

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

GARVEY SCHOOL DISTRICT.

OAH Case No. 2018080021

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on July 31, 2018, naming Garvey School District.¹

Administrative Law Judge Elsa H. Jones heard this matter in Rosemead, California, on September 26 and September 27, 2018, and on October 24 and 25, 2018. Hannah Rosenstein and Priya Bahl-Sen, Attorneys at Law, represented Student. Student's mother attended all days of hearing. A Spanish interpreter was present on all hearing days to interpret the proceedings for Mother.

Sharon A. Watt, Attorney at Law, represented Garvey. Alma R. Ulloa, Director of Special Education for Garvey, attended all days of hearing.

Sworn testimony and documentary evidence were received at the hearing. The parties requested and were granted a continuance until close of business on November

¹ On August 14, 2018, Garvey filed a response to the complaint, which allowed the hearing to proceed. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

19, 2018, to file written closing briefs. The parties timely filed their written closing briefs on November 19, 2018, and the issues set forth below were submitted.

ISSUES

1. Did Garvey deny Student a free appropriate public education by failing to appropriately assess him in all areas of suspected disability from July 31, 2016, to the date Student's complaint was filed, specifically by not conducting a functional behavioral assessment or an educationally related intensive counseling services assessment?

2. Did Garvey deny Student a FAPE by failing to design and implement an individualized education program uniquely tailored and reasonably calculated to confer meaningful educational benefits from July 31, 2016, to the date Student's complaint was filed, specifically in the areas of need of academic and social-emotional functioning?

3. Did Garvey violate procedural mandates of the Individuals with Disabilities Education Act, resulting in the denial of a FAPE, by impeding and interfering with Mother's right to meaningful participation in the process and resulting in the loss of educational benefit, specifically by refusing to recognize Mother and Student's outside counselor as valid members of the IEP team?

SUMMARY OF DECISION

Garvey found Student eligible for special education in June 2017, at the end of third grade, as a student with a learning disability. In fall 2017, when Student was in fourth grade, Student became anxious about attending school, and would cry when he went to school. During October 2017, Mother advised Garvey of this and requested an evaluation. During the 2017-2018 school year, and continuing into the 2018-2019 school year, Student's anxiety regarding attending school became more intense. Garvey held several IEP team meetings to discuss Student's anxiety, and added school-based

counseling services to his IEP, but Student's anxiety remained high, and his school attendance and academic progress remained poor. In May 2018, Garvey assessed Student for possible disabilities in the areas of autism, emotional disturbance, and other health impairment, due to his behaviors, but did not find Student eligible in any category other than his initial eligibility of specific learning disability.

When Student attended school, staff observed that Student did well, made progress, and got along with peers and staff. Garvey attributed Student's failure to make anticipated progress to his numerous absences, while Student asserted that Garvey did not take any effective action to address Student's anxiety issues and his poor school attendance.

This Decision finds that the primary cause of Student's failure to make progress in school was his anxiety regarding school, which created stress and prevented him from consistently attending school. Garvey deprived Student of a FAPE by failing to conduct an intensive counseling services assessment to explore the causes of Student's anxiety, and to develop and implement an appropriate program to assist Student in managing his anxiety so that he could attend school. As a result, Garvey is ordered to conduct an intensive counseling assessment. While the assessment is pending, Garvey is ordered to provide home-hospital services to Student until the completion of an IEP team meeting to discuss the results of the assessment and to develop a program to manage and attempt to alleviate Student's school-related anxiety. Further, as compensatory education, Garvey is to provide Student specialized academic instruction, and provide Parent with counseling services to assist Parent in managing Student's unwillingness to go to school. Finally, Garvey did not deprive Student of a FAPE by reason of failing to consider Mother and Student's private therapist as members of the IEP team.

FINDINGS OF FACT

GENERAL BACKGROUND AND JURISDICTION

1. Student is a 10 year old boy, who has resided within Garvey's boundaries at all relevant times. At the time of the hearing, Student was enrolled in the fifth grade at Emerson Elementary School, his home school. Student has been enrolled in Emerson since Kindergarten.

2. Student has been an English Language Learner since Kindergarten. During the 2015-2016 school year, when Student was seven years old and in second grade, Mother became concerned about Student's academic progress. She consulted with Karrah Ly, Student's second-grade teacher. Student was struggling academically, and was only working at about the first grade level in reading and language arts. Student was not a behavior problem, and he functioned well socially. Ms. Ly attempted to help Student. After whole group instruction, she would check with him as to whether he understood what to do. If he needed more prompting, she would give him more information or help him get started, and then he would be able to understand the assignment. She also worked with him in small groups.

3. Additionally, Ms. Ly requested that Andrea Calderon, a Garvey English Language Learner interventionist at Emerson, meet Student to try to determine whether his reading difficulties were due to his status as an English Language Learner. When Ms. Calderon met Student at that time, she believed he was a typical English Language Learner. In her opinion, English Language Learners tended to struggle with reading because, when one is acquiring a language, speaking is easier than reading or writing. Ms. Calderon believed Student just needed a little more support.

4. Student made some slow progress during second grade; by the end of second grade he was working somewhere near the middle of first grade level to the end of first grade level. Ms. Ly believed Student would improve if more time, practice, and

effort were employed in class and at home. She did not believe he needed any further support, such as a special reading program or other interventions.

5. Garvey scheduled a Student Success Team meeting on June 1, 2016, toward the end of student's second grade year, and additional meetings were scheduled during the 2016-2017 school year, when student was in third grade, to address Student's deficiencies in reading and language arts.

6. Tina Ward, Student's third grade teacher during the 2016-2017 school year, participated in the Student Study Team meetings. Student's reading and spelling were not at grade level, and he did not turn in homework on multiple occasions, so he was not getting extra practice at home. She mentioned this at a Student Study Team meeting. Mother said she had difficulty helping him at home because she did not speak English. Ms. Ward suggested the computerized I-Ready Language Arts and Math program, which could be used at home and which Ms. Ward used in the classroom. Ms. Ward also employed accommodations for Student in the classroom, such as preferential seating and monitoring him when she walked about the classroom. She shortened his spelling assignments. Additionally, Ms. Ward worked with Student individually on reading in his response to intervention group, which met 35 minutes per day, 5 days per week. Ms. Ward observed that Student was friendly and kind towards his classmates, and influenced his classmates to be friendly and kind. She never saw him being bullied and nobody reported to her he was bullied.

INITIAL ASSESSMENT OF SPRING 2017

7. Garvey conducted a psychoeducational assessment of Student in spring 2017, when Student was eight years old and in third grade, to determine whether he was eligible for special education. Ruben Fernandez, the school psychologist, conducted most of the assessment and wrote an assessment report dated June 12, 2017. He holds a bachelor's degree in psychology, a master's degree in education, and a pupil

personnel services credential. He has been a school psychologist since 2013, and been employed by Garvey since April 2015.

8. Mr. Fernandez's report noted that Student lived with his parents, and was closer to Mother than Father. He summarized Student's school history and noted that school attendance was not an area of concern. There was no history of behavior referrals or disciplinary actions. As of the second semester of third grade, Student was working toward state standards in every academic area, except for the mathematical area of "Measurement and Data" in which he met state standards.

9. Student passed his vision and hearing screenings. Mr. Fernandez interviewed Student, who said he liked school. Student expressly liked writing, math, and recess. He named some friends. When not at school, Student liked to play with his friends on the trampoline. Ms. Ward reported to Mr. Fernandez that Student was more confident with math than reading. Some days he did well at school, other days he did not. He could read, but his reading and writing were not at grade level. He had difficulty working independently and was very forgetful. He was well-behaved and compatible with all of his peers.

10. Mother reported that Student was well-behaved. He had difficulty retaining information, and when asked questions about something he was told, he would reply that he did not understand. He had friends in the vicinity and at school.

11. Mr. Fernandez observed Student for 20 minutes in class. Student had all his class materials out, he answered the teacher's questions about the lesson, and maintained attention throughout the observation.

12. Mr. Fernandez measured Student's cognitive abilities by administering the Wechsler Intelligence Scale for Children—Fifth Edition. Student's standard scores on the Wechsler ranged from an 89 in Verbal Comprehension (low average range) to 114 in

Processing Speed (high average range).² Student obtained a full-scale intelligence quotient score of 102, which placed him in the average range. Mr. Fernandez considered this score as an indicator that Student should be successful in the classroom environment. Mr. Fernandez also administered the Auditory Processing composite of the Woodcock Johnson Tests of Cognitive Abilities IV, to assess Student's ability to encode, synthesize and discriminate auditory stimuli, including the ability to employ auditory information in task performance. He administered this instrument because the Wechsler does not measure auditory processing. Student obtained a standard score of 85 on this instrument, which was in the low average range with a confidence interval of 76-93. Mr. Fernandez concluded that Student's true score was likely in the low range, based on teacher and parent concerns, his grades, and his score on the Woodcock achievement tests administered by Michael Oyler, a Garvey resource specialist/specialized academic instruction teacher. These factors all suggested that Student had a deficit in auditory processing.

13. Mr. Fernandez also administered the phonological composite portion of the Test of Auditory-Processing Skills—Spanish Bilingual Edition. This assessment measures auditory skills of students who are bilingual in Spanish that are necessary for the development, use, and understanding of language commonly used in academic and everyday activities. The phonological composite measured Student's ability to discriminate between sounds within words and to blend phonemes into words. Student obtained a standard score of 75 on the phonologic composite, which placed him in the below average range. Such a score suggested that when Student was spoken to in Spanish, he would have difficulty understanding what was said. In Mr. Fernandez's opinion, this result confirmed that Student was deficient in auditory processing.

² Standard scores from 85 to 115 are in the average range.

14. Mr. Oyler administered the Woodcock Johnson Tests of Achievement to determine Student's level of academic achievement. Mr. Oyler holds a bachelors' degree in English, *cum laude*, from California Polytechnic University, Pomona, and a mild to moderate California teaching credential. Student's scores on the Woodcock achievement tests ranged from standard scores of 76 in Letter Word Identification (very limited range), 77 in Spelling (very limited range) to 111 in Writing Samples (average to advanced range).

15. Mr. Fernandez's written report set forth the California Code of Regulations criteria for eligibility for special education under the category of specific learning disability, and he compared Student's ability scores (which reflected what Student was capable of performing in a classroom), and achievement scores (which reflected Student's skill levels compared to same-age peers). In comparing Student's intelligence quotient of 102, and his standard scores of 76 in Letter Word Identification and 77 in Spelling on the Woodcock achievement tests, Mr. Fernandez concluded that Student exhibited a 21-point discrepancy between ability and achievement. Due to this discrepancy between ability and performance, and the auditory processing deficit Mr. Fernandez detected, Mr. Fernandez determined that Student was eligible for special education under the category of specific learning disability.

IEP TEAM MEETING OF JUNE 6, 2017

16. On June 6, 2017, Garvey convened an IEP team meeting to review the results of the psychoeducational assessment and determine whether Student was eligible for special education and related services. The IEP team included Mother, Anna Marie Knight (Emerson's principal), an interpreter, Ms. Ward, Mr. Oyler, and Mr. Fernandez.

17. Mother was given the procedural safeguards document, and a copy of the assessment report. The team noted Student's strengths. He was well-behaved in class

and cordial to staff. He displayed relative academic strength in the areas of Applied Problems and Written Language on the Woodcock achievement tests. Mother expressed her concern that Student was struggling academically.

18. Student's scores on the California English Language Development Test, administered in September 2016, placed him at the Early Advanced level in the areas of Listening and Speaking, and at the Beginning level in Reading and Writing. The team also recorded Student's standardized scores as reported in Mr. Fernandez's psychoeducational assessment report, and noted Mr. Fernandez's conclusion that Student had an auditory processing deficiency. Mr. Oyler expressed his belief that some of Student's scores on the Woodcock achievement tests were higher than Student's actual classroom performance. He advised the IEP team and Mother that Student had more challenges than were reflected in those scores.

19. The areas of communication development, gross/fine motor development, adaptive/daily living skills, and health were not areas of concern to the IEP team. In the area of social-emotional/behavioral, the team noted Student was well-behaved in class.

20. The team found a severe discrepancy between intellectual ability and achievement in the areas of written expression and basic reading skills, and the discrepancy was directly related to an auditory processing disorder. Student's auditory processing deficit impacted his educational performance because he would have difficulty discerning auditory information.

