’s symptoms, opinions expressed by informed outside experts, or other less formal indicators, such as the child’s behavior. (*Id.* at pp. 1120-1121 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

Issue 5 (a)(i) and 6 (a)(i): Autism

23. Student contends that Berkeley denied her a FAPE by failing to assess Student for autism, despite her displaying characteristics of autism and being diagnosed with Autism Spectrum Disorder on June 30, 2017. Berkeley argues that there was no reason to suspect or assess Student for autism from February 1, 2016, through the 2016-2017 school year. Further, Berkeley did not receive notice of Student’s autism diagnosis until February 1, 2018, after the applicable time period for Issues 5(a)(i) and 6(a)(i).

24. Under California law, autism is a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child’s educational performance. Characteristics often associated with autism are repetitive activities, stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

25. Student did not establish that autism was a suspected area of disability until she was diagnosed with Autism Spectrum Disorder by Dr. Grandison in June 2017.

Student notified Berkeley of the diagnosis upon filing the complaint on February 1, 2018, and provided the assessment in June 2018. Thus, Berkeley had no notice of Student's autism diagnosis during the applicable time period for issues 5(a)(i) and 6(a)(i) from February 1, 2016 through the end of the 2016-17 school year.

26. Further, Parents neither suspected autism at any time prior to Student's diagnosis nor made a request to assess Student for autism. Additionally, Student's experts conceded the complexity of Student's autism diagnosis and that Dr. Grandison failed to suspect or test for autism in 2010.

27. Student's behavior failed to raise concerns with Berkeley staff of a suspicion of autism. Berkeley assessed Student in 2013 and 2015. Both assessors neither identified autistic-like behavior nor tested for it. Contrary to autistic-like symptoms, they found Student social, engaging, and holding conversation with linear thought. Berkeley had no reasonable basis to assess Student for autism at that time based on their assessments or Parent's concerns, and attributed Student's reported behaviors to mental health issues.

28. After the 2013 and 2015 Berkeley assessments, Student's behavior did not raise concerns for autistic-like symptoms. Student initially transitioned well into Berkeley. Teacher and staff observed Student advocating for herself, communicating with teachers and classmates, and engaging with friends. No repetitive movements or activities were noted. Although she struggled with one-sided focused conversation, nothing appeared extreme, and any social issues at school were neither of significant consistency, nor of such concentration, as to give rise by Berkeley about possible autism.

29. Thus, Berkeley was not on notice that autism was a suspected disability during the 2105-2016 and 2016-2017 school years. Student failed to prove by a preponderance of the evidence that Berkeley denied Student a FAPE for failure to assess for autism.

Issue 5(a)(ii) and 6(a)(ii): Central Auditory Processing Disorder

30. Student contends that Berkeley failed to assess Student in central auditory processing disorder during the 2015-2016 and 2016-2017, school years. Berkeley argues that Student did not need to have auditory processing further assessed because the prior assessments adequately tested for it. Further, there was no suspected need for an audiologist to assess Student for a central auditory processing disorder at that time. And, Berkeley was not on notice of Student's central auditory processing disorder diagnosis until February 1, 2018, after the applicable timeframe for issues 5(a) and 6(a).

31. Auditory processing disorder is not a stand-alone category for receipt of special education services; however, students with auditory processing disorders may be eligible under an existing category if it manifests itself in such a way as to result in an adverse effect on educational performance. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities. (34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, sub. (a); Cal. Code Regs., tit. 5, § 3030(b)(10).) The basic psychological processes include attention, visual processing, auditory processing, phonological processing, sensory-motor skills, and cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030(b)(10).)

32. A central auditory processing disorder assessment by an audiologist would have looked more specifically at Student's brain's ability to decipher noises and sounds, take the signals and interpret them. An audiologist would have looked at background noise, foreground noise, competing noises, and speech versus other noises, to assess how Student processed speech and other sounds, and how Student's brain interpreted

different types of noises and sounds. But, there was no evidence that during the 2015-16 and 2016-17 school years, Student required any further interventions. Student received accommodations such as: preferential seating, instructions repeated, rephrased, check for understanding, extended time to complete assignments, large assignments broken down into chunks, reduced and shortened assignments, note taking support, highlighting textbooks and notes, notebook planner, home school communication system, and presenting one task or direction at a time.