21. The team determined that Student's areas of need were: basic reading/decoding, passage comprehension, English language development/written language/spelling, and mathematics calculation. The team developed baselines and goals in these areas, and each goal had related short-term objectives. Student's standard scores for relevant subtests of the Woodcock achievement tests were factors the team considered in developing the baselines for each goal. Academic Goal 1, the

basic reading and decoding goal, had a baseline noting that Student's standard score of 76 on the Letter/Word Identification subtest placed him at approximately the one year, seven-month grade level. The goal provided that Student would accurately decode unfamiliar multi-syllabic words in context or out of context, at a designated level of accuracy. Academic Goal 2 addressed passage comprehension. The baseline stated Student's score of 80 on the Passage Comprehension subtest placed him at approximately the first grade, nine-month grade level. His struggles with decoding contributed to his struggles with answering basic comprehension questions on reading passages. The goal provided that Student would identify and summarize a theme and key details from a passage he group-read, at a designated level of accuracy. Academic Goal 3, an English language development/written language/spelling goal had a baseline that referred to Student's standard score of 77 on the Spelling subtest. This placed him at approximately the first grade, six-month grade level, and he scored at the Beginning level on the California English Language Development test. Student struggled with spelling words with initial consonant blends. The goal provided Student would spell one-syllable words and nonsense words with initial consonant blends at a specified level of accuracy. Academic Goal 4 addressed mathematics calculation. The benchmark stated Student earned a standard score of 77 on the Calculation subtest, which placed him at approximately the second grade level. Student struggled multiplying one digit by two digit numbers. The goal provided Student would multiply one digit by two digit numbers at a specified level of accuracy.³

³ The document that was admitted into evidence at hearing as the June 6, 2017 IEP, (District's Exhibit 16), did not include the pages showing the first two academic goals. The ALJ issued an Order on November 14, 2018, that questioned the completeness of District's Exhibit 16. In response to the Order, Garvey provided a copy of the June 6, 2017 IEP that included the first two academic goals, and confirmed that

22. The team also decided that Student would take the English Language Development tests listening assessment with accommodations, but he would take the other English Language Development tests without accommodations. No accommodations were checked for the annual state common core assessments (Smarter Balanced Assessments). The IEP team offered no classroom accommodations.

23. The team offered placement in the general education classroom at Emerson, with specialized academic instruction in the resource specialist program at a level of 120 minutes per week in a small group. The specialized academic instruction was to be provided at a rate of four sessions a week for 30 minutes each session, on a pull-out basis. The team did not offer special education summer school, as Student did not exhibit severe regression during school breaks. The team decided Student did not require assistive technology and that his instructional language would be English. Student's behavior did not impede his learning or that of others. Mother consented to all parts of the IEP. She also checked the box affirming that the school facilitated parental involvement.

24. Mr. Oyler believed that the level of service in this IEP was appropriate. Student was relatively high functioning compared to other resource specialist program students. A general education environment was the least restrictive environment for Student, and it was appropriate to keep him in that environment as much as possible.

this copy was the complete IEP. Student also filed a response to the November 14, 2018, Order, contending that District's Exhibit 16 in the form admitted at the time of hearing was complete. The IEP Garvey produced in response to the November 14, 2018, Order is accepted as the complete IEP of June 6, 2017, and it is included in the hearing exhibits as District's Exhibit 16A.

STUDENT'S PROGRESS DURING THE 2016-2017 SCHOOL YEAR

25. Since Student's IEP was completed at the end of the school year, Student did not receive any special education during the 2016-2017 school year. Ms. Ward did not believe Student needed special education during the 2016-2017 school year. On some days he needed help to focus, but when she helped him, he would do well, and she thought he had the potential to do well. He did well in school, but was absent quite a bit. When he returned to school after an absence, he lacked motivation, did not participate as much, and did not turn in homework as he had before. She agreed, as part of the IEP team, that he had a specific learning disability, but she believed that had he attended school more often, he would not have needed special education to make progress. However, his absences made it difficult for her to work with him more. She observed that Student was kind, and encouraged his classmates to be kind. She had never seen him being bullied, and nobody had reported to her that he was bullied. Ms. Ward had a good rapport with Student. He stopped by to say "hi" to her the next school year when he was in fourth grade.

26. Student's grades at the end of his third grade year were: 2s (Working Toward State Standards) in all areas of reading, writing, speaking/listening, language, math, and social studies. He obtained a 3 (Meets State Standards) in science. Ms. Ward estimated that Student was performing at between the first and second grade level in writing and math, and between the kindergarten and first grade level in reading. Ms. Ward wrote on the report card that Student was making adequate progress toward meeting grade level standards in reading/language arts, because she had been told she was not permitted to retain students. She conceded that her comment was an overstatement, because Student was not making adequate progress. She would not have retained Student, however, because he had potential to improve, and she had not had enough time to work with him.

27. Ms. Ward's statement as to Student's absences is not entirely supported by the record. Student's third grade report card showed that he had four absences and five tardies during the 2016-2017 school year, which are not necessarily unreasonable numbers. Her testimony was credible, however, as to Student's academic levels, his academic potential, and his good relationships with her and his classmates. Her opinion as to whether he required special education and related services was irrelevant.

EVENTS DURING THE 2017-2018 SCHOOL YEAR

28. Towards the beginning of the 2017-2018 school year, when Student was nine years old and in fourth grade, Student began to be anxious about coming to school. On August 30, 2017, school staff offered verbal encouragement to attend school, and on October 1, 2017, his schedule was changed and his English Language Development teacher was changed. On October 7, 2017, Student's pediatrician, Zong Hao Zhang, M.D., wrote a note on a prescription pad that referred Student to psychiatry/psychology for symptoms of anxiety and depression. The referral also mentioned "intellectual disability." The referral noted Student had sleeping, behavioral, and learning problems for one month. There was no evidence that a copy of the referral was transmitted to Garvey in a timely fashion. On October 25, 2017, Mother wrote a letter to the school requesting an evaluation for Student. Mother stated that she wrote the letter because Student had been crying about attending school. He told Mother he did not understand what the teacher was trying to teach him, and he was being teased. At home, Student was pulling his hair, not eating, and not sleeping. Mother's letter generated an immediate referral by Mr. Oyler, Student's special education teacher, for behavior intervention and/or counseling services for Student. The referral, also dated October 25, 2017, stated Student was anxious about coming to school, and that he cried when he came to school. Mother had taken him home from school early on several occasions. Mother's letter was attached to the referral.

29. By letter dated October 27, 2017, Dawn Berlin, a Garvey special education program specialist, addressed Mother's October 25, 2017, letter with a prior written notice denying an evaluation. The prior written notice noted Student's status as a special education student receiving resource services, and that Mr. Oyler was his case manager. The prior written notice advised Parents that Garvey would refer Mother's concerns to the IEP team for discussion. Specifically, Garvey would route the assessment request to Mr. Oyler, who would contact Mother to schedule an IEP team meeting to discuss Mother's concerns and the need for an assessment. Dr. Berlin's letter also referred to an attached copy of parent's procedural safeguards.

IEP Team Meeting of November 29, 2017

30. On November 29, 2017, Garvey convened an amendment IEP team meeting to discuss Student's episodes of anxiety regarding coming to school. The team members included Mother, the school principal, the Spanish interpreter, Jenny Duque (Student's fourth grade general education teacher), Jacky Lau (the school counselor), and Mr. Oyler. The procedural safeguards document was given to Mother.

31. Student's strengths were that he was a pleasant, capable and willing student in class. He was well-liked by his peers and staff, and had specific strengths in math. Approximately three months before this meeting, Student began to have emotional outbursts at home about coming to school. Mother stated that Student became frustrated with the school work and cried at home. Mother did not feel the school was supporting Student academically.

32. Ms. Duque stated Student functioned well in class. He answered questions, worked well with peers, and produced the assigned work. He seemed happy and calm. He was typically confident, and he did not display any anxiety fear, or sadness while in the classroom. He had academic challenges. He struggled with decoding. Math was his strongest area. She implemented accommodations in the classroom, by keeping

Student's work groups in the same area of the classroom to minimize change, reducing the amount of class work and homework, as necessary, and allowing Student to choose whether to participate in his electives or to work on academics. Mother agreed that these accommodations were appropriate.

33. Mr. Oyler stated Student was happy, willing to learn, and put forth a good effort during his resource classes. Student had challenges in reading, writing, and math, but was making progress. Mother noted that Student was still having trouble with some letters. Mr. Oyler explained that Student had been receiving special education instruction for only one trimester, since his program was not developed until two days before the end of the last school year, and that Student had a specific learning disability. Therefore, Student would likely continue to have academic challenges and learn at a pace that may be slower than his typical peers.

34. Mother stated Student had therapy for years, but in the past two-and-a-half months Student started to be unwilling to attend school some days. She reported Student stated he was not having difficulties with any peers or that any bullying was taking place at school.

35. Mother shared a letter from Foothill Family Counseling, a local institution that provided mental health services to Student since at least October 2017. Student had been diagnosed with anxiety disorder, and a copy of a prescription for Student for Prozac. Mr. Lau, the school counselor, asked how long Student had demonstrated anxious behavior at home. Mother stated that she noticed Student was anxious from a very young age. Sometimes he did not eat. She shared recordings of Student refusing to come to school, and videos of Student crying and refusing to cooperate. He tore up the living room looking for a particular pair of shoes he wanted. Mother agreed that Student was being supported academically at school, and stated her concerns were with Student's anxiety about coming to school. Mr. Lau asked if he could contact Student's

therapists at Foothill Family to discuss their findings and ask them about the type of support he or other direct service providers at Emerson could provide to best support Student at school. Mother agreed. Mr. Lau would assist Mother in procuring a release of information regarding Foothill Family and then he would contact them to determine a course of action based on their findings to address Student's struggles with coming to school.

36. The team determined that no services would be added to Student's IEP yet. Mr. Lau would contact Foothill Family to determine a possible cause of action, including possibly adding school-based counseling services. The team would meet again to discuss Mr. Lau's findings and to develop a plan for Student to best meet his academic needs. Mother agreed with the outcome of this meeting, and signed consent to the IEP amendment.

37. Prior to winter break, Mr. Lau informally spoke with Mother and Student one time when Student appeared distressed on campus and did not want to go back into the classroom. Mr. Lau talked with Student as he and Student walked around the playground area of campus, and Student expressed worries that Mother would leave him at school and not pick him up. Student did not reenter the classroom and went home with Mother. On several occasions when Student was present on campus, but before he was assigned as Student's counselor, Mr. Lau would check on Student to see if he was all right. Sometimes Student would informally drop by Mr. Lau's office when he was stressed or sad, and he and Mr. Lau would talk about Student's feelings. Mr. Lau also followed up with Foothill Family after the IEP meeting and discussed possible therapies and approaches with Liana Quijada, Student's therapist there.

IEP Team Meeting of January 31, 2018

38. Garvey convened an IEP team meeting on January 31, 2018, to discuss adding school-based counseling services to address Student's difficulties in leaving

home to come to school, and to continue the dialogue between Garvey and Student's doctor and other non-school service providers via Mr. Lau. The IEP team included a school administrator, Ms. Duque, Mr. Lau, a Spanish language interpreter, Mother, and Mr. Oyler. Mother was given the procedural safeguards document.

39. All Garvey staff who provided direct services to Student observed that Student was relaxed, calm, happy, and engaged in learning while Student was at school. The team noted Student's strengths. He was a happy, willing student. He continued to be enthusiastic about learning. He appeared calm, content, and interacted well with staff and peers in all school settings and under all circumstances. Mother was concerned that Student would not come to school. Student reported to Mother that he was being made fun of at school, and he did not understand one of his teachers.

40. Mr. Oyler noted Student was progressing well toward his goals when he was present in class. Ms. Duque stated that Student tried his best. He was a leader and he responded well during class discussions.

41. The team developed a counseling goal. The baseline for the goal referred to Student's 23 absences from school, constituting 24 percent of school days, due to anxious thoughts, as reported by Mother. Since the beginning of the 2017-2018 school year, Student had refused to enter a classroom two to four times per month due to fear of abandonment by Mother. The goal provided that, on campus, Student would integrate coping skills learned in counseling to accurately identify and self-regulate feelings of fear and anxiety with 80 percent accuracy in 4 out of 5 trials, for the purposes of strengthening emotional regulation so Student could focus in school and build peer relationships. The team added 30 minutes per week of school-based counseling services to Student's IEP, to be provided in an individual or group setting.

42. The team also determined Student would remain in the general education setting with 120 minutes per week of pull-out specialized academic instruction provided

in a group setting in the resource specialist program. Garvey ultimately assigned Mr. Lau to provide the counseling services. The team did not offer special education summer school because Student did not exhibit severe regression during long breaks from school.

43. Mother signed consent to the IEP.

Student's Behavior Status Following January 2018 IEP

44. Mr. Lau provided Student counseling services when Student was present at school, but Student's school attendance did not improve. When Mr. Lau asked Student why he was frequently absent, Student gave various reasons, such as anxiety, worry about schoolwork, how peers and teachers perceived him, and peers making fun of him. Mr. Lau attempted to work with Student to help him to understand and identify triggers and thought processes. He also worked with Mother to understand Student's daily routines and what led Student to have these types of feelings. He worked with Ms. Quijada, the therapist at Foothill Family, to coordinate care to ensure that their interventions were generalized and used both at home and school. He also discussed with Ms. Quijada how Student was reluctant to discuss his thoughts and feelings, about having Student identify the intensity of his feelings, as well as the use of cognitive behavioral therapy. Due to Student's absences, Mr. Lau was not able to progress very far with Student in using cognitive behavioral therapy and encouraging Student to discuss his thoughts and feelings. Mr. Lau last spoke with Ms. Quijada towards the end of the 2017-2018 school year.

45. During counseling, Student expressed concerns about whether Mother would appear after school. Student was also stressed about not performing at grade level, and feared his teachers would be upset with him. He was also concerned about other students making fun of him. Student did not tell Mr. Lau that he was being bullied.

However, Student told him other students laughed at him because Student liked ponies and unicorns.

46. Ms. Quijada, a marriage and family therapist at Foothill Family, has provided counseling services to Student from October 2017 through the time of hearing, to address his general anxiety. She provides mental health assistance to families and refers them to community resources. Ms. Quijada has no background in education, does not possess a California teaching credential, and she never observed Student at school.

47. Ms. Quijada provided services to Student through Foothill Family on an individual basis, and he also participated in group sessions when she facilitated a social skills group. She did not assess or evaluate Student. Mr. Lau tried to coordinate his services with Ms. Quijada, and spoke to her several times regarding Student during the 2017-2018 school year.

48. Ms. Quijada wrote a letter dated April 2, 2018, addressed to the East Los Angeles Regional Center, in support of Student receiving a psychological evaluation from the Regional Center. There was no evidence that Garvey saw this letter in a timely fashion after it was written. The letter stated Parent was concerned about Student's behaviors, consisting of tantrums, hitting, yelling, and self-injurious behaviors. Ms. Quijada's letter stated these behaviors suggested developmental and social delays at home and school, and the behaviors were interfering with Student's school attendance and social interactions with peers at school. The content of the letter was based solely upon Mother's reporting. Ms. Quijada had no independent opinion that Student required a school-based psychological evaluation. She had never witnessed Student tantrumming, hitting himself or others, or engaging in self-injurious behaviors. During the social skills group, he was receptive to his peers, verbal, and engaged in appropriate interactions. Additionally, Ms. Quijada had a conversation with Mr. Oyler during the

2017-2018 school year, during which Mr. Oyler informed her Student worked well with other children and did not engage in tantrums at school.

49. At Mother's request, Davy Qian, D.O., a psychiatrist at Foothill Family, wrote a letter dated April 10, 2018 regarding Student. After receiving his D.O. degree, Dr. Qian served his internship and residency in psychiatry at L.A. County-USC General Hospital, and thereafter obtained additional training in the specialty of child psychiatry.

50. Dr. Qian's letter was addressed to "To whom it may concern." The letter noted Dr. Qian first met and evaluated Student on October 24, 2017, and at that time Student presented with "symptoms, such as but not limited to" the approximately 24 symptoms he listed in the letter. Dr. Qian's provisional impression was generalized anxiety disorder, rule out depression not otherwise specified; attention deficit disorder, rule out attention deficit hyperactivity disorder; and panic disorder, rule out post-traumatic stress disorder. Dr. Qian prescribed Paxil and Tenex to manage Student's symptoms. Dr. Qian's letter stated that Student was suffering tremendously, and his symptoms had intensified since his first visit to Dr. Qian. He recommended Student be home-schooled.

51. Dr. Qian testified at hearing. Foothill Family staff wrote the April 10, 2018, letter, and Dr. Qian signed it. The symptoms described in the letter were not necessarily the symptoms Student displayed, and were not specific to Student, but rather were symptoms that were generally displayed by patients with anxiety disorder and attention deficit hyperactivity disorder.

52. Dr. Qian usually met with Student once a month, but sometimes they met twice a month. The sessions were usually 30 minutes long, but sometimes they extended to an hour. Mother was always present, along with an interpreter and a therapist. Dr. Qian did not perform therapy during these sessions; rather, he tried to determine Student's condition, and what was happening at home and at school, and whether his

medication needed to be adjusted. Student had difficulty going to school and difficulty with peers. He was depressed and stressed, with a flat affect. Student did not talk much during the sessions, and sometimes he would not talk at all. Sometimes he was so disorganized and distracted that he would tune out what was being said, which Dr. Qian believed could be a manifestation of attention deficit hyperactivity disorder. Student's symptoms intensified over time. As he became more stressed, and less able to talk, most of the information Dr. Qian received about Student came from Mother. Mother reported it was becoming more difficult for Student to go to school, and he could not remember what he was taught there. In Dr. Qian's experience, patients such as Student did better with home-schooling or by taking on-line courses. If a student was anxious and being bullied at school, it can be difficult for the student to learn. It can be even more difficult for such a student to learn if the student is in a classroom with 20 to 30 other students. Dr. Qian had heard that the Student's classroom could be rowdy. He suggested accommodations, such as more one-to-one attention and a slower instructional pace.

53. Dr. Qian's testimony was not entirely credible with respect to his diagnoses and their relationship to Student's education for a variety of reasons. Much of his information as to Student's symptoms came from Mother, not Student. Dr. Qian admitted that his letter of April 10, 2018, which purported to list Student's symptoms, was just a general list of symptoms and Student did not necessarily display those symptoms. He did not support his proposed diagnoses with any references to the Diagnostic and Statistical Manual, 5th edition, and he provided little specific information as to the basis for his diagnoses.⁴ There was no evidence that Dr. Qian had any

⁴ This is a reference published by the American Psychiatric Association, and is used by mental health professionals to assist them in diagnosing and treating psychiatric and psychological disorders.

background or expertise with respect to the impact of his diagnoses on Student's program and placement. His recommendations of home-schooling, one-to-one attention, and a slower pace were banal. He did not specifically identify Student's educational needs or the type of individualized educational program Student should have. He never observed Student in school, and had never been to Emerson. He did not remember whether he had ever reviewed Student's school records, and he never spoke to school personnel. He did not know grade Student was in. He had no personal knowledge as to what Student was capable of learning at school.

IEP Team Meeting of April 11, 2018

54. Garvey convened Student's annual IEP team meeting on April 11, 2018, when Student was nine years old and in fourth grade. Members of the team included Dr. Berlin, Ms. Knight, a Spanish language interpreter, Ms. Duque, Mr. Lau, Ms. Quijada, Mother, and Mr. Oylar.

55. The team reiterated Student's eligibility category of specific learning disability. Student's strengths were that he was well-liked by staff and peers at Emerson. He was upbeat and good-natured. He was always willing to participate in robust discussions about tests or topics in class, and he had a rich imagination. He had shown progress in decoding and comprehension. Ms. Duque reported Student liked to help others. Mr. Lau stated Student was vocal and verbalized plans. Ms. Knight said all of her interactions with Student were positive. Ms. Quijada said Student verbalized when he did not like something, and was able to express his feelings, depending on the day.

56. Mother presented Dr. Qian's April 10, 2018, letter to the team. Mother and school staff engaged in a discussion regarding Student's behavior and experiences at school. Mother stated Student was not the same as staff reported. His anxiety about school attendance was becoming worse. He did not want to go to school, and Student told her he had no friends at school. Mother said he was afraid to go to school. She

reported that people made fun of him and another student said Student was gay because Student liked unicorns and horses. She was concerned about Student's progress in all academic areas and did not know why Mr. Oyler said Student had made progress. Mother said that other students called Student names at recess and did not want to play with him. She reported he went to the bathroom and cried during the school day. Student's teachers disagreed with these comments. Mr. Oyler mentioned that Student's progress was hampered by excessive absenteeism. Mr. Oyler said other children liked Student, and neither Ms. Duque nor Mr. Oyler saw other students call him names or exclude him from play. He participated with other children, and smiled often. However, Mr. Oyler also commented that Mother took Student to school in a stroller, which was not age-appropriate and that other children teased Student about that. Mr. Oyler commented that Mother walked Student to class in the morning, brought him lunch, and was present on campus during the school day. Mr. Oyler noted this was not typical for a fourth grader. Mother said she had agreed with Student that if he went to school, she would come during the day, but that she had stopped doing this. She acknowledged bringing Student to school in a stroller when he did not want to walk. When Student was at home and did not come to school, he read or talked to the dog. Student told her that the dog was the only one that loved him.

57. Mother said that Student complained because the pace of math class was too fast for him, and that he complained to the teacher about this. The teacher stated that were different groups depending on pace and skills. The team decided to change Student to another math teacher.

58. Ms. Quijada stated that Mom reported Student engaged in self-injurious behaviors. Mother stated he banged his head when he had tantrums. Mother also said he grabbed sharp objects and cut himself. When Ms. Quijada asked what happened, Student told her he did not remember; that something took his soul.

59. Mr. Lau reported Student was always very happy when he saw Student and that Student participated during counseling. At first, Student expressed that he missed Mother and wanted to be with Mother, but he had not expressed that recently. He talked about his dog. He commented that he did not have friends. Mr. Lau saw Student engaged and interacting with his peers during recess. When Mr. Lau pointed this out, Student said those were his classmates and not his friends. Mr. Lau did not know why Student distinguished between classmates and friends. Mr. Lau believed that sometimes Student reported things that did not comport with reality. In counseling they were working on strategies for anxiety and expressing his feelings. Student did not like to talk about his anxiety or fears. Ms. Quijada agreed that Student sometimes wanted to engage in therapy, and sometimes he did not.

60. Ms. Duque reported on Student's present levels. He came back from spring break in a great mood, and said he was happy and loved coming to school. This was also his affect at the beginning of the school year. Student was below grade level in reading. He worked well in small groups. He was below grade level in math. He participated in class and was very careful. He wrote neatly and tried hard to do well.

61. At hearing, Mother elaborated on her contention that Student was teased at school. Student wore his hair long, and other children teased him about being a girl. Someone at school, whom she could not identify, forcibly cut Student's hair. Mother spoke to Ms. Knight about the incident, and Ms. Knight said she would investigate, but Mother did not know the outcome of the investigation. Student was hitting himself and throwing himself on the floor crying when it was time to go to school. His anxiety increased because he was being made fun of often, and this would negatively affect his ability to concentrate in class. Student did not feel secure at school. He would sit alone on a bench while at school. Mother had permission from the principal to take Student to school and into the classroom. Mother denied taking Student to school in a stroller,

which contradicted her affirmation at the IEP team meeting that she did, as reflected in the IEP notes. Rather, Mother asserted at hearing that Student walked to school holding Mother's hand. Mother offered no documentation or percipient witness testimony to support her contentions that Student was the subject of bullying and teasing while at school. All, or nearly all of her information about Student being teased or bullied came from Student's reports, and not from her first-hand observation.

62. At hearing, Mr. Oyler testified regarding Mother's claims of bullying. Mr. Oyler had noticed no bullying, and he had asked Student about the bullying that Mother reported. Student told Mr. Oyler he was not having difficulties with any peers or that any bullying was taking place at school. Mr. Oyler also consulted with other teachers, who reported they had not observed any bullying or trouble with peers.

63. The team listed Student's assessment results. On the Smarter Balanced Assessment, Student's overall score in English Language Arts reflected standard not met. In particular, his scores were below standard in Reading, Writing, and Speaking and Listening. His score was at or near standard in Research/Inquiry. His overall score in Math was standard not met. In particular, his scores were below standard in Concepts and Procedures, Problem Solving and Data Analysis, and Communication Reasoning. On the English Language Development Test, Student's overall score was in the intermediate range. Specifically, his Listening score fell in the intermediate range, his Speaking score was in the early advanced range, and his Reading and Writing scores were in the beginning range. The team also revisited Student's standard scores from his initial psychoeducational assessment.

64. As in his June 2017 IEP, the team found Student's communication development, gross/fine motor development, and adaptive/daily living skills were not areas of concern. In the area of social-emotional/behavioral, the team had new findings. When Student attended school, Student showed positive affect and mood, and

attempted to complete assignments. Mother reported Student had difficulty transitioning between home and school at least one time per week since the beginning of the 2017-2018 school year, due to Student's anxious thoughts and behaviors. This resulted in multiple absences. Student refused to voice thoughts or feelings in the presence of Mother during meetings with school staff; rather, he presented with his hoodie pulled over his lowered head.

65. In the area of health, Mother reported that Student was allergic to all dairy and to nuts. She reported Student had been diagnosed with anxiety and he took medication daily. She stated that if Student were not medicated he would be hospitalized. Mother provided Dr. Qian's letter of April 10, 2018 to the team.

66. The team considered Student's progress on his goals. He had not met his decoding goal, and his mood affected his consistency. He met his reading comprehension goal, as well as his written language goal. Mother mentioned that Student sometimes confused his letters, and Mr. Oyler agreed. Student did not meet his mathematics goal, in that he could achieve it with supports, but not independently.

67. The team decided to develop goals in the following areas of need: basic reading/decoding; passage comprehension; English language development/written language/spelling, and mathematics calculation.

68. The team updated the baseline on Student's counseling goal. Student continued to display no change in the frequency of school attendance, with 34 absences (missing 25% of school days), due to feelings of anxiety, per Mother's report. In his school-based counseling sessions, Student denied feeling sad and voiced "everything is good." He was reluctant to discuss issues in regards to feelings, but was respectful and engaged in session with counselor.

69. The team also developed a new counseling goal. The goal provided that by April 2019, Student would be able to identify and express thoughts and feelings

during the counseling session. Student would develop and integrate at least three coping skills to mitigate anxious thoughts and feelings impeding Student from attending school.