33. The evidence established that Berkeley was aware of Student's general auditory processing deficits and conducted assessments revealing her auditory processing needs. In 2015, Dr. Dutta conducted a psychoeducational assessment, including reviewing the previous 2013 auditory processing testing that Dr. Peregoy conducted. She found that Student's processing speed, specifically auditory processing, was a concern. The February 19, 2015, IEP team found Student eligible under a specific learning disability, with attention and auditory processing issues.

34. After the 2015 IEP finding regarding a specific learning disability related to auditory processing, nothing in Student's classroom behavior or performance indicated any further need to reassess for auditory processing deficits, as Berkeley already recognized the need. Further, Parents did not request further auditory processing testing of Student, and her triennial assessments were not due until 2018.

35. Parents did not consider central auditory processing disorder as a possibility until it was suggested by Dr. Horton in the fall of 2017, after the applicable time period for issues 5(a) and 6(a). Dr. Horton recommended audiologist, Dr. Loomis. Rather than ask Berkeley for the assessment, Parents privately funded the assessment. Dr. Loomis diagnosed Student with central auditory processing disorder on November 17, 2017, and made classroom suggestions and interventions. Neither Dr. Loomis nor any other qualified audiologist testified at the hearing.

36. Nothing in Student's classroom behavior or performance indicated a need to assess in central auditory processing disorder. Further, no evidence was presented from an audiologist to support that Student's behaviors or complaints, indicated a need for Berkeley to assess in central auditory processing disorder, or that any of Student's behavior put Berkeley on notice to refer Student to an audiologist for an assessment.¹¹

ISSUE 5B AND 6B: APPROPRIATENESS OF BERKELEY'S OFFERS OF PLACEMENT AND SERVICES FROM FEBRUARY 1, 2016, THROUGH THE 2016-2017 SCHOOL YEAR

37. Student contends in issues 5(b) and 6(b) that Berkeley failed to offer an appropriate placement by placing Student in the CEC program during the 2015-2016 and 2016-2017 school years. Regarding issue 5(b), concerning the February 19, 2016 IEP, Student cites that Student fulfilled only one of the six goals specified in Student's February 2015 IEP, and that CEC was an inappropriate placement.¹² Regarding issue

¹¹ In Student's closing argument, she argued that Berkeley failed to assess for autism and central processing disorder in 2016, 2017 and 2018. Student's second amended complaint failed to plead for an assessment issue for the 2017-2018 school year. Student also failed to raise the issue at the prehearing conference or request to augment the issues at the time of hearing. Because of this, a failure to assess for the 2017-2018 school year is not adjudicated in this decision.

¹² In Student's closing argument, she states that Berkeley failed to properly classify Student's disability. Student's second amended complaint failed to plead this issue. Student also failed to raise the issue at the prehearing conference or request to augment the issues at the time of hearing. Because of this, Student's allegation for failure to properly classify Student's disability is not adjudicated in this decision.

6(b)(i), Student contends that Berkeley failed to offer Student a FAPE during the 2016-2017 school year because Student failed all of her previous annual goals; and her IEP failed to offer new goals in reading, writing and mathematics. Regarding issue 6(b)(ii) Student contends that the IEP failed to offer an appropriate transition plan to meet Student's unique needs. Berkeley contends both its February 2016 and its February 2017 IEP offered FAPE.

38. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

39. 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.) 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.*)

40. 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); Ed. Code, §§ 56032.)

41. An IEP includes a statement of the present performance of the student, a

statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

42. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) Annual goals must meet "the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "[meet] each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).)

43. In addition, the IEP must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. §

1414(d)(1)(A)(i)(III).) An examination of an IEP's goals is central to the determination of whether a student has received a FAPE. In *Adams v. State of Oregon*, the Ninth Circuit stated: "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The failure to include appropriate and measurable annual goals in an IEP is a procedural violation of the IDEA.

44. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) The IDEA does not contemplate that all annual goals will be achieved. It expressly provides that one of the purposes of the annual IEP review is to determine whether annual goals are being achieved and revise the IEP to address any lack of expected *progress toward* those goals. (34 C.F.R. § 300.324(b)(1)(ii)(A), emphasis added.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2d Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist. No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

45. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, not parent's preferred program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the

student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*) School districts need to "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Endrew F., supra*, (2017) 580 U.S. __ , [137 S. Ct. 988].)

46. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

47. In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H., supra*, at pp. 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class; and (4) the costs of mainstreaming the student. (*Id.*, 14 F.3d at p. 1404.)