70. The baseline for Student's new basic reading/decoding goal noted that Student had developing decoding skills, and when he attained a rhythm, he could decode well. He continued to struggle when reading multi-syllable words out of context. The goal required Student to accurately read novel grade-level multi-syllabic words in context and/or out of context in four out of five trials, as measured by instruments specified in the goal.

71. The baseline for Student's new English language development/written language goal stated that Student scored at the beginning level in Writing on the English Language Development test. Student struggled with spelling, grammar, and syntax when attempting to compose three to five sentences in response to a teacher prompt. The goal required Student, after conferring with adults and/or peers on a writing assignment or response that required three to five sentences, to edit his writing for proper spelling, grammar, and syntax with 90 percent accuracy over five trials.

72. The baseline for Student's mathematical calculation goal stated student could multiply one digit by two digits when given examples, reminders, and a multiplication chart. He continued to struggle when asked to solve problems without a significant level of support. The annual goal required Student to use the multiplication algorithm to solve one digit by two digit numbers and arrive at the correct product with minimal supports and reminders and without a multiplication chart with 90 percent accuracy over five trials with a total of 10 problems, as measured by work samples. This goal was similar to the previous annual goal that he did not meet.

73. The goals included related short-term objectives. The baselines for the goals were accurate, and the goals were appropriate.

74. The team offered placement in the general education classroom, with 120 minutes weekly of small group specialized academic instruction, and 30 minutes per week of individual and group counseling. The team added special education summer school because Student had missed approximately 25 percent of the school year due to absences. The team felt that this would result in a significant reduction in Student's retention of information. The four-week summer school program would consist of 240 minutes of specialized education per day for four weeks, and 60 minutes per month of individual and group counseling.

75. Classroom accommodations would consist of use of a visual chart to reinforce Student's on task behavior, check for understanding, visual aids (such as a picture schedule and flash cards), and use of verbal encouragement/coaching. Student would take the Smarter Balance assessments without supports or accommodations, and the English Language Proficiency Assessment without accommodations, except that test administration directions would be simplified or clarified.

76. The team also specified that Student's behavior impeded his learning because of his chronic absence from school.

77. Dr. Berlin suggested assessment in suspected areas of disability of attention deficit disorder, emotional disturbance, and autism. The team agreed to offer such assessment based on Dr. Qian's letter and agreed that an assessment plan would be sent home for signature. Garvey staff had not seen any characteristics of autism in Student that were affecting his education at this time, and therefore they believed the IEP offered a FAPE without any supports for autistic-like behaviors. Mother agreed with all aspects of the IEP and signed consent to the IEP. She also checked the box to affirm that that the school facilitated parental involvement. She received a copy of the procedural safeguards. At hearing, Mother denied checking the box which said she agreed to the IEP, and also asserted she did not check the box regarding parental

involvement, but these denials were not credible. The weight of the evidence demonstrated that she consented to the IEP and checked the box regarding parental involvement.

78. Since Student was missing so much school, at some time during fourth grade Mr. Oyler went to Student's home to work on strategies to improve his attendance. He suggested to Mother that Father walk Student to school, but Mother rejected this idea. Student was happy and smiling and not in distress. Mr. Oyler tried to encourage Student to go to school, but Student was coy. He only seemed interested in bargaining with Mr. Oyler about school attendance, and having Mr. Oyler promise that Student could participate in certain favored activities if he went to school. Mr. Oyler did not again go to Student's home to try to encourage Student to attend school, because he thought it would be counter-productive and only encourage Student to negotiate his attendance at school.

Assessment Plan of May 2018 for Assessment of Other Possible Disabilities

79. On May 6, 2018, Mother signed her consent to the assessment plan for the assessment of the additional possible disabilities mentioned at the April 2018 IEP team meeting. The assessment plan stated the assessment was generated by Mother's presentation to the IEP team of multiple areas of concern regarding Student's home behavior, and by the Foothill Family psychiatrist's diagnosis of several areas warranting assessment.⁵ The plan noted that Garvey had not suspected any additional disabilities based on Student's school performance. The assessment plan reflected that the areas of eligibility that would be assessed were emotional disturbance, attention deficit disorder,

⁵ Based on the assessment plan's description of this letter, the assessment plan referred to Dr. Qian's letter of April 10, 2018.

and autism. The assessment plan specified that Student would be assessed in the areas of social-emotional/behavior and adaptive behavior.

80. The assessment plan did not include a functional behavior assessment. Ann Dalena, a Board Certified Behavior Analyst who has been employed by Garvey as a behavior intervention specialist since November 2015, testified as an expert at hearing regarding functional behavior assessments. Ms. Dalena holds a bachelor's degree in liberal studies from California State University, Long Beach, and a master's in applied behavior analysis from Ball State University in Muncie, Indiana. She holds a multiple subject general education teaching credential for kindergarten through eighth grade, and a mild/moderate education specialist credential for special education

81. Ms. Dalena explained that a functional behavior assessment assesses behavior that occurs at school. Its purpose is to determine how the target behavior impacts the student's education. Based on Student's IEPs, and his assessment reports of June 2017 and June 2018, Student demonstrated no behaviors that warranted a functional behavior assessment. Ms. Dalena specified that anxiety is not a behavior, and therefore does not trigger a functional behavior assessment. She also asserted that bullying and teasing behaviors directed at a student do not warrant a functional behavior assessment of that student, as the teasing is the behavior of other students. Ms. Dalena concluded that a functional behavior assessment was not appropriate.

82. Mr. Lau also did not believe that Student displayed any behaviors that warranted a functional behavior assessment. Garvey never conducted a functional behavior assessment of Student.

83. The assessment plan also did not include an intensive counseling services assessment. Stephanie Chun-Ho testified at hearing regarding intensive counseling services assessments, and eligibility for services based upon such assessments. Ms. Chun-Ho has been a school psychologist since 2003, and employed by Garvey since

April 2016. She administers a variety of standardized and non-standardized assessment to students, including intensive counseling services assessments. She received her bachelor's degree in psychology from the University of California, Los Angeles, and holds master's degrees from Loyola Marymount University in both educational psychology and counseling. She holds pupil personnel services credentials in both school psychology and school counseling. She has completed training as a behavior intervention case manager.

84. Educationally related intensive counseling services are a related service, which Ms. Chun-Ho characterized as the top level of support for students with social-emotional challenges. Tier 1 services include classroom behavior management systems, such as a token reward system. Tier 2 interventions include special education, counseling, behavior support plans, and functional behavior assessments. Intensive counseling services are Tier 3, and include psychological services, longer counseling sessions, more individual counseling, social work services, behavior intervention services, day treatment services, and parent training. Best practices require lower level counseling be tried for six months to one year before moving to a higher level of service, because one wants to give time for the counseling to work and for a student to progress on the counseling goal.

85. Severe anxiety can be evaluated by an intensive counseling services assessment. Ms. Chun-Ho described the factors which school psychologists consider as part of the assessment to determine whether a Student is eligible for educationally related intensive counseling services. The factors involve whether the student is eligible for special education; whether the student exhibited significant social, emotional, or behavioral challenges, such as marked depression, self-injurious or aggressive behavior, or a psychiatric hospitalization; whether the challenges significantly impeded the student's access to education or significantly impeded the student's ability to

accomplish IEP goals; whether the student responded sufficiently to earlier interventions; whether the student had the mental capacity to benefit from the services; and whether the student required the services to benefit from special education in the least restrictive environment.

86. Garvey never conducted an intensive counseling services assessment of Student, and never offered to do so. Ms. Walsh, the school psychologist who conducted the assessment that was the subject of the assessment plan, did not mention the need for an educationally related intensive counseling services assessment at the June 2018 meeting when Mr. Walsh reported on the assessment, as discussed below. As a result, Mr. Lau did not believe Student required such an assessment.

Assessment of May 2018

87. In May 2018, Garvey school psychologist Gerry Walsh conducted an assessment of Student to evaluate additional suspected disabilities. The assessment team included Mr. Oyler, Ms. Duque, Mr. Lau, and the school nurse. Mr. Walsh wrote a report of the assessment dated June 4, 2018. Mr. Walsh had retired from Garvey before the hearing and did not testify. Mr. Walsh's report noted the purpose of the assessment was to consider Mother's concerns that Student required additional special education due to possibly significant academic delays and possible emotional or other issues. Student was being evaluated concurrently for autism spectrum disorder by an outside agency. The report listed Student's current special education services. He described Student as physically healthy and well-developed. He observed Student had typical gross motor skills. Student was polite to adults at school. He followed directions in English and completed school work in English. A records review reflected that Student had no noted health difficulties. Mother reported he had no acute illnesses. Student passed his hearing and vision screenings.

88. The report contained an attendance summary which reflected that Student was present 134 days during the school year and absent 43 days.⁶ Mr. Walsh listed Student's most recent Smarter Balanced Assessment results, on which Student's scores reflected Standard Not Met in Mathematics and English Language Arts. Mr. Walsh also listed California English Language Development Test results, which reflected Student was at an Intermediate level overall. Student scored at the Beginning levels in Reading and Writing, at the Intermediate level in Listening, and at the Early Advanced level in Speaking. There was no history of behavior referrals or disciplinary actions. The report briefly summarized the conclusions of Student's initial psychoeducational assessment administered in June 2017, upon which the IEP team relied to find Student eligible for special education as a student with a specific learning disability.

89. Mr. Walsh interviewed Student's teachers. Ms. Duque said that Student was very helpful and had a positive attitude. He may have appropriated items during the school day and not been forthcoming about that behavior. Mother escorted him to class. He separated from her, but he would go back out sometimes to exchange papers or say good bye.

90. Mr. Oyler reported that Student wanted to achieve and learn. He was social, motivated, and happy. Student was enthusiastic and likeable and had good social skills. He exaggerated when telling stories. Mr. Oyler said this because sometimes Student related stories that were fanciful, such as saying he had a tiger at his house. Student was sometimes unscrupulous in playing games. For example, Mr. Oyler

⁶ Mr. Walsh's summary of Student's attendance varied slightly from the data on Student's fourth grade report card, which states that Student was absent 41 days during the school year.

observed that when they played card games in class, sometimes Student would hide the cards.

91. Mr. Walsh administered the Test of Nonverbal Intelligence—Fourth Edition, to measure Student’s cognitive functioning. The Nonverbal Intelligence test is a brief, individually administered, language-free test, designed to measure general ability. Student received an index score of 95 on this instrument, which placed him in the average range.

92. Mr. Walsh used the Beery-Buktenica Developmental Test of Visual-Motor Integration—Sixth Edition, to assess Student’s processing. The Beery measures visual-motor integration skills, which is the degree to which visual perception and finger-hand movement were well coordinated. Student obtained a standard score of 109 (average range) on Visual Perception, and a standard score of 111 (high average range) on Motor Coordination. His Visual-Motor Integration score was 110, which placed him in the high average range. This meant that Student’s development of visual-motor coordination regarding pen or pencil control was similar to students in Student’s grade level and age group. These results reflected Student may have little difficulty effectively transferring information from a classroom board or screen and he may be well organized with written work on paper.

93. Mr. Walsh also measured Student’s visual-motor integration skills using the Bender Visual-Motor Gestalt Test, Second Edition. Student received a standard score of 118 (high average) on this instrument. On this test, Student’s performance showed that his visual-motor coordination regarding pen or pencil control may be greater than most students at his grade level and age group.

94. Mr. Walsh administered the Conners Rating Scale 3rd Edition, by providing the rating scales to Ms. Duque and Mr. Oyler. The Conners is an assessment that takes into account home, social, and school settings. The consistency in the scale items across

teacher versions facilitates the comparison of information between sources. The rater reviews the items and decides how often the rater observed the item in the past month, or how true each item was in the last month. A score in the elevated range meant that there was an area of moderate concern. A score in the at risk range reflected a more serious concern. Ms. Duque's ratings showed she had no concern in the areas of Inattention and Hyperactivity/Impulsivity, but her ratings were in the elevated range in the areas of Learning Problems/Executive Functions and Peer Relations, and in the at risk range in the areas of Defiance/Aggression. Mr. Oyler's ratings showed no concern in the areas of Inattention and Peer Relations, and they were in the at risk range in the areas of Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, and Defiance/Aggression.

95. Mr. Walsh administered the Behavior Assessment Scales for Children, Third Edition, and provided the rating scales to Ms. Duque and Mr. Oyler.⁷ The Behavior Assessment Scales measures the child's social/emotional status. Ms. Duque's ratings fell into the at risk range in the area of Externalizing Problems. Her ratings in the other areas (Internalizing Problems, School Problems, Behavioral Symptoms Index, and Adaptive Skills) fell into the no concern range. Mr. Oyler's ratings fell into the at risk range in School Problems. Mr. Oyler's ratings on this scale were based on information from Mother. All other areas (Externalizing Problems, Internalizing Problems, School Problems, and Adaptive Skills) were in the no concern range.⁸

⁷ Mr. Walsh's report states that he administered the Behavior Assessment Scales-2 to Ms. Duque, but this is a typographical error, as the rating forms that Ms. Duque completed and were in evidence were Behavior Assessment Scales-3 rating forms.

⁸ Mr. Walsh's report misreported Mr. Oyler's ratings on the Behavior Assessment Scales. The text of the report states that Mr. Oyler rated Student as at risk in the

96. Mr. Walsh did not administer the Behavioral Assessment Scales or Conners ratings scales to Mother. These assessments do not require parent input, although Mr. Fernandez believed it was good practice to obtain it.

97. Mr. Walsh also administered the Gilliam Autism Rating Scale-3, which is used to identify people who have severe behavioral problems that may be indicative of autism. There are six subscales. Restricted/Repetitive Behaviors measures stereotyped behaviors, fixated interests, routines, or rituals. Social Interaction measures social behaviors. Social Communication measures the individual's responses to social situations and understanding of the intent of social interaction and communication. Emotional Responses measures extreme emotional responses to everyday situations. Cognitive Style measures idiosyncratic fixated interests, characteristics, and cognitive abilities. Maladaptive Speech consists of items that describe deficits and idiosyncrasies in verbal communication. Ms. Duque's ratings generated an autism index scaled score of 58, which reflected a probable chance of autistic-like symptoms.⁹ A parent can provide

Behavioral Symptoms Index, when the table shows a T-Score of 51 (no concern). The text also states that Mr. Oyler rated Student as no concern in the School Problems area, with a T-Score of 52, when the table shows a T-Score of 63 (at risk). The discussion of the Behavior Assessment Scales at the June 6, 2018 IEP meeting, discussed below, where Mr. Walsh presented his report, reflected that the IEP team relied on the scores reported in the tables of the report, and not the text of the report. However, the IEP team meeting notes labeled the at risk category as "Social Problems" not "School Problems."

⁹ The copy of Mr. Walsh's report entered into evidence was inexplicably missing any description of Mr. Oyler's ratings on the Gilliam. However, the protocols for the Gilliam were entered into evidence. They contained Mr. Oyler's ratings, including the information that Mr. Oyler's ratings yielded an autism index rating of 46, which reflected

ratings on the Gilliam, but there was no evidence that Mr. Walsh sent Mother any rating scales for the Gilliam.¹⁰

98. Mr. Walsh considered various eligibilities, and reported his analysis. Student continued to meet the eligibility requirements for specific learning disability. Student did not appear to meet the threshold to be considered a student with autistic-like behaviors requiring educational assistance. He also did not appear to meet the criteria regarding emotional disturbance requiring educational assistance. Counseling currently addressed school concerns regarding adjustment to school and success in school. Student did not appear to meet eligibility as a child with other health impairment, such that his ability to participate in his educational experience was diminished.

99. Mr. Walsh summarized his report. Student's teachers provided scaled information and interview information showing a cognitive ability within the average

an unlikely probability that Student was a student with autism spectrum disorder.

¹⁰ Indeed, the report does not reflect that Mr. Walsh interviewed Mother, although it reflects that he performed a records review that included Mother's input. As Mr. Walsh did not testify, there was no evidence as to why Mr. Walsh did not obtain more of Mother's input. Mr. Walsh's report also contains errors in that it did not include Mr. Oyler's responses on the Gilliam, and it did not accurately report Mr. Oyler's responses on the Behavior Assessment Scales. Student's complaint did not allege that Mr. Walsh's assessment was inappropriate on these grounds, Student did not mention the issues of Mr. Oyler's responses at hearing, and Student presented no evidence as to the impact of these or any other deficiencies on the appropriateness of the assessment. (Ed. Code, § 56502, subd. (i).) Student may file another complaint to pursue these matters. (Ed. Code, § 56509.)

range considering English language acquisition challenges. Visual-motor integration was in the average to high or above average range, with strengths in separate evaluations of visual perception and motor coordination. Emotional and social-emotional development was measured by rating scales and few scales indicate elevated scores in specific areas measured with consistency. Student did not score in the range associated with attention deficit disorders or hyperactivity on the ratings scales completed by his teachers. There were few to no signs of autistic-like behavior on behavior rating scales, or upon direct observation by the assessor. Student did not demonstrate stereotypical behavior associated with autism and he did not have overt language or social delays associated with autism. Academic achievement results showed achievement strengths and weaknesses associated with learning disabilities.

100. Mr. Walsh ended his report with the California Code of Regulations sections defining eligibility for specific learning disability, emotional disturbance, other health impairment, and autistic-like behaviors.

101. Mr. Fernandez commented upon Mr. Walsh's report at hearing. Mr. Fernandez stated that the Behavior Assessment Scales, especially the conduct domain, was an instrument that could be used to assess Student's school avoidance issues. Further, the teachers' ratings on the Behavior Assessment Scales did not rate any of Student's behaviors as significant, but their ratings on the "at risk" areas were not in agreement. These ratings, and indeed, the results of the entire assessment showed there was no consistency across settings. If there were a disability, the ratings would reflect consistency across settings. Therefore, he concluded that Mr. Walsh's assessment did not show any additional disability beyond Student's learning disability.

102. On May 16, 2018, Eric Kung, Psy.D., a clinical psychologist at Garfield Health Center and a California licensed psychologist, wrote a letter addressed to Parents, at Parents' request. The letter confirmed that Student had been receiving

psychological services at Garfield since May 8, 2018. The letter stated Student was provisionally diagnosed with autism spectrum disorder pending an assessment by the Regional Center, and recommended that the Regional Center assess Student to clarify the diagnosis and begin autism-related services. The letter contained a list of approximately 30 symptoms which led to Dr. Kung's provisional diagnosis, under the headings Social Deficits, Communication Deficits, Unusual Interests/Behaviors, and Other Symptoms.

103. Dr. Kung testified at hearing. Student was referred to him by Student's primary care physician. Dr. Kung met with Student one time before writing the letter. Dr. Kung first met with Student, Mother, and Student's sister on May 8, 2018, for approximately an hour, during which he observed Student and received information about Student from all three of them. He suspected Student had a developmental delay and possibly autism. He did not suspect any other diagnosis. Dr. Kung knew Student was not doing well at school, and believed his symptoms would impact his ability to function in a regular classroom environment.

104. Dr. Kung met with the family again for 30 minutes on May 16, 2018, the date of the letter, to discuss what to say in the letter and to whom it should be sent. Dr. Kung did not provide therapy to Student at either of these meetings. He observed certain of the behaviors set forth in his letter, but he did not observe any of the eight behaviors listed under the heading "Other Symptoms." Like Dr. Qian's letter, Dr. Kung's letter did not specify which symptoms he personally observed and which symptoms were reported by family. Mother delivered Dr. Kung's letter to the principal's office.

105. Dr. Kung met with Student, Mother, and his sister a third time, approximately a week or two prior to the hearing. The family requested a referral for home-schooling. Dr. Kung believed that home schooling might be more beneficial than a classroom situation. He knew that Student performed poorly in school, based on his

report cards and family report. He never observed Student at school, or visited Student's class.

106. Dr. Kung's provisional diagnosis that Student had autism spectrum disorder, which was based only upon two brief observations of Student, was not particularly credible. He did not relate his diagnosis to the Diagnostic and Statistical Manual criteria. There was no evidence that he had any professional knowledge as to how his provisional diagnosis related to Student's educational needs. Dr. Kung's referral for home schooling, just because it might be more beneficial for Student, did not demonstrate that Dr. Kung had given much thought to an educational program and placement that was designed to meet Student's needs and provide him a FAPE.

IEP Team Meeting of June 6, 2018

107. Garvey convened what it described as a triennial IEP team meeting on June 6, 2018, towards the end of Student's fourth-grade year, to discuss Mr. Walsh's psychoeducational assessment. The team included Mother, Alma Ulloa (Garvey's Director of Special Education), Mr. Oyler, a Spanish language interpreter, Ms. Duque, Mr. Walsh, and Mr. Lau.

108. The team discussed Student's strengths. As before, teachers and Mother had different opinions regarding Student's behaviors and progress. His teachers described him as a social student who displayed great effort at his studies and was making progress. He could graph ordered pairs in math very well, and he excelled recently in the I-Ready computer program. Ms. Duque commented that Student was making good progress on the I-Ready testing.

109. Mr. Lau expressed that Student understood cause and effect during counseling, and was working on social skills and reducing anxiety. Student advocated for what he wanted. Mother stated that Student was not comfortable and could not relate

to others, he had no friends, and did not want to come to school, but he had not missed school in earlier grades.

110. The team discussed whether other children teased Student. Mother asserted that other children made fun of Student because he went to the resource classroom. Mr. Oyler responded that other children did not generally notice very much when a student went to the resource room, and that he had not observed any children making fun of Student. Ms. Duque remarked that Student reported some teasing in February or March when Mother made her aware of this issue. Ms. Duque spoke to the children Student identified and they did not admit to teasing. Mr. Lau stated that Student sometimes said that people made fun of Student. When asked for specific names, Student could not name them. Mr. Lau asked if Student mentioned any specific names to her, and Mother said there were specific people teasing Student.

111. Mr. Lau formally reported Student's progress on his counseling goal. He had made partial progress in achieving the first objective, to identify and express feelings of anxiety for the purpose of reducing absences from more than 4 times per month to 3 times per month. Student continued to voice reluctance in expressing feelings of anxiety, but also refused to attend school at least once or twice per week since the establishment of a counseling goal. When Student attended school, he was engaged in class and willing to participate in activities. He enjoyed playing games and was often an advocate for himself when he was happy. Student continued to be challenged in managing emotions to attend school and refused to discuss thoughts and feelings. He would benefit from continued counseling to build feelings of safety in school and coping skills for self-regulation.

112. No formal written progress reports were provided on the first short-term objectives of any of Student's academic goals. At hearing, Mr. Oyler testified regarding Student's progress. He had been working on his academic goals since April 2018.

Student had made limited progress because of his inconsistent attendance. Since March or April 2018, Student had missed at least 25 percent of school days.

113. Mr. Walsh reviewed the results of the psychoeducational assessment with the IEP team, and the team also discussed previous assessments. Mother expressed concern regarding some of the elevated ratings on the Conners. The team explained the areas of concern were mild behaviors that were addressed with the classroom management system. Student's counseling services also addressed some of the concerns with Student's peer relations and social skills. The team discussed the results of the two areas that were rated at risk on the Behavior Assessment Scales, and explained that there were no behavior concerns in the school setting that were not addressed by the classroom management system.

114. Mother expressed concern regarding the possibility that Student was a student with autism. The team discussed examples of autistic-like behaviors and explained that Student did not demonstrate those behaviors or characteristics.

115. The IEP team discussed Foothill Family. Mr. Lau stated he had communicated with Foothill Family and confirmed Student was diagnosed with anxiety. Mother agreed to provide a copy of the Foothill Family evaluation report. Foothill Family was investigating whether Student was a student with autism. Ms. Ulloa clarified that there were differences between medical diagnoses and school special education categories.

116. Mr. Ulloa stated Student's academic needs were being addressed by his specialized academic instruction and his anxiety was being addressed by his school-based counseling services. The team considered the program offered in the April 2018 IEP to be appropriate and Student to be progressing on his academic and counseling goals. The IEP team did not change Student's eligibility from specific learning disability, change his services or levels of service, or change his goals and objectives, except to

extend the time for completion of the goals from April 2019 to June 2019.

117. The IEP reflected that Mother signed her agreement to the entire IEP, and checked the box stating the school facilitated parent involvement. At hearing, Mother asserted that the interpreter was not competent to translate, and the interpreter told her she had to sign consent to the IEP because the meeting only involved the assessment results. Mother stated she did not agree with the IEP. Mother advised that Student needed a smaller class setting and a slower pace. Mother asserted she asked for more resource support for Student, because she believed the resource specialist class was smaller. She also requested home-schooling. The psychologist had told her Student needed to be home-schooled or his anxiety would not go away.

118. Ms. Ulloa, who was present at this IEP meeting, testified at hearing and disagreed with Mother. The interpreter was adequate, but may have stumbled over some of the technical terms in the assessment. Ms. Ulloa did not recall whether the interpreter was certified. However, Ms. Ulloa, who also spoke Spanish, was able to further explain those terms. Ms. Ulloa explained to Mother in Spanish the assessment findings regarding autistic-like behaviors, as well as the significance of signing consent to the IEP. Ms. Ulloa stated that Mother was not told she had to sign the IEP. Garvey staff asserted that Mother never expressed disagreement with any IEP. These differing views regarding whether Mother gave consent to the IEP are largely not relevant, as Mother is clearly challenging the IEP in this action, and she has the right to do so.

119. However, Mother's statement that the interpreter misled her into signing consent to the IEP and that she did not realize she had just participated in an IEP meeting are not credible. All, or nearly all pages of the IEP that Mother signed, including the signature page, identified the document as an IEP document. The meeting itself had all of the earmarks of an IEP team meeting, and Mother had attended several of these during this school year. Specifically, the meeting consisted of approximately eight

people and lasted more than an hour; Mother was offered the procedural safeguards documents, and the team discussed an assessment, Student's eligibility, Student's school progress, and Student's educational program. Finally, if Mother thought, as she testified at hearing, that the interpreter was not a competent interpreter, it is questionable that Mother would rely on the interpreter's representation that Mother had to sign consent to the IEP.