Analysis of Issue 5(b): February 19, 2016 FAPE Offer

48. The February 19, 2016 IEP, included all of the legally required contents. It identified Student's needs, offered measurable goals addressing those needs, and contained a statement of special education services and program modifications and accommodations. Student's goals were drawn from the information the IEP team gathered, including input from Parents. The February 19, 2016, IEP was procedurally compliant.

49. Student's IEP team first determined her goal progress. Student failed to meet four out of six of her previous annual goals but she made progress on each goal. Student's IEP team proposed new measurable annual goals in Student's areas of need resulting from her disabilities to enable Student to make progress. Student's February 19, 2016 IEP, goals were measurable and appropriate. Student did not prove that the partial nature of her progress toward her goals was due to some deficit in the goals themselves.

50. Student failed to establish that CEC was an inappropriate placement. Her needs were met at a comprehensive campus in a CEC program with therapeutic support, with specialized academic instruction related services, and accommodations at the time of the February 19, 2016 IEP offer. Once Student was placed in the CEC program in the summer of 2015, she was able to perform academically, to progress, and she gained educational benefits. Mother admitted that the CEC was initially beneficial to Student.

51. Prior to the February 19, 2016 IEP, specifically between March 2015 through May 2015, Berkeley had offered placement in a less restrictive environment, a resource class program with counseling. Student's IEP team determined in February 2016, that she required a more restrictive placement, with therapeutic support imbedded, due to her academic and social struggles the prior year.

52. Student argued that a more restrictive placement was warranted. However,

at the time the February 19, 2016 IEP was drafted and offered, a more restrictive placement was not compliant with Berkeley's legal obligation to educate Student in the least restrictive environment given her present levels of performance and unique needs, as Student's witnesses infer. Berkeley established that Student's educational and emotional needs would be met at the CEC and that she did not require a more restrictive environment to access her education. The CEC had a small student-to-teacher ratio that Student was accustomed to at her previous private school. Student would be exposed to typically-developing peers in her general education curriculum. Student's unique needs would be supported through her specialized academic instruction and individual counseling. Berkeley further recognized Student's absences and missing instructional time, and provided that Student could access make-up work missed. Upon reviewing the *Holland* factors, the evidence established that at the time of the February 19, 2016 IEP, the least restrictive environment for Student was the CEC.

53. The IEP offered the accommodations, modifications, and supports necessary to permit Student to access her education. The IEP appropriately determined the extent to which Student could participate in regular education programs, and concluded her needs could be met in the CEC with specialized academic instruction to support her disabilities. The February 19, 2016 IEP, was appropriate and offered Student a FAPE in the least restrictive environment.

Analysis of issue 6(b): February 14, 2017 FAPE Offer

ISSUE 6(B)(I): GOALS

54. In February 2017, Student had failed to meet any of her previous annual five goals but the evidence established that Student made progress on all of them. Student failed to submit evidence that that the partial nature of her progress toward her goals was due to some defect in the goals themselves. Thus, Student did not prove by a preponderance of the evidence that she was denied a FAPE because she failed all five of

her previous annual goals.

55. However, Student proved that Student continued to have needs in academics for which Berkeley failed to devise appropriate goals. Berkeley attributed the lack of further progress on Student's 2016 annual goals, in large part, to attendance issues and social emotional issues. In turn, Berkeley determined that Student's present levels of performance and progress on prior annual goals identified weaknesses in attendance, engagement/on task behavior, self-advocacy and emotional support, and transition planning at the 2017 IEP team meeting. Berkeley's four new goals for Student focused on these areas and not on academics. This was not appropriate to address Student's academics needs.

56. Student qualified for special education in the category of specific learning disability with a severe discrepancy in math calculation and written expression. Student's 2016 IEP found academic needs in reading, writing and math, and she failed to meet the last annual academic goals in these areas. Since that time, her grades lowered and the evidence established that she was making less progress than before. While some of the issues were related to absenteeism and social-emotional needs, Student continued to have needs in these academic areas and Berkeley failed to address the lack of progress on her academic goals. Further, the IEP team in February 2017 suggested that all unmet goals may be carried forward, including academic goals, yet none of Student's new annual goals addressed reading, writing or mathematics. Moreover, no new assessments were conducted to see if these areas continued to be a need. Instead, the academic goals were summarily dropped without assessments or by recommendation.