STUDENT'S PROGRESS DURING THE 2017-2018 SCHOOL YEAR

120. Ms. Duque was Student's fourth grade teacher during the 2017-2018 school year.¹¹ She considered Student to be working at the first to second grade level in math and English language arts during the school year. He was only working at approximately the first grade level in writing mechanics. He struggled with writing things down, spelling, and writing multiple paragraphs as she expected of fourth grade students. She implemented modifications and accommodations. For example, she gave him reduced classwork, such as assigning him only 10 words for spelling/vocabulary, while the other students would have 20 words. She sat Student close to her, and assigned him a peer tutor. Ms. Duque also did small group instruction adapted to Student's reading level. She kept Mother advised of Student's progress in reading. In her opinion, his lack of progress was due to his large number of absences.

121. Student's teachers never saw Student being bullied, and no bullying came to their attention. Student seemed happy to be at school. Student never cried in Mr. Oyler's classroom, had a temper tantrum, or demonstrated self-injurious behaviors. He could barely recall Student even asking to use the bathroom. Mr. Oyler did not observe or know that anyone said Student was gay until the April 11, 2018, IEP team meeting.

¹¹ Ms. Duque holds a master's degree in early childhood education from California State University, Los Angeles, and has a California teaching credential.

The principal checked it out and found out the kids who said that were really his friends, and it just seemed to be ordinary teasing among friends, which was not pervasive and did not recur.

122. Andrea Calderon was Student's fourth grade English Language Learner intervention teacher. As part of her job, she monitored English Language Learners to provide interventions for those who were at risk of becoming long-term English Language Learners. It takes five to seven years to become fluent in a language, and she described long-term English Language Learners as those students who have attended a California public school for five to seven years and still have not been re-classified as fluent. Ms. Calderon considered Student as at-risk during the 2017-2018 school year for becoming a long-term English Language Learner, because he had been an English Language Learner for several years and was still at the intermediate level. His inability to achieve beyond that level impeded his ability to be successful at school.

123. Student had everyday language, but he lacked academic language. He had difficulty with figurative language, idiomatic expressions, and higher levels of vocabulary. Therefore, Garvey enrolled Student in Ms. Calderon's intervention class, which met for 40 minutes per day, five days per week. There were eight students in the class, all at-risk of being long-term English learners. They worked on building vocabulary, academic language, and language structure, and focused on maximum oral participation and minimal writing. Student attended very infrequently, due to his absences from school.

124. When Student attended Ms. Calderon's class, he actively participated, liked to speak and talk about his life, and loved to read aloud. Sometimes he said things that were far-fetched. The students worked in pairs, and Student was compatible with his classmates. He did not get into any fights. One time, toward the end of the school year, he complained that several boys would not play with him, but when Ms. Calderon

investigated, she learned that Student had acted in an offensive manner during play. Eventually these boys included him in their play again, and there was no evidence that Student ever repeated his offensive behavior. Mother walked Student to class, which Ms. Calderon considered unusual for a fourth-grader, but she was not aware that Student was teased because of it. Ms. Calderon was a credible witness. She was articulate, knowledgeable about her field, and had good recall of events.

125. Student's report card at the end of the 2017-2018 school year, which showed that the grading period ended on June 8, 2018, reflected Student received 2s (Working Toward State Standards) in all areas of Reading Standards, 1 (Not Meeting State Standards) in Writing Standards, 3 (Meets State Standards) in Speaking and Listening Standards, 2 in Language Standards, 1s in all areas of Mathematics Standards, 2 in Social Studies, and a 3 in Science. The comments sections of the report card stated Student showed interest in physical education, science projects, and reading projects. He showed growth in the I-Ready program. During the summer he would benefit from mastering his multiplication facts, reading aloud, and working on I-Ready math and reading lessons. Ms. Duque checked the box stating he was making inadequate progress toward meeting grade level standards in reading/language arts, and may be at risk of retention in future grades. She checked this box because Student was not at grade level.

EVENTS DURING THE 2018-2019 SCHOOL YEAR

126. Prior to the start of the school year, Mother went to the office of Ethan Stocks, Emerson's new principal, expressing concern about enrolling Student at school. She was concerned that Student was anxious about school, and he found it challenging. She told Mr. Stocks that Student had been bullied because he was in special education. Mr. Stocks tried to reassure her that Student's needs would be supported.

127. On September 11, 2018, Dr. Qian wrote a letter addressed "To Whom It

May Concern," regarding Student. The letter stated Student had generalized anxiety disorder, panic disorder with agoraphobia, and depressive disorder. Dr. Qian reported that Student was highly stressed in his current crowded class setting of over 30 students, and he would not be able to learn well under those conditions. The letter recommended that Student receive more accommodations and be placed in a more encouraging educational setting. There was no evidence that Garvey received this letter.

128. Dr. Qian did not recall whether he received the information regarding the classroom setting from Mother or from Student's therapist. He based his conclusion that Student could not learn well on information from Mother and the therapist that Student was unable to go to school. Even if Student went to school, Dr. Qian was of the opinion that Student's ability to learn would be hampered by his high anxiety level and attention deficit disorder. However, the credible testimony of all of the Garvey personnel who worked with Student at school refuted this opinion.

129. In approximately late September, after the fall semester began, Mother came to school again and met with Mr. Stocks. She told Mr. Stocks that Student's teacher was not following his IEP accommodations. However, the accommodations Mother was referring to were not the accommodations in Student's IEP. Mr. Stocks scheduled a parent-teacher conference and also scheduled an IEP amendment meeting to occur after the parent-teacher conference. At the parent-teacher conference, which occurred in approximately late September, Mother shared her concerns about Student not wanting to come to school, and the parties discussed incentives, such as rewarding Student's positive behavior with stickers and the like. Mother also expressed concern about the schoolwork that Student was missing. Student's teacher then provided assignments for Student that he could do at home. Mr. Stocks also gave Mother documentation that permitted her to walk Student to class in the morning. Student has not attended school since that meeting took place.

130. On October 9, 2018, Garvey convened an IEP meeting. The parties, including Mother, Ms. Stocks, Student's special education teacher, and his general education teacher met and discussed Student's anxiety about coming to school, considered prior accommodations, and discussed possible accommodations to implement. Ultimately, the parties agreed that resource teacher and the classroom teacher would develop accommodations and share them with Mother. Mr. Stocks convened another meeting with Mother to review the proposed accommodations. An interpreter was present. The accommodations included shortening Student's homework assignments and prompting Student in class before a transition to another activity. Mother expressed her pleasure with the proposed accommodations, but did not sign an IEP amendment to include the accommodations in the IEP because she wanted to confer with counsel. As of the third day of hearing, Mother had not signed the IEP amendment. On the days Student was present at school, Student's general education classroom teacher reported to Mr. Stocks that he had performed very well in class, and she felt he had the potential to do well in school. Nobody reported to Mr. Stocks that any bullying of Student occurred at school during the 2018-2019 school year. No Garvey staff at the meeting suggested any additional educational support or an additional assessment.

131. As of the last day of hearing, Student had missed more than 30 days of school during the 2018-2019 year. He had been present for only eight or nine days. Mr. Lau was unable to provide any counseling services to Student during the current school year, because Student was not attending school.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA

1. This hearing was held under the Individuals with Disabilities Education Act,

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

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

3. In *Board of Education of the Hendrick Hudson Central School Dist. 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, the *Rowley* court decided that the FAPE requirement of the IDEA was met when a child received access to an education that was reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The Supreme Court recently decided the case of *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S. Ct. 988] (*Endrew F.*) and clarified the *Rowley* standard. *Endrew F.* provides that an IEP must be reasonably calculated to enable "progress appropriate in light of the child's circumstances." (137 S.Ct. at 999.) The Court recognized that this required crafting an IEP that required a prospective judgment, and that judicial review of an IEP must recognize that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Ibid.*) Additionally, the Court stated, "for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, 'be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" (*Id.* at 999 [citing *Rowley, supra*, 458 U.S. at

203-204.]) The Ninth Circuit Court of Appeals has held that *Andrew F.* did not change, but simply clarified *Rowley*. (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535; *K.M. v. Tehachapi Unified School Dist.* (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807, **16-18.)

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

ISSUE 1: DENIAL OF A FAPE DUE TO GARVEY'S FAILURE TO CONDUCT A FUNCTIONAL BEHAVIOR ASSESSMENT OR AN INTENSIVE COUNSELING SERVICES ASSESSMENT

6. Student contends that Garvey should have further assessed Student by performing a functional behavior assessment, or conducting an intensive counseling services assessment, to obtain information about Student's behaviors, anxiety, and unwillingness to attend school. Garvey contends that neither a functional behavior assessment nor an intensive counseling services assessment would be appropriate assessments to obtain information regarding Student's anxiety.

Assessments

7. The failure to comply with procedures for assessments is a procedural violation of the IDEA. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2005) 464 F.3d 1025, 1031.) In this regard, states must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483 (*Target Range*)[*superseded by statute on other grounds*, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 939.] Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Target Range, supra*, at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of a FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

8. The general law pertaining to assessments provides that, before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The pupil must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the pupil has a disability or whether the pupil's educational program is appropriate. The school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information

about the student. This includes any information provided by the parent which may assist in determining whether the student is a child with a disability and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).) (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related service needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

9. As part of a reevaluation, the IEP team and other qualified professionals must review existing evaluation data on the child, including teacher and related service providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. §300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The school district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

10. In the case of *Timothy O. v. Paso Robles Unified School Dist.*, (9th Cir. 2016) 822 F.3d 1105 (*Timothy O.*), the court determined that the failure of a school district to formally assess a student for autism deprived him of a FAPE, and emphasized that a disability is "suspected" and a district must assess when the district has notice the student displayed symptoms of that disability. (*Id.* at p. 1119.) Quoting *Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, at 802, the court noted that "the 'informed suspicions of parents, who may have consulted outside experts,' trigger the requirement

to assess, even if the school district disagrees with the parent's suspicions because '[t]he identification [and assessment] of children who have disabilities should be a cooperative and consultative process.' " (*Timothy O., supra*, at p. 1120.)

Behavior Assessments

11. If a student has already been found eligible for special education, but his absence from school affects his learning, a district has a duty to address the absences in the IEP, regardless of whether they stem from a disability. The IEP team must consider the use of positive behavioral interventions, supports and strategies whenever a child's behavior impedes his or her learning or that of others. (34 C.F.R §300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

12. The IDEA does not require a functional behavior assessment prior to development of a behavior intervention plan unless the child's placement has been changed for disciplinary reasons and the conduct that resulted in discipline is determined to have been a manifestation of the child's disability. (See 20 U.S.C. 1415(k)(1)(f).) The United States Department of Education, in promulgating regulations implementing the IDEA, explained that the IEP team determines whether a behavior implementation plan is required, and although a functional behavior assessment may assist the team to address behavioral issues, the IDEA does not require a functional behavior assessment in order to formulate a behavior intervention plan. (71 Fed. Reg. 46683 (Aug. 14, 2006).)

13. Based on the assessment Garvey performed in May 2018, the IEP team concluded that Student was not eligible for special education in the categories of autistic-like behaviors, emotional disturbance, or other health impairment. The weight of the evidence revealed that Student was not displaying maladaptive or disruptive behaviors at school. Since Student's behavior in not attending school did not occur at school, and since Student behaved well at school when he attended school, Garvey

demonstrated that a functional behavior assessment was not appropriate.

14. However, Garvey did next to nothing to address the reasons for Student's failure to attend school. Garvey had services available, including counseling services, for Student to access when he attended school, and the counseling services were designed to assist Student in overcoming his anxiety and fears regarding attending school. Additionally, Garvey permitted Mother to come to campus and take Student to his classes. The evidence reflected that Student's anxiety was a major factor in Student's refusal to attend school, however, Garvey made no sustained systematic attempt to ascertain the basis for Student's anxiety, and how it could be managed so that Student would attend school. Rather, Garvey variously considered Student's school anxiety as a home problem and not a school problem, or considered Student's anxiety a conduct problem and not an appropriate issue for special education services.

15. Garvey made no effort to explore these assumptions, but the law required such effort. As of the IEP team meeting of November 2017, Garvey knew that Student had been diagnosed with anxiety by outside professionals consulted by Mother, knew, or should have known, that Student anxiety was affecting his school attendance, and knew, or should have known, that Student's failure to attend school would likely adversely affect Student's academic progress. Under the authority of *Timothy O., supra*, Garvey could not simply assume that, because Student's anxiety manifested itself at home, his anxiety was not a problem for the IEP team, or that it was a conduct problem. Rather, Garvey should have performed an intensive counseling services assessment, which is an appropriate assessment to determine more information about a student's anxiety. There was no direct evidence as to why Mr. Walsh, the school psychologist who performed the May 2018 assessment in the areas of emotional disturbance, attention deficit disorder, and autism, did not perform, or assign someone else to perform, an intensive counseling services assessment

16. Yet, Student met all the criteria for eligibility for such services, as described by Ms. Chun-Ho: (1) Student was already eligible for special education; (2) He exhibited significant emotional and behavioral challenges which impeded his access to education and significantly impeded his ability to complete his IEP goals; (3) Student had not responded sufficiently to school counseling or to accommodations, such as having Mother accompany him to school and classes; (4) Student, with his 102 IQ score, had the mental capacity to benefit from the services; (5) and Student required the services to benefit from special education in the least restrictive environment. Indeed, with respect to criterion (5), the evidence demonstrated that Student's unwillingness to attend school not only negatively affected his ability to access his education and to benefit from his special education services, but also that Student's school placement was the least restrictive environment. Such an assessment would have provided more information about Student's anxiety, and about services and techniques that the IEP team could consider so as to assist Student in managing his social and emotional issues. Eventually, such individualized assistance could result in Student attending school more frequently, which, in turn, could assist him in accessing his education and making progress toward his goals.