57. For these reasons, Student demonstrated that Berkeley failed to identify areas of educational need that required goals to be written to enable Student to access the general curriculum. Accordingly, the goals included in the February 2017 IEP, failed to address Student's full range of educational needs arising from her disabilities, and

were not reasonably designed to enable her to be fully involved in and make progress. Student showed by a preponderance of the evidence that Berkeley failed to develop and offer appropriate goals in the February 2017 IEP in writing, reading and mathematics which denied Student a FAPE.

ISSUE 6(B)(II): TRANSITION PLAN

58. Student attacks the validity of the transition plans in effect in the 2016 and 2017 IEPs for the 2016-2017 school year and contends that Berkeley failed to design individualized transition plans for Student. Berkeley argues that its transition plans were appropriate.

59. Beginning no later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must also include appropriate measurable postsecondary goals related to training education, employment, and where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa-bb); 34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345, subd. (a)(8).) The postsecondary goals must be based upon age-appropriate transition assessments and must be updated annually. (*Ibid.*) Every such IEP must also include transition services to assist the child in reaching those postsecondary goals. (*Ibid.*)

60. "Transition services" are a coordinated set of activities for an individual with exceptional needs that: (1) is designed within a results-oriented process that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including postsecondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation; (2) is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil, and (3) includes instruction, related services, community experiences, the

development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

61. A flawed or missing transition plan is generally regarded as a procedural error. (*Board of Educ. V. Ross* (7th Cir. 2007) 486 F.3d 267, 276; *A.S. v. Madison metro School Dist.* (D. Wis. 2007) 477 F.Supp.2d 969, 978.)

62. A procedural error does not automatically require a finding that a FAPE was denied. (See *C.B. v. Garden Grove Unified School Dist.* (9th Cir. May 28, 2014, No. 12-56911) 575 Fed. Appx. 796 [Inadequate transition service did not result in a FAPE denial as student had several years to receive services and work on transition goals.]) "In considering the adequacy of a myriad of transition services, an inquiring court must view those services in the aggregate and in light of the child's overall needs. The test is whether the IEP, taken in its entirety, is reasonably calculated to enable the particular child to garner educational benefits." (*Lessard v. Wilton-Lyndeborough Coop. School Dist.*, (1st Cir. 2008) 518 F.3d. 18, 30.)

63. Here, the February 2016 transition plan was appropriate to meet Student's unique needs at that time. The February 2017 transition plan, however, failed to provide Student individualization to prepare for her for post-graduation. Student was 17 at the time this transition plan was designed and she was set to graduate the following year. The transition plan was almost identical to the February 2016 transition plan, showing how little Berkeley focused on Student's transitional needs. The transition plan was deficient in updated goals and transition services for training and education, and employment, as they were identical to the previous year. The employment goal continued to refer to Student's interest from the previous assessment and neither changed nor augmented to fit Student's current assessment data. Further, Berkeley failed to offer modifications, accommodations and supports in order for Student to

access the career counseling center, counselors, and the career and education information. Student did not engage in these activities the year before, yet Berkeley made no update in the transition plan to support Student in obtaining these services this year. The lack of updates to this transition plan highlight the lack of individualization for Student at that time.

64. The February 2017 IEP failed to include necessary academic goals and an appropriate transition plan. These were not minor errors. The IEP, taken in its entirety, was not reasonably calculated to enable Student to garner educational benefit due to these omissions. According, Student proved by the preponderance of the evidence that the February 2017 IEP, did not offer her a FAPE.

ISSUE 6C – NO INCIDENTS OF BULLYING AND UNSAFE ENVIRONMENT DURING THE 2016-2017 SCHOOL YEAR

65. Student contends that Berkeley denied her a FAPE due to bullying and an unsafe learning environment during the 2016-2017 school year. Berkeley denies all of the allegations.

66. All students have a right “to be safe and secure in their persons.” Cal. Const., Art. I § 28.

67. The California Education Code defines bullying as “any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils ... directed toward one or more pupils” that causes or is “reasonably predicted” to cause a reasonable student to experience one or more of the following: (a) fear of harm to his or her person or property; (b) a substantially detrimental effect on his or her physical or mental health; (c) a substantial interference with his or her academic performance; or (d) a substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school. (Ed. Code, § 48900, subd. (r).) A “reasonable student” is a pupil, including an exceptional needs pupil, who exercises average care, skill, and

judgment in conduct for a person of his or her age, and with his or her special needs. (Ed. Code, § 48900, subd. (r)(3).)

68. In a 2013 joint letter providing guidance on the IDEA, the U.S. Office of Special Education and Rehabilitative Services and the Office of Special Education Programs described bullying as the use of real or perceived power over a target where the aggression is repeated, or has the potential to be repeated, over time. Acts of bullying include physical, verbal, emotional, or social behaviors ranging from blatant aggression to subtle and covert behaviors. (*Dear Colleague Letter*, (OSERS/OSEP August 20, 2013) 61 IDELR 263; 113 LRP 33753 (*Dear Colleague 2013*).) The bullying of a student with a disability that results in the student not receiving meaningful educational benefit may constitute a denial of a FAPE under the IDEA. (*Dear Colleague 2013, supra* at p. 2.) This applies whether or not the bullying is related to the student's disability. (*Ibid.*) Therefore, a determination of whether bullying has denied a student a FAPE requires a two-step analysis: whether the bullying occurred, and whether the bullying resulted in the student not receiving educational benefit within the meaning of Rowley.

69. At hearing, Student elicited testimony of Mother and witnesses regarding (1) physical fights between students in the hallway outside the CEC, including an incident on February 24, 2017; (2) students throwing paper and pencils; (3) Student believing that other students were staring and calling Student names, and (4) Student refusing to attend school because it was an unsafe environment. Student failed to establish bullying and an unsafe environment under the State and Federal definitions, although she showed that some of the incidents occurred.

70. Parent and Ms. Elliott described physical fights occurring in the hallway outside of the CEC classroom during the 2016-2017, school year. One physical fight occurred in the hallway on February 24, 2017. On February 24, 2017, Student witnessed a physical altercation between two students in the hallway where one student pushed

another to the ground. Student comforted the targeted Student after the incident. This incident was not directed at Student and no malicious intent was directed at her. Although upsetting to see, the incident was not “reasonably predicted” to cause a reasonable student, including a special needs student, to experience fear of harm or other substantial detriment to herself.

71. Student failed to establish that other, or multiple physical fights, occurred outside of the CEC room in the hallway. No allegations were made that Student was involved or a target of any physical altercations at Berkeley. Even if multiple physical altercations had been established, it would have failed to meet both the Federal and State bullying requirements because the evidence did not establish that Student was targeted in any of the alleged physical altercations. Further, the evidence also failed to establish that Student observed multiple fights that would cause any bona-fide fear.

72. Through the testimony of Ms. Davis, the weight of the evidence established that students in the CEC classrooms frequently threw papers and pencils during class out of frustration but not directed at any students, including Student. Thus, Student failed to establish that any incident of throwing papers or pencils subjected Student to bullying or an unsafe environment under the Federal or State bullying definitions.

73. Although Student complained to Ms. Fishman on one or two occasions during the 2015-2016 school year of students staring at her and calling her names, no other evidence was presented that this occurred routinely. Mother and other witnesses stated that Student complained about it, but no evidence was elicited about the specifics. Ms. Davis believed Student’s fear of school was based in her overall anxiety issues and not due to bullying or an unsafe school environment.

74. The United States Supreme Court has found peer-on-peer name calling inevitable in the adolescent school environment. (*Davis v. Monroe County Bd. of Educ.*

(1999) 526 U.S. 629, 651-652 [119 S.Ct. 1661, 143 L.Ed.2d 839] (*Davis*.) Accordingly, Student failed to meet her burden that any staring and name calling amounted to bullying or an unsafe environment.

75. Moreover, Student failed to establish that any such incidents interfered with her access to education and making educational progress at school. Student's school refusal could also not be attributed to bullying or an unsafe learning environment. Student's attendance and tardy issues started well before Berkeley at both Landmark and Mentoring. Further, the accusation that Student's attendance issues were related to a bona-fide fear of Berkeley CEC was not established. Mother, however, expressed concern and safety issues after the February 24, 2017 incident, but her rendition of the event of Student as the intervener was not persuasively proven. Further, any other discussions by Mother to Berkeley about attendance did not raise issues of classroom or peer interaction fear. Thus, Student's failed to establish by the preponderance of the evidence bullying and unsafe environment during the 2016-2017 school year.

ISSUE 6D AND 7C: NO REQUIREMENT TO FILE FOR DUE PROCESS AFTER UNILATERAL PLACEMENT

76. Student contends that under the decision in *I.R. ex rel. E.N. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164 (*I.R.*), Berkeley was required to obtain a decision through a due process hearing that its placement was FAPE after Parents unilaterally placed Student. Berkeley argues that it was not required to file a due process hearing because Parents consented to the most recent IEP.