17. Garvey's failure to perform an intensive counseling services assessment was a procedural violation of the IDEA and the Education Code, which impeded Student's right to a FAPE and caused a deprivation of educational benefits. Garvey deprived Student of a FAPE on this ground during the 2017-2018 school year, when Student began to exhibit reluctance to attend school, through July 31, 2018, the date

the complaint was filed.¹² Therefore, Garvey is ordered to timely perform an intensive counseling services assessment, as set forth below.

ISSUE 2: GARVEY'S OFFERS OF A FAPE WITH RESPECT TO ACADEMICS AND SOCIAL-EMOTIONAL FUNCTIONING SINCE JULY 2016

18. Student contends that, since July 2016, Garvey failed to offer Student a FAPE since July 2016 because, although Student was not making progress in academics, the IEPs did not increase Student's specialized academic instruction or offer additional academic services, and that Student's placement should have been changed to home-hospital. Additionally, Student contends Garvey failed to address his social-emotional status, especially since Garvey knew that Student had been diagnosed with anxiety and was reluctant to attend school.¹³ Garvey contends that the IEPs appropriately addressed

¹² The complaint alleges that Student was denied a FAPE on this ground since July 2016, but there was no evidence that Garvey had any information that Student was anxious about attending school until October 2017.

¹³ The issue as stated in Student's complaint includes a failure to "implement" as well as develop an IEP that offered a FAPE in the areas of academic and social-emotional functioning. However, Student's complaint does not allege that Garvey failed to implement any IEPs on those days when Student attended school, and Student makes no such contention in his closing brief. There is also no specific and separate allegation in the complaint that Garvey failed to implement any IEP as a consequence of Student's absence from school. Regardless, the latter failure, even though unalleged, is encompassed in the conclusion that Garvey deprived Student of a FAPE by failing to adequately address Student's social-emotional issues so that he could attend school. Therefore, in this situation, the compensatory education remedy for this FAPE deprivation as discussed below, necessarily includes any remedy for a failure to

Student's academic deficits, and that Student offered no evidence that they failed to do so. Garvey further contends that it appropriately addressed Student's social-emotional issues by offering counseling, a counseling goal, coordinating with Student's therapist, responding to Mother's allegations of teasing and bullying, and by assessing Student for behavior issues.

19. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Ibid*, citing *Fuhrmann v. East Hanover Bd. of Ed.* (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid*.) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 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, and comported with the student's IEP, 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*.)

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

implement the IEP due to Student's absences from school, and this Decision treats it as such.

achieve those behavioral goals (34 C.F.R. § 300.320(a)(4).) Education Code section 56363, subdivision (b)(10) provides that related services include psychological services. The IDEA regulations specifically describe related services that are required to assist a child with a disability to benefit from special education. (34 C.F.R. § 300.34). Among those services are counseling services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel; medical services; parent counseling and training; psychological services, including psychological counseling for children and parents; and social work services, including group and individual counseling with the child and family, and working with parents on those problems in a child's living situation that affect the child's adjustment. (34 C.F.R. § 300.34(c).)

21. In *Letter to Borucki*, April 11, 1990, 16 IDELR 884, the federal Office of Special Education Programs stated the failure of a special education student to cooperate with his educational program does not relieve the school district of its obligation to provide Student a free appropriate public education. Indeed, OSEP advised the child's failure to cooperate with school staff may be indication of the need for a reevaluation, a revision in the child's IEP, or a change in the child's educational placement.

Bullying

22. If the bullying of a student with a disability causes a deprivation of a meaningful educational benefit to the student, it can constitute a denial of a FAPE under the IDEA. (Office of Special Education and Related Services, *Dear Colleague Letter*, August 20, 2013, 61 IDELR 263.) It does not matter whether 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: (i) whether the bullying occurred, and (ii) whether the bullying resulted in the student not receiving educational benefit within the meaning of *Rowley, supra*, and *Andrew F., supra*.

23. The IDEA does not define bullying. The Education Code does not define bullying in a special education context, but Education Code section 48900, subdivision (r), defines bullying for purposes of suspension or expulsion of a student. In that context, bullying is “any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils, as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following: (a) fear of harm to her person or property; (b) a substantial detrimental effect on the student's physical or mental health; (c) a substantial interference with her academic performance; or (d) a substantial interference with her ability to participate in or benefit from the services, activities, or privileges provided by a school.” Education Code sections 48900.2, 48900.3, and 489.004 refer to acts of sexual harassment, hate, and intimidation, and these statutes do not apply to students who are in kindergarten through third grade.

24. The label applied to the conduct, whether bullying, hazing, teasing, or something else, does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be considered for civil rights implications. (U.S. Dept. of Ed., Office for Civil Rights, *Dear Colleague Letter on Harassment and Bullying*, October 6, 2010, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>, at p. 3.) A sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or an increase in missed classes would generally be sufficient to trigger the school’s obligation to convene an IEP team meeting. (OSERS, *Dear Colleague Letter*, October 21, 2014, 464 IDELR 115.)

25. Student alleged in his complaint that this issue covers the period from July 2016, but Garvey did not find Student eligible for special education services, and thus entitled to a FAPE, until the IEP team meeting of June 6, 2017. Student’s complaint did not allege, and Student did not demonstrate, that Garvey violated the IDEA’s child find

mandate and should have identified Student as a student with special needs any earlier than June 6, 2017.¹⁴

26. Furthermore, Student failed to demonstrate that his initial IEP of June 6, 2017, was not reasonably calculated to provide him with educational benefit had he attended school regularly. Indeed, judged by the snapshot rule, Student's initial IEP of June 6, 2017, was reasonably calculated to provide him with educational benefit. At the time it was developed, no member of the IEP team, including Mother, could predict that Student would develop such anxiety that he would not consistently attend school in fall 2017 and thereafter, which negatively affected some of his progress. (It is noteworthy that, at the time of the April 11, 2018 IEP, Student had met two of the four academic goals in the June 6, 2017 IEP, despite his absences.) At the time the IEP was developed, no member of the IEP team had any reason to believe that the specialized academic instruction offered in that IEP would not be sufficient for Student to make progress as required by *Rowley, supra*, and *Andrew F., supra*. Indeed, Student presented no evidence with respect to any additional services that should have been included in the June 6, 2017 IEP for Student to obtain an educational benefit had he attended school regularly.

27. Student presented no evidence to substantiate his contentions that he was teased and bullied such that Garvey deprived him of a FAPE. Student did not meet his burden of showing that the teasing he alleged was severe or pervasive, or other than a stray comment, such that it would be actionable under the authorities cited above. Student provided no documentation of the teasing or bullying, and offered no evidence

¹⁴ The IDEA's child find mandate requires school districts to actively and systematically seek out, identify, locate, and evaluate all children with disabilities and determine whether the child is eligible for special education services. (20 U.S.C. § 1412(a)(3)(A); Ed. Code, § 56171, 56301, subds. (a) and (b).)

as to when it occurred. Garvey staff acknowledged an incident of teasing regarding Mother taking Student to school in a stroller, but Mother denied that she ever took Student to school in a stroller. The evidence demonstrated that Garvey staff did not ignore the incidents of teasing Student and Mother mentioned, and, in some cases, unsuccessfully attempted to verify them. Under these circumstances, Student has not demonstrated that Garvey is liable with respect to Student's vague allegations of teasing or bullying.

28. However, the weight of the evidence showed that Student's IEPs developed after the June 6, 2017 IEP were not sufficient because they did not offer sufficient services, supports, and accommodations to address Student's failure to attend school. Accordingly, they did not offer Student a FAPE in either the academic or the social-emotional areas. As was discussed above, Garvey had a duty to address Student's failure to attend school. Garvey's failure to fulfill this obligation deprived Student of the benefits of his IEP and deprived Student of a FAPE.

29. Mother presented plenty of information to Garvey regarding Student's aversion to attending school. From October 2017 through the time of hearing, she expressed her own observations to Garvey regarding Student's anxiety and stress about attending school. At the IEP team meeting of November 29, 2017, Mother presented audio and video evidence of Student's behaviors at home when he refused to come to school. At that IEP team meeting she also presented documentation from a Foothill Family therapist regarding Student's diagnosis of anxiety disorder and a prescription for Prozac. At the January 31, 2018 IEP team meeting, Mother again stated that Student refused to come to school. At the April 11, 2018 IEP team meeting, Mother and Ms. Quijada from Foothill Family described Student's symptoms of anxiety and stress regarding attending school. Mother provided a letter from a Foothill Family psychiatrist listing his provisional impressions that Student had a generalized anxiety disorder,

among other disorders, and requesting consideration of home schooling. At the June 6, 2018 IEP team meeting, Mother again stated Student's difficulty with coming to school. Additionally, at that meeting the school counselor related that Foothill Family had diagnosed Student with anxiety, and that Student may be taking medications for anxiety.

30. Despite this plethora of information that Student was suffering from anxiety, and that his anxiety and feelings of stress were preventing him from attending school, Garvey did almost nothing to address Student's school attendance issues. Mr. Oyler visited Student's home once during the 2017-2018 school year, to attempt to investigate Student's unwillingness to come to school and attempt to encourage him to come to school. Mr. Lau attempted to discuss Student's feelings of anxiety and stress with him, and communicated with Ms. Quijada to attempt to help Student. Student's anxiety and school attendance were discussed at all of Student's IEP team meetings during the 2017-2018 school year. Since January 2018, Student had a counseling goal in his IEP to address his anxiety. During the early part of the fall semester of the 2018-2019 school year, Mr. Stocks, Emerson's principal, attempted to work with Mother and Student's teachers to develop accommodations for Student, and he gave Mother permission to accompany Student on campus.

31. Garvey's well-meaning, but relatively meager efforts to assist Student were unsuccessful. Garvey never was able to determine the basis for Student's anxiety about coming to school, because Garvey never performed any intensive counseling services assessment. Such an assessment likely would have demonstrated that Student was eligible for intensive counseling services, and would have helped determine what those services might be. In turn, those services would have been included in Student's IEPs.

32. Throughout the hearing and in Student's IEPs, Garvey acknowledged that Student's failure to attend school seriously impaired Student's ability to progress and to

obtain an educational benefit from his IEP services, but Garvey also contends that it was not obligated to address Student's aversion to coming to school. The failure of Student's IEPs to include any effective techniques, strategies, or services to address Student's unwillingness or inability to come to school deprived Student of a FAPE. Student is entitled to remedies for this FAPE deprivation, as set forth below.

ISSUE 3: FAILING TO RECOGNIZE MOTHER AND STUDENT'S PRIVATE COUNSELOR AS VALID MEMBERS OF THE IEP TEAM

33. In his complaint, Student contends that Garvey was disdainful of Mother and did not take into consideration the suggestions and concerns of Mother and Ms. Quijada. In his closing brief, Student does not mention Ms. Quijada, and additionally contends that Garvey (a) did not obtain Mother's input on the behavior rating scales that Mr. Walsh administered to Student's teachers during his May 2018 assessment and (b) did not provide a certified Spanish interpreter at the June 6, 2018 IEP meeting. Student also contends that the interpreter misinformed Mother she had to sign in agreement with the June 6, 2018 IEP. Student contends all of this conduct impeded Mother's right to participate in the decision making process with respect to Student's educational program. Garvey contends that it was responsive to Mother's and Ms. Quijada's concerns. Garvey further contends that Mother signed all IEPs without any written dissent, and also agreed that the school facilitated parental involvement on the June 6, 2018, IEP.

34. The IDEA and the Education Code emphasize that parents are important members of the IEP team. Indeed, any conduct by a school district that prevents or inhibits a parent's participation in the IEP process can constitute a deprivation of a FAPE under certain circumstances. (*Target Range, supra*, 960 F.2. 1479 at 1483; 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

35. The parents of a child with a disability must be afforded an opportunity to

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

36. An IEP team must consider a parent's input, but it need not necessarily follow a parent's wishes. For example, in *Gregory K. v. Longview School Dist.*, *supra*, 811 F.2d 1307, 1314, the court stated that if a 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, and comported with the student's IEP, 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.*) Similarly, when presented with an outside expert's report, a school district need only review and consider the report; it need not follow its recommendations. (*G.D. v. Westmoreland School Dist.* (1st Cir. 1991) 930 F.2d. 942, 947.)