77. School districts are required to initiate a due process hearing if the school district determines that a portion of an IEP to which a parent does not consent is necessary to provide a child with a FAPE. (Ed. Code, § 56346, subd. (f).) *I.R.* held that Education Code section 56346, subdivision (f), requires a school district to

“expeditiously” request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE. The court explained, “If, in the school district’s judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime.” (*I.R.*, *supra*, 805 F.3d at pp. 1169-1170.)

78. Parents consented to the February 14, 2017 IEP. No evidence was presented at hearing that Parents revoked consent to the IEP. Two months later, on April 14, 2017, Parents provided notice of unilateral placement of Student to a private school.

79. Nowhere has *I.R.* or Education Code, section 56346(f) been applied to mandate a school district file to enforce a consented to offer of FAPE for a unilaterally placed Student. Student failed to prove by a preponderance of the evidence that Berkeley was required to obtain a determination from OAH that the February 14, 2017 IEP offer, was FAPE, after Parents unilaterally placed Student. Parents consented to the most recent IEP and it was operative at the time they privately placed Student in private school. Thus, Student did not prevail on issues 6d and 7c.

ISSUE 7A AND 7B: FAILURE TO TIMELY CONVENE TRIENNIAL ASSESSMENTS AND HOLD AN IEP TEAM MEETING IN FEBRUARY 2018

80. Student contends Berkeley denied her a FAPE by failing to hold a timely IEP team meeting by February 14, 2018, and failing to conduct triennial assessments by February 19, 2018. Berkeley concedes these two issues but argues that two months later, when Berkeley gave notice of an IEP team meeting and drafted an assessment plan, Parents refused to attend the meeting, and delayed consenting to the assessments.

81. The IDEA provides for reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once

every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

82. Absent a statutory exception, the IDEA mandates that a district offer a FAPE to all students who reside in it. States must ensure that “[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21.” (20 U.S.C. § 1412(a)(1)(A).) Developing an IEP is a necessary predicate to offering a FAPE, and the obligation to offer a FAPE also includes an obligation to develop an IEP. (Cf. *Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 238–39 [129 S.Ct. 2484, 174 L.Ed.2d 168] [“[W]hen a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP”].)

83. To provide a FAPE, a school district must develop an IEP that is reasonably calculated to provide an eligible disabled child with an educational benefit. (*Rowley*, *supra*, 458 U.S. at pp. 206-207.) The district must review the child's IEP at least once a year and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).) A parent's failure to cooperate in the development of the IEP does not negate this duty. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 (*M.P.*); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a) [School districts “...cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents.” (*M.P. supra*, 689 F.3d at p. 1055, citing *W.B. v. Board of Trustees of Target Range School Dist.* No. 23, etc. (9th Cir. 1992) 960 F.2d 1479, 1485, *superseded in part by statute on other grounds* (*Target Range*).].) The failure to timely hold an IEP team meeting or triennial assessments is a procedural violation.

84. An offer of placement must be made to a parentally-placed private school student even if the district strongly believes that the student is not coming back to the

district, or parents have indicated that they will not be pursuing services from the district. The requirement of a formal, written offer should be enforced rigorously and provides parents with an opportunity to accept or reject the placement offer. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, *cert. den.*, 513 U.S. 965 (1994).)

85. Parents of a child privately placed in private school with an existing IEP may choose to revoke consent in writing for the provision of special education and related services to their child. (Ed. Code, § 56346, subd. (d).) If the parents do not revoke consent in writing, the school district must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher. (20 U.S.C. §§ 1412(a)(3)(A) and (a)(4), 1414(a); *Department of Educ., State of Hawaii v. M.F. ex rel. R.F.*, (D.Hawaii 2011) 840 F.Supp.2d 1214, 1228-1230, *clarified on denial of reconsideration*, (D.Hawaii, Feb. 28, 2012, No. CIV 11-00047 JMS) 2012 WL 639141 [rejecting public agency's argument that the student's disenrollment from public education, without a written revocation of consent to special education services, excused the agency from preparing further IEP's until the parents subsequently requested services].)

86. Student proved that Berkeley failed to conduct timely triennial assessments. Berkeley's last triennial assessments occurred in 2015, and her next triennial assessments were due on February 19, 2018. Berkeley should have offered an assessment plan in November 2017, which it did not do. Student also proved that Berkeley failed to convene Student's annual IEP team meeting by February 14, 2018. Student's last IEP team meeting was February 14, 2017. The April 14, 2017, notice of unilateral placement did not dismiss Berkeley's obligation to hold an annual IEP team meeting and conduct triennial assessments. Further, no evidence was presented that Parents revoked consent to Berkeley's special education services or that Student no longer lived within Berkeley's boundaries.

87. Berkeley argues that two months later, Parents refused to attend the April 17, 2018 IEP team meeting, and delayed consent to the assessment plan impeding its ability to make a FAPE offer. This argument is not persuasive. Berkeley cannot blame Parents for its failure to offer the IEP and assessments months before. Further, Parents' delay was minimal as the assessment plan was signed by May 30, and assessments were underway at the time of the hearing. Additionally, Berkeley failed to establish that Parents would have been uncooperative if the assessment plan and IEP team meeting were offered at the appropriate times. Thus, Berkeley cannot blame Parents for delaying its duty under the IDEA to revise an outdated IEP and conduct overdue assessments months after its own failure.

88 The failure to timely assess, significantly impeded Student and Parents' right to meaningful participate in the development of Student's educational program. The IEP team could not have updated information to create an IEP. If Berkeley had procedurally complied with the IDEA and assessed Student then convened a timely IEP team meeting, Parents would have had the opportunity make an informed decision to either return Student to Berkeley or keep her at private school. Because Berkeley failed to timely assess and timely hold the IEP team meeting, Parents were left with no option but to keep Student at private school.

89. Student proved by a preponderance of the evidence that Berkeley's failure to timely assess and convene a triennial IEP were procedural violations of the IDEA that denied Student a FAPE. Student's remedies are discussed below.

REMEDIES

1. Student prevailed on Issues 6b(i) and (ii), 7b, and 7c, and established that Berkeley failed to offer her a FAPE at the February 14, 2017 IEP team meeting, failed to conduct timely triennial assessments in 2018, and to convene a timely 2018 IEP team meeting. As remedies, Student seeks reimbursement for school tuition, tutoring,

psychological counseling, and assessments for a total of \$57, 980. Prospectively, Student asks OAH to order an appropriate placement, order Berkeley to contract with an agency or an educational consultant to help locate a placement, and transportation reimbursement if needed. Berkeley argues that Student is not entitled to any reimbursement because Tilden was inappropriate, provided no educational benefit, and failed to meet her mental health needs.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School Dist. supra*, 31 F.3d at p. 1497.) The award must be fact-specific and “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. Dist. of Columbia, supra*, 401 F.3d. at p. 524.)

3. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96] (*Burlington*)). When a school district fails to provide a FAPE to a pupil

with a disability, the pupil is entitled to relief that is “appropriate” in light of the purposes of the IDEA. ALJ’s have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

4. The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent School Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents’ placement need not be a “state approved” placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child’s needs and provide student with an educational benefit. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361] (*Carter*).) Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter, supra*, 510 U.S. 7, 15-16 [114 S.Ct. 361].) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*)

5. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

6. In *C. B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3 1155 (*Garden Grove*), the Ninth Circuit set forth the standards to be applied in determining whether a private placement is appropriate for the purpose of reimbursement. There, a student had benefited substantially from a private placement, but parents had been awarded only partial reimbursement because the placement did not address all of the student’s special education needs. (*Id.* at pp. 1157-1158.) The Court of Appeals held that parents were entitled to full reimbursement because the IDEA “does not require that a private school placement provide all services that a disabled student needs in order to

permit full reimbursement.” (*Id.* at p. 1158.) In reaching this conclusion, the Ninth Circuit relied upon a standard set forth by the Second Circuit. The Court concluded that, for a parent to qualify for reimbursement, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only to demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from instruction. (*Id.* at p. 1159 [quoting *Frank G. v. Bd. of Education* (2d. Cir. 2006) 459 F.3d 356, 365 (citations and emphases omitted)]).)

7. Berkeley denied Student a FAPE from February 14, 2017, until February 14, 2018, by failing to offer appropriate goals in reading, writing, and mathematics and failing to offer a transition plan that met Student’s unique needs. Berkeley denied Student a FAPE from February 14, 2018, to the present by failing to convene an annual IEP team meeting and conduct triennial assessments.

8. In light of the failures documented above, Parents’ unilateral placement of Student was reasonable. Parents timely and appropriately notified Berkeley of their intent to place Student at Tilden. On the continuum of placements, Tilden was more restrictive than CEC, because it was a private school with one-to-one tutoring with little social interaction and no therapeutic component. Despite this, Student received some educational benefit when she first arrived. She passed two classes in the summer of 2017, and one class in the fall of 2017. Her teacher, Ms. Tuneto, established that Student initially adapted to Tilden, had friends, interacted with peers and teachers, and engaged in some social activity. At this point, Tilden’s environment permitted Student to make progress and gain educationally benefit.

9. By March 2018, things changed. Ms. Tenuto further established Student missed classes. Student’s school refusal became more frequent by March 2018. By that

time, Student was taking one course over the internet via Skype and Google Hangouts and was rarely attending Tilden in person. At this point, Student failed to have access to typically developing peers and was secluded. Student was not making progress. Ms. Blanche and Dr. Horton believed she needed more social interaction and became isolated at the Tilden placement. By March 2018, Student regressed emotionally and educationally, and was no longer receiving educational benefit from Tilden.

10. Student is awarded the cost of Tilden tuition from May 2017 through February 2018. Student's tuition reimbursement is considered both compensatory and an appropriate remedy for the failure to offer an appropriate program at the February 2017 IEP. After February 2018, Student failed to benefit educationally and make progress, of which Parents were aware. Therefore Student's tuition reimbursement after February 2018 is denied.

11. Student also seeks reimbursement for psychological counseling. This is outside the scope of Student's due process complaint, which failed to address therapeutic services at Berkeley CEC. Nor was any such inadequacy established at hearing. Balancing the equities under these facts, Student is denied reimbursement.

12. Student also seeks reimbursement for tutoring services. Student began tutoring soon after Berkeley denied Student a FAPE in February 2017 by failing to offer academic goals in writing, reading, and mathematics. Student is entitled to tutoring reimbursement from February 14, 2017, through the time she started at Tilden in May 2017. Because Student received one-to-one support at Tilden, she did not establish that she required tutoring after April 2017, when she received an educational benefit at the school. After February 2018, however, Student was no longer receiving an educational benefit at Tilden, thus tutoring was appropriate from March 2018 through June 2018.

13. Student's request for reimbursement for Dr. Grandison's and Dr. Loomis' assessments is denied. Student failed to establish at hearing that Berkeley was on notice

of a suspected disability in autism or central auditory processing disorder during the applicable time period.

14. Student's request for reimbursement of Dr. Horton's assessment is granted. Although Dr. Horton did not complete her report until June 2018, she began her assessment in 2017, before Student's complaint was filed. Berkeley failed to conduct triennial assessments in February 2018, and a psychological assessment for educational purposes is a typical assessment that would be conducted by a school district for triennial assessments. Dr. Horton's report included recommendations and interventions for a school setting. Because Berkeley failed to conduct timely assessments, Berkeley will reimburse Student for Dr. Horton's assessment.

15. All of Student's other claims for relief were carefully considered and are denied.

ORDER

1. Berkeley shall reimburse Student Tilden tuition from May 2017 through February 2018. This includes any up-front costs and the hourly amount for course sessions that Student attended during this time period. Berkeley is not required to reimburse for missed or cancelled sessions. Within 45 days, Student shall produce proof of attendance as well as Tilden's records for billing and cancellations from May 1, 2017, to February 28, 2018. Student will receive reimbursement based upon proof of receipt of payment and Student's attendance. District shall reimburse Parents within 45 calendar days of receiving that documentation. If Student is unable to proffer the above information within 45 days of the date of this Decision, Berkeley shall reimburse \$7,000, the amount proven at hearing.

2. Within 45 calendar days of the date of this Decision, Berkeley shall reimburse Student for Dr. Horton's assessment in the full amount of \$1,500.

3. Within 45 calendar days of the date of this Decision, Berkeley shall

reimburse Student for Ms. Blanche's tutoring services from February 14, 2017, through April 30, 2017, and from March 1, 2018, through May 30, 2018, in the amount of \$1,890.

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

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Berkeley prevailed on Issues numbered 1, 2, 3, 4, 5, 6a, 6c, 6d and 7c. Student prevailed on issues numbered 6b(i) and (ii), 7a and 7b.

RIGHT TO APPEAL

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

Dated: August 13, 2018

_____/s/____

CYNTHIA FRITZ

Administrative Law Judge

Office of Administrative Hearings