37. Student's contentions pertaining to this issue, as expressed in his closing brief, have changed dramatically from his allegations in his complaint and his presentation of his case at hearing. First, Student's complaint did not mention the interpretation services at the June 8, 2018 IEP team meeting, and therefore Student's contention violates Education Code section 56502, subdivision (i). In any event, Student's contention lacks merit. Student cited no legal authority that an interpreter at an IEP team meeting must be a certified interpreter, and did not offer any proof that the

interpreter at the IEP team meeting was not a certified interpreter. The fact that Ms. Ulloa did not know whether the interpreter was certified is hardly proof that the interpreter was not so certified. Additionally, Student did not demonstrate that Mother disagreed with the IEP, or signed agreement to it based on a misrepresentation. Rather, the weight of the evidence showed that Ms. Ulloa, Garvey's program specialist and a Spanish speaker, fully explained to Mother the significance of Mother's signature consenting to the IEP. The IEP notes do not reflect that Mother disagreed with the IEP, nor did she submit to Garvey any writing disagreeing with the IEP.

38. Second, as set forth above, Student's complaint did not allege any defects in the assessment process. Student's new contentions attempt to circumvent his failure to allege such defects by converting the issue into an allegation that the assessment process violated Mother's right to participate in Student's educational program. Student offers no legal authority that he can do so in this situation without violating Education Code section 56502, subdivision (i). In any event, this contention was not supported by the evidence. Student did not call Mr. Walsh, the assessor, to testify. Student presented no evidence on the foundational question as to whether he gave Mother the rating scales to complete. Student offered no evidence that the assessment was inappropriate because Mother did not fill out the rating scales, or that the results of the assessment would have been any different had Mother filled out the rating scales. Therefore, this contention is unmeritorious.

39. Here, the weight of the evidence reflected that, at all relevant times, Garvey considered Mother and Ms. Quijada as valid members of the IEP team. Beginning in December 2016, and for the four month period prior to assessing Student for special education in April 2017, Garvey held a series of Student Study Team meetings to attempt to address Mother's concerns. When it became apparent that these meetings were not providing an effective solution, Garvey assessed Student for special education.

In October 2017, when Mother requested another assessment due to Student's issues with school attendance, Garvey timely held an IEP team meeting in November 2017 to discuss Mother's concerns. At that meeting, Mr. Lau was assigned to communicate with Foothill Family to obtain further information. Mr. Lau did so, and at a follow-up IEP team meeting in January 2018, Student's IEP was amended to provide for counseling services. Based upon information provided by Foothill Family, Garvey assessed Student for additional disability areas.

40. Mother attended every IEP team meeting, and Student's problems were discussed at each IEP team meeting. Mother's input was noted and considered in all of the subject IEPs. Her comments were included in the notes of every IEP, and the IEP notes also reflect that Garvey members of the IEP team answered Mother's questions. Mother checked the box on almost every IEP asserting that the school facilitated parental involvement. Ms. Quijada's input was also included in the IEP notes, and Mr. Lau, Student's school counselor, consulted with her regarding Student's therapy. At all relevant times, Garvey considered and followed-up on Mother's concerns, whether by providing a prior written notice, scheduling an IEP team meeting, performing assessments, or amending the IEP. Garvey checked into both her and Student's complaints that he was being teased or bullied.

41. At the IEP team meetings, Mother and Garvey staff disagreed regarding Student's affect and behaviors, as Garvey staff did not see those social and emotional behaviors at school that Mother observed at home. Similarly, Garvey staff observed that Student was teased occasionally at school, but they did not observe him being bullied, and they disagreed with Mother on that issue. These disagreements did not prevent Mother from expressing herself at the IEP team meetings, or contacting staff outside of the IEP process when she had concerns.

42. As is stated elsewhere in this Decision, Garvey's efforts to assist Student to

access and benefit from his education were not sufficient. However, Garvey did not exclude Mother or Ms. Quijada from the IEP process, or inhibit their participation in the process, or ignore Mother's and Ms. Quijada's concerns. The evidence showed that Garvey did not deny Student a FAPE on this ground.

REMEDIES

1. Student prevailed on Issues 1 and 2. As relief, Student proposed a variety of remedies, including independent educational evaluations in a variety of purported areas of need, and compensatory education in the form of specialized academic instruction, behavioral therapy services, occupational therapy services, speech and language services, and counseling services.¹⁵

2. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist., v. T.A.* (2009) 557 U.S. 230, 240 [129 S.Ct. 2484].)

3. In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, at p. 374 [the purpose of the IDEA is to provide students with disabilities "a free appropriate public education which emphasizes special

¹⁵ Student's issues as alleged in the complaint and stated in the PHC Order did not relate to many of these proposed remedies, and no evidence was presented as to many of these proposed remedies.

education and related services to meet their unique needs.”].) Appropriate relief means “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Puyallup, supra*, 31 F.3d. 1489, 1497.)

4. Student demonstrated that he was denied a FAPE because Garvey failed to perform an intensive counseling services assessment and also failed to develop IEPs with strategies and services to address Student’s anxiety and stress regarding school attendance. These failures resulted in Student’s inability to consistently attend school and thereby progress in and benefit from his education. Therefore, Garvey shall perform an intensive counseling services assessment, and hold an IEP team meeting to discuss the assessment within 60 days after receiving Parent’s signature on the consent to assess. While Garvey is performing the subject assessment, through the date of the IEP team meeting Garvey will hold to discuss the assessment, Garvey will provide Student with five hours per week of home-hospital instruction through a certified nonpublic agency.¹⁶

5. School districts may be ordered to provide compensatory education or

¹⁶ This assessment is not ordered to be an independent assessment, because this assessment should be completed as soon as possible for Student’s benefit, and there are legal mechanisms in place to ensure timely completion of an assessment when it is performed by a school district such as Garvey. Additionally, Student has the ability to request an independent assessment after Garvey completes the assessment. In contrast, Student, who presented very little evidence as to remedies, offered no evidence as to how quickly an independent intensive counseling services assessment could be performed by a qualified person who met the requirements of the Special Education Local Plan Area to which Garvey belongs. Nor did Student offer evidence that Garvey could not perform an adequate intensive counseling services assessment.

additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 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 analysis, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

6. To compensate Student for the educational benefit he lost by reason of Garvey’s failure to address his anxieties and fears regarding school attendance, Student shall receive a block of 18 hours of specialized academic instruction provided by a nonpublic agency. Student’s absences from school also caused him to miss his school-based counseling services. However, the evidence reflects that Student has been receiving counseling from an outside source, and it is unclear that adding additional counseling from another outside source, such as a nonpublic agency provider, would be helpful to Student in mitigating his anxiety so that he can attend school. There is also a concern that the home-hospital services ordered in this Decision could risk increasing Student’s comfort with being home and therefore increase his discomfort with attending school. Therefore, instead of providing additional hours of compensatory counseling services to Student, and in an attempt to mitigate the possibility that Student will become accustomed to home schooling, Garvey shall provide Parent counseling and training. Parent shall receive four-and-a-half hours of counseling provided by a nonpublic agency, focusing on strategies and techniques Parent can employ to address Student’s school attendance issues, including Student’s separation anxiety, and to

motivate Student to attend school. Parent counseling and training is a well-established related service under the IDEA (34 C.F.R. § 300.34(c)(8).), which school districts can provide to parents. Under the circumstances of this case, such services may be a more useful remedy to address Student's anxiety about attending school than direct counseling services to Student would be.

7. The calculation of these amounts of compensatory education begins with the determination that Garvey should have developed an assessment plan in early January 2018, immediately after the end of its winter break. By that time, Garvey had known of Student's anxiety diagnosis, and that Student had been having difficulty attending school throughout the entire fall.

8. There may be some rationale for Garvey waiting until May 2018 to conduct its assessment to determine whether Student was eligible as a student with an emotional disturbance, as among the eligibility criteria for such a category is that the Student demonstrate specific characteristics over a long period of time. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).) However, no such rationale supports any delay in conducting an intensive counseling services assessment under the circumstances of this case, when Student's unwillingness to attend school is not diminishing, and when his ongoing failure to attend school is disrupting his education.

9. Indeed, these circumstances also outweigh the fact that one of the criteria for eligibility for intensive counseling services is whether lower-tier services have been effective, and therefore there is some benefit in giving them time to work. Overwhelming evidence demonstrated that Student could not benefit from lower tier services because his anxiety prevented him from attending school to receive the services. Therefore, the norm to delay the assessment is not rational in this case, and it should not be strictly adhered to. This is especially so when, as here, Student was not only receiving counseling at school, but he was also receiving therapy from an outside

source, and they were not effective in achieving Student's attendance at school. Accordingly, the calculation of the amount of the compensatory education award ignores any typical time constraint on performing an intensive counseling services assessment, as Student's anxiety and stress were causing him to miss more and more school.

10. Assuming that Garvey received consent to an assessment plan by approximately January 25, 2018 (15 days after Garvey became aware of the need for the assessment, pursuant to Ed. Code, § 56321, subd. (a)), Garvey would have 60 days to complete the assessment and hold an IEP team meeting to discuss it. (Ed. Code, 56344, subd. (a).) At least one court has decided that the calculation of an award of compensatory education in a child find situation properly begins on the date when an IEP would have been due (i.e., the date district would have made a FAPE offer) had the district promptly acted on its duty to assess. (*E.S. v. Conejo Valley Unified School Dist.* (C.D. Cal., July 27, 2018, No. CV 17-2629 SS) 2018 WL 3630297.) (*Conejo Valley*). There is no reason why the *Conejo Valley* calculation standard should not apply to this analogous situation of assessing for a newly suspected disability. Therefore, the IEP meeting to discuss the results of the intensive counseling services assessment, at which Student likely would have been found eligible for such services, would have occurred on or about March 16, 2018. Assuming that the school year ended on or about June 8, 2018, which was the date that marked the end of the last grading period for the 2017-2018 school year, that meant that there were approximately 59 days left in the school year (without making allowances for any school vacations or holidays other than Memorial Day). The evidence reflected that Student missed approximately 25 percent of school days due to his anxiety, which means he missed approximately 15 days of school during that period. During the 2018-2019 school year, the evidence as of October 25, 2018, the last day of hearing, reflected that Student missed more than 30 days of school.

The evidence reflected that these absences were also due to his anxiety. Adding the approximately 15 days of school missed during spring of the 2017-2018 school year to the approximately 30 days of school missed during the fall semester of the 2018-2019 school year, Student has missed a total of approximately 45 days of school, or approximately nine weeks of school between March 16, 2018, and the time of hearing.¹⁷

11. The nine weeks of missed school provide the basis for calculating the amount of compensatory services Student is owed. An award of compensatory services may track the frequency of the services offered in a subsequent agreed-upon IEP. (*Conejo Valley, supra*, 2018 WL 3630297.) The IEP of June 6, 2018, which was the last agreed-upon IEP between the parties in evidence, provided that Student would receive two hours per week of specialized academic instruction and 30 minutes per week of counseling.¹⁸ Therefore, Student shall receive a block of 18 hours (calculated as 2 hours per week for 9 weeks) of specialized academic instruction, as ordered below. Parents shall receive four-and-one-half hours (calculated as 30 minutes per week for 9 weeks) of counseling services, as ordered below.

¹⁷ Garvey also offered four weeks of special education summer school services in the April 2018 and June 2018 IEPs. Enrollment in special education summer school is optional. There was no evidence that Student was ever enrolled in or attempted to attend Garvey's special education summer school, and therefore those four weeks are not included in the compensatory education calculation.

¹⁸ Student contended that this IEP generally did not provide enough services with respect to dealing with Student's anxiety and its impact on his academics. However, Student offered no evidence that the specific amounts of specialized academic instruction and counseling services offered in this IEP were deficient.

ORDER

1. Within 15 days from the date of this Decision, Garvey shall provide an assessment plan to Parent to obtain Parent's consent for Garvey to perform an educationally related intensive counseling services assessment.
2. Garvey shall perform the assessment and hold an IEP team meeting within 60 days after receiving Parent's consent to assessment, to review the assessment results and develop an IEP based upon those results.
3. While the assessment ordered in items 1 and 2 above is pending, and through the completion of the IEP meeting ordered in item 2, Garvey shall provide 5 hours per week of home-hospital instruction to Student by a California certified nonpublic agency. This remedy is equitable only and is not stay put.
4. Garvey shall provide Student a block of 18 hours of specialized academic instruction by a California certified nonpublic agency, to occur at home or at another location to be agreed upon by Parent and the nonpublic agency. If the services are held at a location other than Student's home, Garvey shall reimburse Parent for round-trip transportation for travel to the location. This remedy is compensatory only and is not stay put.
5. Garvey shall provide Parent a block of four-and-one-half hours of counseling by a California certified nonpublic agency, to occur at home or at another location to be agreed upon by Parent and the nonpublic agency, to focus on strategies and techniques Parent can employ to address Student's school attendance issues, including Student's separation anxiety, and to motivate Student to attend school. If the services are held at a location other than Student's home, Garvey shall reimburse for round-trip transportation for travel to the location. This remedy is compensatory only and is not stay put.
6. All other relief sought by Student is 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. Student prevailed on Issues 1 and 2. Garvey prevailed on Issue 3.

RIGHT TO APPEAL

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: December 5, 2018

/s/

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings