

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OXNARD SCHOOL DISTRICT.

OAH Case No. 2018080844

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DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on August 17, 2018, naming Oxnard School District. Oxnard served its written response to Student's complaint on September 26, 2018. Administrative Law Judge Robert G. Martin heard this matter in Oxnard, California on October 4, 15, 16, 17, 22, 23, 24, 25, 29 and 30, 2018.

Janeen Steel and Shawna Parks, Attorneys at Law, represented Student. Mother attended the hearing on behalf of Student. Father attended on October 4, 15, 16 and 17, 2018. Student did not attend the hearing. Lawrence Joe and April Navarro, Attorneys at Law, represented Oxnard. Oxnard Special Education Director Amelia Sugden attended the hearing on behalf of Oxnard.

At the parties' request, OAH continued the matter to December 3, 2018, for written closing arguments. The record closed on December 3, 2018, upon timely receipt of closing briefs from the parties.

## ISSUES

1. Did Oxnard deny Student a free appropriate public education by failing in its child find duty from February 26, 2016 to the date of the filing of the complaint?

2. Did Oxnard deny Student a FAPE by: (a) failing to make any offer of FAPE prior to January 11, 2018; (b) failing to make an appropriate offer of FAPE in the individualized education programs dated January 11, 2018, January 22, 2018, February 26, 2018, May 1, 2018, June 7, 2018, and July 26, 2018; and (c) failing to implement the January 11, 2018 offer of FAPE?

3. Did Oxnard deny Student a FAPE by failing to use appropriate behavior interventions and by improper use of restraint and seclusion as a behavior intervention?

4. Did Oxnard deny Student a FAPE by failing to comply with the following procedural requirements: (a) failing to make a clear written offer of FAPE in the initial IEP; (b) failing to complete an IEP within 60 days of the initial assessment plan; and (c) failing to include a general education teacher at the May 1, June 7 and July 26, 2018 IEP meetings?

## SUMMARY OF DECISION

Student's academic and behavioral challenges began when he entered kindergarten during the 2015-2016 school year. Oxnard addressed Student's difficulties at a student success team meeting in February 2016. By October 25, 2016, after the interventions put in place in February were complete and Student's academic and behavioral difficulties were more severe, Oxnard violated child find by failing to refer Student for assessment. Student should have been referred for assessment in October, 2016.

Oxnard did not assess Student until January 2018. Oxnard failed to complete the assessment and hold an initial IEP team meeting within the statutory timelines and failed to offer Student an IEP at any time before January 11, 2018, at which time Student was found eligible for special education. The January 11 and 22, 2018 IEPs were not reasonably calculated to offer Student a FAPE under the circumstances. Student's behaviors had escalated in frequency and physical aggression to the point where he was

a danger to himself and others. The January IEPs did not appropriately address Student's behavior issues. As to the services offered, Oxnard did not implement the level of speech/language therapy and specialized academic instruction in the January 11, 2018 IEP. Student did not prove the IEPs dated February 26, 2018, May 1, 2018, June 7, 2018, and July 26, 2018 failed to offer behavior support reasonably calculated to enable Student to make progress on his goals, at the time the IEPs were offered.

Student did not prove Oxnard used improper seclusion and restraint as a behavior intervention. Student's behavior was extreme, violent, unpredictable and uncontrollable. Oxnard staff was properly trained to use reasonable restraint and seclusion to protect Student, and others, from physical harm. Physical restraint was used only to the extent the restraint was necessary and only for the amount of time required under the circumstances.

## FACTUAL FINDINGS

1. At the time of hearing, Student was an eight year-old third grader who had resided at all relevant times within the boundaries of Oxnard. He was first found eligible for special education in January 2018. Student had not attended school since June 2018, and was not receiving any educational program at home.

### EARLY DEVELOPMENT

2. Student was born in August 2010. Student was somewhat slow in reaching developmental milestones, but neither Parents, nor Student's pediatrician, thought that he might have a disability. Student did not receive any medical treatments or services related to any disability. Student did not attend preschool.

### 2015-2016 KINDERGARTEN AT ROSE AVENUE ELEMENTARY

3. Student began his schooling in August 2015, at age five, in a general

education kindergarten at Oxnard's Rose Avenue Elementary School. Student liked being at school, and was generally kind, happy, and energetic. At the end of each trimester of the school year, Student's teacher, Gina Hawkins, evaluated his performance in language arts and mathematics using letter grades in 22 common core state standards benchmarks used throughout the state of California, and in other states, to describe what a kindergarten student should know and be able to do in those subjects. Ms. Hawkins evaluated Student for effort-only in five academic subjects – science, social studies, art, music and physical education. She also evaluated Student's effort towards developing skills in sixteen aspects of work organization and task completion, classroom behavior, cooperation with peers, and following rules, needed for successful learning.

4. In his first trimester, in the academic subjects in which he was graded only for effort – science, social studies, art, and music – Student's effort was satisfactory. However, Student had difficulty understanding new concepts and was easily distracted, and he immediately began to struggle with language arts, mathematics, and mastering skills needed for successful learning. Student made no progress towards reading common, frequently-used words like "the," "of," and "and." He did not make good progress recognizing or writing upper and lower case letters, or identifying consonant letter sounds. In mathematics, he did not make good progress identifying or writing numbers, or identifying and drawing shapes. Overall, Student met none of the 14 first-trimester common core state standards benchmarks for language arts and mathematics. Student also struggled to master the 16 skills for successful learning that he was supposed to learn in kindergarten, and his teacher rated him at risk to repeat kindergarten. Student's development of skills of organizing himself and his work, working independently, and completing tasks, all needed improvement, as did his classroom behavior in the areas of self-control, listening skills, accepting responsibility, and expressing his feelings appropriately. Student's cooperation with other Students

needed improvement in the areas of treating his peers with respect and working cooperatively with them. His ability to follow rules also needed improvement in the areas of following directions and showing respect for authority.

5. Rose Avenue's Principal, Pablo Ordaz, first became aware of Student in November 2015, when Ms. Hawkins asked him to help transition Student from the playground back to class. Shortly thereafter, at the monthly collaboration meeting with Mr. Ordaz and teachers to discuss student progress, Ms. Hawkins reported that Student was often upset or angry, and frequently took three to five minutes to calm down and return to class. Student's academic progress was also poor. Transitioning problems were common among general education kindergarteners at Rose Avenue. Many of them received group counseling to help them learn to transition, and individual counseling when their teacher or counselor observed them having trouble transitioning. Mr. Ordaz asked school counselor Mayra Perez<sup>1</sup> to help Student with transitioning, and told Ms. Hawkins to arrange a student success team meeting with teacher, staff and Parents to discuss how to help Student academically and with transitioning.

6. Ms. Hawkins asked Rose Avenue's outreach counselor, Raquel Rodriguez, to arrange a student success team meeting, which was ultimately scheduled for February 25, 2016. Ms. Rodriguez, following her usual practice, gave Student's teacher, Ms. Hawkins, a note to put in Students' backpack to invite Parents to the meeting. Parents did not receive the notice of the student success team meeting, and Ms. Rodriguez did not verify whether they would be attending.

7. Prior to the meeting, Ms. Hawkins had an intervention services provider tutor meet with Student at school to help him learn letter sounds. As of February 25,

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<sup>1</sup> Mayra Perez is referred to herein as "school counselor" to avoid confusion with Student's second-grade principal, Brasilia Perez, who is referenced more frequently.

2016, Student knew only 20 of these 78 sounds. Ms. Hawkins also asked that the school's speech therapist, Angel Dominguez, attend the meeting to discuss Student's lisp that affected his ability to pronounce "s" and "z" and made him difficult to understand.

8. Student's referral to a student success team was consistent with Oxnard's practice of attempting general education interventions through a student success team before assessing a student for possible disabilities requiring special education. In this instance, there was no evidence that Parents, or Oxnard teachers or staff, discussed whether Student might have a disability before Oxnard scheduled the student success team meeting.

9. Student's academic progress improved only slightly during his second trimester of kindergarten. He made slow progress in reading, but continued to have difficulty staying on task, and memorizing basic math facts. Overall, Student met none of the 22 common core state standards benchmarks for language arts and mathematics. Student made little progress towards nine common core state standards: identifying upper and lower case letters; identifying consonant letter sounds; reading common, frequently-used words; reading text with purpose and understanding; writing; printing letters; spelling words phonetically; identifying and writing numbers; and counting objects. Student made acceptable progress towards 13 other common core state standards: understanding concepts of print such as reading from left to right and top to bottom; identifying and producing rhyming words; identifying vowel sounds; understanding key ideas and details; participating in collaborative conversations; asking and answering questions; capitalizing words; recognizing and naming ending punctuation; comparing numbers; representing addition and subtraction using objects, fingers, etc.; solving addition and subtraction word problems; identifying and describing geometric shapes; and analyzing, comparing and creating shapes.

10. Student's skills in organization and task completion did not improve. His learning behaviors, and cooperation with peers, each improved slightly, as he made satisfactory efforts to express his feelings appropriately, and to treat his peers with respect. His ability to follow rules improved in two of four areas: he satisfactorily followed directions, and showed respect for authority. He also continued to show respect for property, but his previously satisfactory effort to control his talking declined, and he needed improvement in that area.

#### February 25, 2016: First Student Success Team Meeting

11. Ms. Hawkins, Mr. Ordaz, Ms. Rodriguez, Mr. Dominguez, and the school counselor attended Student's February 25, 2016 student success team meeting. Parents had not received notice of the meeting, and did not attend. The team discussed rescheduling the meeting to give Parents an opportunity to attend, but decided to go forward with the meeting because Ms. Hawkins urgently wanted to address Student's academic issues.

12. The participants discussed Student's strengths – that he was generally kind, happy and energetic. Ms. Hawkins was concerned about Student's academic difficulties with letter sounds, counting and number recognition; his lack of attention and focus; social/emotional issues; his anger and tantrums; and his lisp. Ms. Hawkins was concerned that Student's tantrums were interfering with his academics, because he was unable to focus on classroom instruction and his work for some time after each tantrum.

13. Following discussion, the student success team decided on three strategies to address Student's issues: (1) the school counselor would enroll Student in a social skills boys' group to work on his anger and tantrums; (2) Mr. Dominguez would informally observe Student to see whether Student's lisp could be the result of a speech impairment needing a formal assessment for special education; and (3) Ms. Hawkins would continue her existing efforts to improve Student's academic performance. The

participants agreed to follow-up on Student's progress with another student success team meeting after eight to ten weeks.

14. As of the February 25, 2016 meeting, the student success team members did not suspect Student had a disability and believed Student's difficulties were of types and intensity not unusual among general education students transitioning without preschool into their first year of school. In Mr. Ordaz's experience, such issues usually resolved after an adjustment period without special education. According to Mr. Ordaz, Oxnard did not have a policy against teachers referring a general education kindergartener for special education assessment, he could not recall an instance where a general education kindergartener was referred for assessment absent a specific formal request from a parent.

15. Shortly after the student success team meeting, Mr. Dominguez observed Student in class for 25 minutes. Student's lisp appeared to result from missing front baby teeth, and was normal for his age. Mr. Dominguez did not believe that Student's lisp might be the result of a speech impairment requiring special education, and he reported that he did not believe Student needed to be assessed for a possible speech impairment. Student began attending a boys' social skills group in March 2016 to address his temper, and Ms. Hawkins continued her existing efforts to improve Student's academics.

16. In Student's final trimester of kindergarten, from March to June 2016, his academic performance improved only marginally. Student ended the year failing to make any progress in reading text with purpose and understanding, and without good progress in identifying letters and their sounds, or in identifying numbers and counting. He met the benchmarks in only two of 22 common core state standards; namely, Student was able to participate in collaborative conversations and ask and answer questions. Student's skills in organization and task completion, and in classroom



behaviors, remained unchanged from the second trimester, with improvement from the first trimester shown only in his ability to express his feelings appropriately. Student's two areas of significant improvement from the first trimester were his cooperation with peers, where his efforts to treat peers with respect and work cooperatively with them went from needing improvement to satisfactory, and in following rules, where he began the year needing improvement in following directions and showing respect for authority, and ended the year with satisfactory efforts in those areas, as well as in the other evaluated areas of showing respect for property and controlling his talking.

17. Despite Ms. Hawkins' first-trimester concern that Student might need to repeat kindergarten, and his lack of progress in subsequent trimesters towards meeting common-core benchmarks, mastering organization and task-completion skills, and controlling his classroom behavior, Oxnard promoted Student to first grade. Mother was concerned that Student had not made good progress in the 2015-2016 school year, and needed to repeat kindergarten. Mother spoke with Ms. Hawkins, who told her Oxnard generally was no longer having students repeat a grade. She also said that the school felt that Student could catch up with his peers during first grade.

#### 2016-2017 FIRST GRADE AT ROSE AVENUE ELEMENTARY

18. Student, then six years old, returned to Rose Avenue Elementary in August 2016, as a pupil in teacher Michelle Moran's first grade general education class. As in kindergarten, Student enjoyed school and being in the classroom. He was willing to try new things and worked hard to complete tasks in a timely manner. However, despite his enthusiasm and hard work, Student continued to fall behind academically. Although he continued to receive satisfactory grades for effort in science, social studies, art, music and physical education, he met only one of eight common core benchmarks in his first trimester. Student was close to meeting the common core language benchmark. He was not meeting benchmarks in decoding words and text using phonics, speaking and

listening, and mathematics operations. Student was far below meeting the benchmarks for word analysis skills, reading, and writing.

19. Student continued to get upset easily. He also exhibited ongoing aggression towards some of his classmates; tripping them, ripping up their papers, and, in one instance, punching a classmate. At hearing, Ms. Moran described these behaviors as “nothing out of the ordinary.”

#### October 25, 2016 Second Student Success Team Meeting

20. Student’s second student success team meeting convened on October 25, 2016. Ms. Moran, Mr. Ordaz, Ms. Rodriguez, Mr. Dominguez, the school counselor, and school psychologist Lucy Perales attended. Ms. Rodriguez spoke to Mother before the meeting. Mother said Parents would not be able to attend the meeting, but authorized it to go forward without them.

21. Ms. Rodriguez scheduled the student success team to proceed without Parents, instead of trying to reschedule, because Ms. Moran urgently wanted the team to meet to address Student’s academic issues. As Ms. Moran noted in Student’s first-trimester report card, Student was “having a difficult time understanding and applying the concepts we learn at school. [Student] is at risk for retention.” As of October 25, 2016, all the interventions and strategies implemented following Student’s February 25, 2016 student success team meeting were completed. Student had completed the time allotted for participation in the social skills boys’ group intended to work on his anger and tantrums. Mr. Dominguez had observed Student and concluded that his frontal lisp was not indicative of a possible speech impairment needing assessment for special education, and Ms. Hawkins and Ms. Moran had completed their academic interventions. However, Student still got upset easily, his lisp had not resolved, and his performance remained low in all academic areas. Additionally, Student was frequently absent, did not bring his tablet to school, and had turned in no homework assignments

since the start of the school year.

22. The student success team did not discuss whether Student's continuing failure to make progress in his academics, his ability to understand and apply learning concepts, or his lisp, despite the interventions provided, might indicate a suspected disability. The team discussed whether some of Student's academic and behavioral difficulties might be caused by family instability, but did not discuss that possibility with Parents. Ultimately, the team decided to wait to see if Student's lisp resolved on its own as Mr. Dominguez expected, and to extend Student's participation in the boys' social skills group with the school counselor. Additionally, the team decided to provide academic tutoring for Student four times per week after-school, if Parents agreed, and space was available.

23. On November 17, 2016, Ms. Rodriguez met with Mother during Mother's parent/teacher conference with Ms. Moran. Ms. Rodriguez reviewed the notes of the October 25, 2016 student success team meeting with Mother. Mother signed the notes and approved Student's participation in an after-school program, which began in January 2017.

#### January-June 2017: Escalating Aggressive Behaviors

24. Student's tantrums and aggressive behaviors increased markedly beginning in January 2017, after the winter break. In the first major incident, Student became enraged for no apparent reason in Ms. Moran's class. He cursed, overturned desks in the class, and tore the papers off the class bulletin boards, finally running from the classroom when Principal Ordaz arrived at Ms. Moran's request. Mr. Ordaz called Mother to take Student home from school, then waited with Student and the school counselor for four hours until Mother arrived to take Student home. Similar incidents occurred several times in the last week of January, 2017, and even more often in February and March, 2017. Ms. Moran could not identify a consistent trigger for

Student's destructive behavior, but it often started with his refusal to comply with a request from Ms. Moran, followed by rapid escalation into screaming, cursing, throwing chairs, then running from the classroom outside to the school grounds. Soon, the school was calling Mother three or four times a week to take Student home.

25. On March 28, 2017, Ms. Moran was counseling Student and a classmate after an incident between them. When his classmate bent over, Student said, "fuck it," and kicked the classmate in the head without any provocation. Ms. Moran suspended Student for the remainder of March 28, and all of March 29.

26. Student's tantrums traumatized his classmates. Student's behavior also traumatized Ms. Moran, who suffered from panic attacks and chest pains, and described her experience as Student's teacher as her "worst year ever." Fearing for her own safety and that of the other students in her class, Ms. Moran had to evacuate her classroom to escape Student on at least five occasions between March and June 2017. She taught the other students a secret safe word, "ice cream," that she would say to signal the class to evacuate when Student began to get out of control.

27. Despite Student's extreme behavior, and a continuing failure to make academic progress, Oxnard did not propose assessing the six-year old's possible need for special education. Instead, it arranged for Student to participate again in the boys' social skills group, beginning in March 2017. It also arranged weekly anger management therapy sessions from an outside provider, New Dawn Counseling, beginning in April 2017, and scheduled Student's third student success team meeting for April 26, 2017.

#### April 26, 2017 Third Student Success Team Meeting

28. Ms. Moran, Mr. Ordaz, Ms. Rodriguez, the school counselor, and academic coach Gene Figueroa attended the April 26, 2017 student success team meeting. Parents did not attend. The team's areas of concern academically were that Student struggled with focus and remembering information, was far below basic in all academic areas, and

continued to be at risk of retention after his second trimester. Behaviorally, Student could not control his temper. He got upset often and exhibited no self-control. He was defiant and physically aggressive, hitting others, throwing chairs, and running from the classroom.

29. The student success team reviewed Student's prior interventions. Student had been tutored after school in reading and math from October 2016 until April 2017, and showed minimal improvement. He had good and bad days in the after-school program, and needed improvement in in the boys' social skills group. The New Dawn therapy seemed to be helpful, and a New Dawn licensed marriage and family therapist, Ms. Lucero, had diagnosed Student as having and unspecified disruptive, impulse-control, conduct disorder.

30. The student success team discussed whether Student should be assessed for a possible disability. Ms. Moran testified she did not suspect a disability because she had "seen this before," where problems at home caused behavioral issues that later cleared up. The team concluded they would try more general education interventions before having Student assessed for special education. The team decided Student should continue his New Dawn therapy, and, at Ms. Lucero's suggestion, the team would develop a 504 Plan [Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.)] for Student. Student also continued in his after-school program and boys' social skills group, but did not resume tutoring.

#### May 10, 2017 Incident and Parent Request for Assessment

31. On May 10, 2017, Student escalated into a major tantrum. He eloped from Ms. Moran's classroom onto the school yard and playground, and began throwing rocks at passing cars and at school staff. Student was crying, yelling profanities, and was non-compliant. He kicked staff and attempted to hit them with his head. Concerned for the safety of Student and others, Rose Avenue staff called Mother and the police. Assistant

principals Susan Mares and Suzanne Grajeda restrained Student with standing one-and two-person control holds for approximately eight minutes. Student remained angry and defiant until his grandfather arrived to pick him up, at which point he de-escalated. Later that day, Mother submitted a written request for a 504 plan for Student. Oxnard scheduled a student success team meeting for May 18, 2018.

32. On May 12, 2017, Mr. Ordaz sent a request to Oxnard behavior specialist Julia Bolognino for behavioral support for Student in the general education environment.

33. On May 15, 2017, Student's after school program dismissed him because of his behaviors.

34. On May 18, 2017, before the student success team meeting, Mr. Ordaz sent an email to Ms. Bolognino, Oxnard Special Education Director Amelia Sugden, and Oxnard Special Education Manager Kristin Haidet, to follow up on his request for additional behavioral support for Student. Interpreting Mother's request for a 504 plan as a request for special education assessment, Mr. Ordaz explained Rose-Avenue staff would be holding a student success team meeting later that day with Parents, at which they would respond to Mother's request for a full assessment of Student.

35. Mr. Ordaz explained that Rose Avenue had been working with Student during the school year using the student success team process, but Student's aggressive behaviors had increased. Student was now very violent and defiant, was kicking, punching, and destroying school property, and had hurt other students and staff. Student had also tried to climb fences and leave school.

36. Mr. Ordaz explained that Rose Avenue staff was now being called to address Student's aggressive, disruptive behavior in his classroom or on the school campus as often as three or more times a day. On three occasions staff had called the police school resource officer, and dispatch, for assistance. Mr. Ordaz explained that

Student had been working with New Dawn, and Rose Avenue staff had referred Student to the Ventura County Behavioral Health Department. Mr. Ordaz informed the Health Department "My team has been working with [S]tudent, however, we need support as it is becoming more and more challenging to meet his needs on a daily basis."

#### May 18, 2017 Fourth Student Success Team Meeting

37. On May 18, 2017, Oxnard convened Student's fourth student success team meeting. Parents, Ms. Moran, Mr. Ordaz, Ms. Rodriguez, the school counselor, Mr. Figueroa, Ms. Perales, Mr. Dominguez, and Ms. Lucero attended. The team's areas of concern with respect to academics were that Student was far below basic in all academic areas, struggled to focus and remember information, and did not participate or engage in class. He struggled with number sense and recognizing numbers, and completed homework but never turned it in. The team's concerns with Student's behavior were that he was defiant, and exhibited no self-control. He was often upset and out of his seat, destroying the classroom environment and other students' work. He was physically aggressive towards adults and students, and was hitting, throwing chairs, kicking and punching doors and walls, and climbing fences.

38. The team recommended that Oxnard conduct a full special education assessment of Student in the areas of academics, social/emotional functioning, and speech and language. The team's action plan for Student was to continue with therapy from New Dawn for emotional and anger management issues, follow up on Student's referral to Ventura County Behavioral Health Department, have Ms. Bolognino develop a behavior plan for Student, continue Student's participation in the boys' social skills group, and have Parents take Student to a physician to discuss his nasal congestion.

39. Student finished his 2016-2017 school year meeting none of the common core state standards benchmarks for first grade. His best grade was in speaking and listening, where he was striving towards meeting the benchmark. In language, Ms.

Moran graded him as not meeting the benchmark. In all other academic standards, Ms. Moran graded Student far below the benchmark.

40. Although Student's grades had declined since Ms. Moran had marked Student at risk of retention in his first two trimesters, Ms. Moran recommended him for promotion to second grade at the end of his third trimester. At hearing, she testified that she recommended him for promotion to second grade because she did not believe that Student would get any educational benefit from repeating first grade, because he had not made even "a little bit" of growth in first grade, and seeing first grade materials again would not help him understand the material. She was also concerned that he would be old and tall for a first-grader if he repeated the grade.

#### May 31, 2017 Student Assessment Plan

41. On May 31, 2017, Ms. Perales mailed Parents a letter enclosing a proposed assessment plan for Student, a copy of Parent Rights and Procedural Safeguards for Special Education, a Health and Development Questionnaire, a copy for each Parent of the parent rating scales for the Behavior Assessment System for Children, Third Edition, and a return envelope. Ms. Perales' letter asked Parents to sign and return the assessment plan and completed health questionnaire and rating scales.

42. The assessment plan identified Student's academics, attention, and behavior as areas of concern, and the reason for the assessment. The plan specified six assessments: (i) a health assessment, including screening of Student's vision and hearing; (ii) an intellectual development assessment by a school psychologist; (iii) an academic achievement assessment by a special education teacher; (iv) a social/emotional behavior assessment by a school psychologist; (v) a language/speech/communication development assessment by a speech-language pathologist; and (vi) a special circumstances educational support assessment to evaluate Student's potential need for a behavioral aide.



## 2017-2018: SECOND GRADE AT CHAVEZ ELEMENTARY SCHOOL

43. In August, 2017, Student, then seven years old, started second grade at a new school, Chavez Elementary School, in teacher Maria Ponce's general education class. Ms. Ponce had no training in addressing special education students with behavioral issues, or in the use of physical restraints. Oxnard had not yet developed a behavior plan for Student, as called for in the May 18, 2017 student success team action plan.

44. On his first or second day in Ms. Ponce's class, Student told Ms. Ponce he did not know how to write. Ms. Ponce then found that Student could read only five words per minute, and could not count to 100. Ms. Ponce approached Chavez Assistant Principal Naomi Cortez, to refer Student for special education testing. Dr. Cortez told Ms. Ponce that Oxnard already planned to assess Student, and was just waiting for Parent's signature.

### September 20, 2017 Signed Student Assessment Plan

45. On September 20, 2017, Mother returned the signed assessment plan for Student, a completed Health and Development Questionnaire, and a copy of the parent rating scales for the Behavior Assessment System for Children, completed by Mother. Oxnard calculated pursuant to the Education Code that it had 60 days – until November 20, 2017, to complete the assessments and hold an individualized education program team meeting to review them.

### September – November 2017: Student's Escalating Behaviors

46. Student was well behaved at the start of the school year, but his previous aggressive and destructive behaviors emerged over the next two months; gradually at first, then with escalating frequency and severity. On August 24, 2017, Student slapped another student in the face while standing in line. Ms. Ponce reprimanded and

counseled Student, assigned him recess detention, and called Mother. On September 15, 2017, Ms. Ponce sent Student home for the afternoon after repeated outbursts in class during which he threw paper, books and crayons and moved classroom tables. On September 18, Student received recess detention for pushing another student in line for no reason. On September 19, Student twice pulled another student's hair. On October 4, 2017, Ms. Ponce referred Student to a district behaviorist after he persisted in following another student in a threatening manner and then hit him in the neck. On October 10, Student was suspended for injuring others when he walked around the classroom poking students with a pencil, then stepped on Ms. Ponce's feet when she tried to stop him. On October 12, Student ran from the school to the playground, where he began throwing rocks at his classroom windows, then at other students. On October 24, Student damaged school property by tearing things off the classroom walls and writing on the floor. On October 26, he damaged the classroom's 8 x 10 rug, remote control and headphones, and other students' property. On November 1, 2017, Student was suspended for disrupting Ms. Ponce's class, insubordination, damaging school property, and attempting to harm himself and others. On November 2, he pushed and tripped another student, causing her to fall, then pushed her again when she got back up.

#### November 9, 2017 IEP Team Meeting and Continued IEP

47. On November 9, 2017, Oxnard convened Student's initial IEP team meeting. Mother, Ms. Ponce, Chavez principal Brasilia Perez, Chavez assistant principal Derek Olson, school psychologist Annette Murguia, speech/language pathologist Shannon Billings, school nurse Marie Sagrado, and specialized academic instructor Margie Llanes attended. Oxnard informed Mother that Oxnard needed more time to complete additional assessments. Mother agreed to open the meeting and she asked Oxnard to notify her in advance when meeting is to reconvene. Mother signed the IEP.

48. After the November 9, 2017 IEP team meeting, Student's behaviors

escalated alarmingly. In incidents on November 13, 17, 27, 28, 29, and December 1, 2017, Student essentially shut down Ms. Ponce's class, cursing, ripping papers off the classroom walls, throwing books and chairs, and destroying school and student property. The December 1, 2017 incident was representative of Student's behavior. Student threw crayons at other students and Ms. Ponce. When Mr. Olson attempted to intervene, Student refused to follow directions, kicked Mr. Olson, and tried to trip, head butt, and bite him. Student threw a chair and other items at Mr. Olson, and repeatedly cursed Ms. Ponce and Mr. Olson, using extremely derogatory gender and racial expletives. Student was suspended following the December 1, 2017 incident, and also following the November 29, 2017 incident, during which Student kicked staff members and threw rocks and a chair at them, while cursing them.

49. Oxnard's schools were closed for the five-day Thanksgiving holiday, November 20-24, 2017, and from December 4, 2017 through January 5, 2018, due to the Thomas Fire that broke out in Ventura County on December 4, 2017, and Oxnard's winter break from December 18, 2017 until school resumed January 8, 2018. Student's initial IEP was reconvened on January 11, 2018; 52 calendar days after November 20, 2017, but just eight school days.

#### JANUARY 10, 2018 MULTIDISCIPLINARY ASSESSMENT AND JANUARY 11, 2018 INITIAL IEP

50. For Student's initial IEP, Oxnard conducted six assessments of Student over 18 days from September 20, 2017 through January 10, 2018, assembled the assessments into a single multidisciplinary assessment report dated January 10, 2018, and held Student's initial IEP team meeting on January 11, 2018.

#### Health

51. School nurse Ms. Sagrado conducted Student's health assessment

including hearing and vision tests. Student's health was generally good. Mother provided information for the health assessment. She reported Student had diagnoses of attention deficit and hyperactivity disorder (ADHD), disruptive disorder, and had had one minor episode of depression. Mother described Student as "mostly angry" at home, and upset by little things.

#### Intellectual Development

52. School psychologist Ms. Murguia employed four generally-accepted and commonly-used standardized tests to measure Students cognitive abilities, auditory and visual processing, and motor integration. Student exhibited no significant cognitive or processing deficits. Student's ability to understand and use speech to communicate was in the average range. Student's ability to solve unfamiliar problems was average to above average. Student's short-term memory was average regarding hand movements, and slightly below average when recalling numbers. Student's long-term memory was average. Student's auditory processing – his ability to analyze and synthesize information transmitted through sound – was average to slightly below average. Student's visual processing – his ability to use mental images to solve problems – was average, as was his processing speed. Student's motor coordination, visual perception skills, and his visual-motor integration skills were all average.

#### Academic Achievement

53. Special education teacher Ms. Llanes assessed Student's academic achievement based on information from Ms. Ponce on Student's current classroom performance, and on the standardized Woodcock-Johnson-IV Tests of Academic Achievement. Student's classroom performance was consistently "very poor," with the exception of his relations with peers, which were "poor." On the Woodcock-Johnson tests, Student's scores in reading comprehension, reading fluency, and math problem

solving, placed him in the first to seventh percentile of children his age (well below average to below average). Student scored slightly below average in math calculation skills (ninth percentile), and written expression (tenth percentile).

### Speech and Language

54. Speech/language pathologist Ms. Billings evaluated Student's speech, language, and communication skills by interviewing and directly observing Student, and administering four commonly used tests. Student continued to exhibit the frontal lisp he displayed in kindergarten, which affected his intelligibility. Ms. Billings found the lisp to be developmentally inappropriate, because it should have resolved by August, 2017, when Student reached the age of seven. Student also distorted the /r/ sound at the beginning and end of words. However, because difficulty with this sound is developmentally appropriate for boys until the age of nine, it did not indicate a disability. Student's expressive language skills scored in the average range. Student's impulsivity and lack of focus affected his receptive language skills, causing him to score in the below average range.

55. Ms. Billings found that Student appeared to meet the criteria for eligibility for special education under the category speech and language impairment, based on his frontal lisp, an articulation disorder significantly interfering with his communication and which attracted adverse attention.

### Social-Emotional Functioning

56. Ms. Murguia assessed Student's social-emotional function by reviewing Student's school behavioral record, and administering the Behavior Assessment System for Children, Third Edition, rating scales to both Parents, and to his teacher, Ms. Ponce.

57. In the overall area of externalized behaviors, all raters indicated that Student's behavior was in the clinically significant range (indicating significant

maladaptive behavior). Parents reported Student was frequently disruptive, impulsive, and displayed uncontrolled behaviors; his teacher reported he had difficulty with self-control, was overactive, and restless. Teacher and Parents indicated Student's behavior included being argumentative, defiant or threatening others. In the area of conduct problems, teacher reported Student frequently broke school and classroom rules. Parents reported similar behavior in the home.

58. In the area of internalized problems, all raters described Student's skills in the at-risk range (signifying the possible presence of disorders). In the area of anxiety, teacher and Mother reported Student sometimes had difficulty making decisions, appeared to worry, and appeared nervous. In the area of depression, teacher and Parents indicated Student was withdrawn and pessimistic. In the area of somatization, all raters indicated that Student was age appropriate, with Student complaining of health related problems about as frequently as his peers.

59. Father and teacher scored Student's behavior in the clinically significant range; Mother rated him at-risk in behavior. In the area of atypicality, teacher reported Student engaged in strange or odd behaviors and he appeared to be generally disconnected from his surroundings. Father reported such behaviors occurred at times; Mother did not report any such behaviors. In the area of withdrawal, teacher described him as sometimes having difficulty making and keeping friends, and unwilling to participate in class discussions or lessons. Parents did not report this as an area of concern. In the area of attentional problems, Parents described Student to sometimes having difficulty maintaining attention.

60. Father and teacher rated Student's adaptive skills in the clinically significant range; Mother rated Student's adaptive skills in the at-risk range. Teacher reported Student had difficulty adapting to changes in his schedule, routine or activity, and sometimes refused to adapt to the change presented. Parents reported this

behavior sometimes occurred. In the area of social skills, all raters indicated Student experienced some difficulty complimenting others and making suggestions for improvement in a tactful and socially acceptable manner. In the area of leadership skills, teacher and Father reported he sometimes had difficulty making decisions, lacked creativity and had difficulty working in a group. In the area of study skills, teacher reported poor study skills, difficulty with organization and turning in any assignments or homework. In the area of functional communication, teacher and Parents reported Student sometimes had difficulty stating his feelings and describing personal experiences.

61. Based on Student's evaluation results, Ms. Murguia considered his potential eligibility for special education under the categories of specific learning disability, other health impairment, and emotional disturbance.

62. Ms. Murguia concluded Student did not meet eligibility criteria for specific learning disability, under the pattern of strengths and weaknesses model used by Oxnard to identify a specific learning disability. Student demonstrated a pattern of cognitive strengths in the average or above range. He also exhibited significant academic weaknesses. However, he did not exhibit both cognitive and academic weaknesses.

63. Ms. Murguia concluded Student met eligibility criteria for other health impairment, based on his medical diagnosis of ADHD; his scores in the clinically significant range indicating significant maladaptive behavior in the areas of externalizing problems through hyperactivity and aggression; and his difficulties maintaining necessary levels of attention in class to participate in lessons that adversely affected his educational performance.

64. Ms. Murguia concluded Student did not meet eligibility criteria for emotional disturbance, which required that Student exhibit one or more of the following

characteristics, over a long period of time and to a marked degree, which adversely affected his educational performance: (1) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory relationships with peers and teachers; (3) inappropriate types of behaviors or feelings under normal circumstances, exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; or (5) a tendency to develop physical symptoms or fears associated with personal or school problems.

65. Ms. Murguia found Student did not exhibit a general pervasive mood of unhappiness or depression, or a tendency to develop physical symptoms or fears associated with personal or school problems. Both these conclusions were supported by Student's assessments.

66. However, Ms. Murguia's explanation for her determination that Student did not demonstrate an inability to learn which could not be explained by intellectual, sensory, or health factors did not make sense. Ms. Murguia stated, "Current academic assessment indicates that Student's academic skills have declined. However, it does not appear to be related to an intellectual, sensory or health factor. Rather, it appears to be the result of his non-compliant behavior." This explanation acknowledged both Student's inability to learn, and that his learning difficulty was not the result of intellectual, sensory or health factors. It appears this basis for a finding of emotional disturbance was met.

67. Ms. Murguia's determination Student did not exhibit inappropriate types of behaviors or feelings under normal circumstances, was also not supported by Student's assessment results. Student's assessments found he exhibited inappropriate aggressive and disruptive behaviors under normal circumstances, both at school and at home. However, Ms. Murguia found this basis for finding emotional disturbance was not met because Student appeared to be able to control his behaviors, stopping tantrums



instantly when he believed they were not getting him attention, or when his grandfather appeared, and because Student was able to explain his defiant behavior.

68. Ms. Murguia also determined that Student's inappropriate behavior was not exhibited over a long period of time, or to a marked degree. However, Ms. Murguia's explanations for these determinations again relied on factors not included in the description of the criteria for a finding of emotional disturbance. Ms. Murguia admitted Student had "a history of behavioral misconduct in the school setting." She then disregarded that finding based on her conclusion that the behavior "does not appear to be emotionally based."

69. Finally, Ms. Murguia explained, "The qualifier 'to a marked degree' comprises two separate components, both of which must be present for the condition to be met: pervasiveness and intensity. Pervasiveness – A student needs to demonstrate the characteristics of their disability across most settings (i.e. school, home, community). While [Student] does display difficulty following rules set forth by his parents and teachers, his behavior appears to be under his control and appears to be willful at this time. This limiting criterion is not met."

#### Autism

70. Ms. Murguia used the Childhood Autism Rating Scales-2, High Functioning, to assess Student for symptoms of autism. This standardized assessment tool used behavioral scales completed by parents and practitioners to identify symptoms associated with autism in higher functioning children who might not exhibit classic autistic characteristics. Its scales asked respondents to rate the test subject's behavior on a score from 1 to 4 in 15 key areas of functioning potentially related to autism diagnosis. Mother rated Student's behavior age-appropriate in Social-Emotional Understanding, Emotional Expression and Regulation of Emotions, Body Use, Object Use, Visual Response, Listening Response, Taste, Smell, and Touch Response and Use,

Nonverbal Communication, Thinking/Cognitive Integration Skills, Level and Consistency of Intellectual Response, and General Impressions. She rated him age appropriate to mildly abnormal in Adaptation to Change, Fear or Anxiety, and Verbal Communication; and mildly abnormal in Relating to People.

71. Ms. Murguia, Ms. Billings, and Ms. Llanes Ms. Murguia, rated Student's behavior age-appropriate in Social-Emotional Understanding, Relating to People, Body Use, Object Use, Visual Response, Listening Response, Taste, Smell, and Touch Response and Use, Fear or Nervousness, Verbal Communication, Nonverbal Communication, Thinking/Cognitive Integration Skills, Level and Consistency of Intellectual Response. They rated him age appropriate to mildly abnormal in, Emotional Expression and Regulation of Emotions, and Adaptation to Change; and as having no characteristics of autism spectrum disorder in General Impressions.

72. All raters agreed Student exhibited minimal to no characteristics associated with autism. At school, Student initiated and engaged in reciprocal interactions with his peers and teaching staff. At home Student initiated and engaged in social interactions with family members and friends. Student's play skills scores indicated that he played with toys for their intended purpose, and accessed playground equipment appropriately. In the area of language development, Student used and followed non-verbal gestures, and communicated his wants and needs. Student presented with well-modulated eye contact and responded to his name when called. Areas of slight concern included Student's tendency to resist transitioning from one task to another directed task.

73. Overall, the Childhood Autism Rating Scales-2, High Functioning rated Student as having minimal to no symptoms of autism.

#### SPECIAL CIRCUMSTANCES EDUCATIONAL SUPPORT

74. Behavior specialist Ms. Garcia-Thomas evaluated whether Student required

intensive individualized services such as a one-on-one instructional assistant or paraprofessional, to address needs in the areas of health and personal care, behavior towards teacher and peers, instruction (engagement in learning, and ability to participate), or inclusion/independence/social functioning. Ms. Garcia-Thomas reviewed Student's school behavior records, interviewed Mr. Olson, Ms. Murguia, and Ms. Llanes, and observed Student at school on three occasions for a total of four hours in and out of the classroom.

75. Ms. Garcia-Thomas concluded Student did not exhibit any significant health or personal care needs. She found Student exhibited frequent challenging behaviors, including off-task behavior, noncompliance, property destruction, tantrums, and physical aggression of an intensity causing injury, particularly during frustrating or non-preferred activities that included most academic instruction. Student's behaviors interfered with his learning and that of others. He was noncompliant and off-task hourly. He destroyed property on a daily basis, and engaged in aggression and tantrums weekly.

76. Ms. Garcia-Thomas was observing Student for her assessment during the November 29, 2017 incident that led to one of Student's suspensions. She watched his behavior escalate to a three-hour tantrum that included liberal use of profanity, property destruction, eloping from school, attempting to kick in Ms. Ponce's classroom door, pounding on the classroom windows, throwing rocks at Mr. Olson's face, and a chair at Ms. Garcia-Thomas.

77. Ms. Garcia-Thomas also observed Student de-escalate when his maternal uncle arrived to pick him up. On seeing his uncle, Student immediately stopped his behavior. His uncle reminded him they had talked before Student came to school about good behavior. Student's uncle asked if Student knew what would happen. Student responded, "You're gonna hit me," and his uncle replied, "Yes, I'm gonna spank you."

Student immediately began cleaning up some of the property he had scattered during the course of his tantrum.

78. Ms. Garcia-Thomas concluded that consistent, intensive, individualized support addressing Student's behaviors was absolutely necessary for Student to learn. At hearing, Ms. Garcia-Thomas testified such support would be most effectively implemented with Student through one-on-one applied behavior analysis therapy, provided by a team of trained applied behavior analysis providers. In her assessment, Ms. Garcia-Thomas concluded that Student's support team needed more accurate baseline data across his school day to address his behaviors, and she subsequently created a specific data sheet to help the support team collect data. Because Student required frequent, individual reminders of positive reinforcement rewards to remain motivated to earn them, she prepared a positive behavior intervention plan for Student that described an individualized reinforcement system as well as proactive strategies, teaching strategies, and reactive strategies to address his behavior at school.

79. In the area of instruction, Student required constant verbal prompts; one-on-one re-teaching; and clarification and reinforcement reminders to stay on task and complete academic work. He rarely participated in whole class lessons delivered by Ms. Ponce and produced little to no work, but attended and remained on-task more frequently during small group or individual instruction. In the area of inclusion, Student required some supervision during non-academic activities such as during transitions to recess, lunch, or transitioning between classrooms, to address profanity and aggression. Student also required redirection, monitoring, and priming to interact in socially appropriate ways with peers.

80. Ms. Garcia-Thomas recommended Student receive a high level of special circumstances educational support to address his deficits in the areas of behavior and instruction, and a low level of support to assist him with inclusion.

January 11, 2018 Continued IEP Team Meeting

81. Student's initial IEP team meeting reconvened on January 11, 2018. Mother, Ms. Ponce, Ms. Perez, Ms. Murguia, Marisol Regoso, Ms. Billings, Ms. Llanes, Mr. Olson, school counselor Teresa Silva, outreach counselor Yolanda Gomez, Oxnard special education manager Katrina Madden; Ms. Garcia-Thomas, and Ms. Sagrado attended.

82. Based on the IEP team's review of Student's initial assessments, the assessor's recommendations, and discussion at the IEP meeting, the IEP team found Student eligible for special education under a primary eligibility of Speech/Language Impairment based on his frontal lisp, with a secondary eligibility of Other Health Impairment based on his ADHD.

83. The IEP offered Student placement in a general education classroom for 81 percent of the school day, with pull-out to a special education class for 265 minutes per week for related services.

84. The IEP team developed seven annual goals for Student. These included two language/communication goals to be implemented by the speech/language pathologist; two social-emotional/behavioral goals to be implemented by "school staff"; and one goal each in reading, writing and math to be implemented by the resource specialist and general education teacher.

85. The IEP included an attached positive behavior intervention plan, and a "reactive plan" setting forth strategies to be employed by school staff in response to escalating behavior exhibited by Student, from off-task behaviors, to non-compliance, to property destruction, and finally to aggression and severe tantrum behavior. The reactive plan advised staff that physical restraint of Student using holds was a last resort to be used only if Student was hurting himself or others. Only Nonviolent Crisis Prevention Intervention (NCPI) holds, developed by the Crisis Prevention Institute, could

be employed, and only by staff trained in their use. Ms. Ponce was not trained in the use of NCPI holds, and never attempted to place Student in any holds. Although Student's special circumstances educational support assessment had recommended Student receive intensive individualized services based on the determination that such services were "absolutely necessary" to address Student's behaviors and instruction, the IEP provided none. Instead, the IEP made Student's classroom teacher (Ms. Ponce), assistant principal (Mr. Olson), and school psychologist (Ms. Murguia) responsible for implementing Student's behavior plan.

86. To support Student, the IEP offered Student pull-out services of 100 minutes per month of small group speech and language services, 120 minutes per week of specialized academic instruction in math, and 120 minutes per week of specialized academic instruction in English/language arts. The IEP also included 17 accommodations to assist Student with scheduling, following directions, responding to questions, transitioning, organization and study skills, and using the restroom.

87. The January 11, 2018 IEP was confusing and incomplete. For reasons no witness could explain, Student's least significant issue, a mild frontal lisp, was the basis for his primary special education eligibility category. While the IEP included goals directed towards the lisp, and also towards improving Student's ability to pronounce /r/ sounds at the beginning and ends of words – which Student's assessment determined was not a disability, it included no goals directed towards Student's secondary disability of other health impairment based on ADHD. Most significantly, the overwhelming issue of Student's destructive, violently aggressive behavior was addressed inconsistently rather than comprehensively. The IEP did not associate Student's extreme behaviors with any disability, and made no attempt to explain their cause. Considering the frequency, severity, and traumatizing effects of Student's behaviors, it was surprising that no functional behavioral assessment had been done to find their antecedents,

consequences, and possible functions so the behaviors could be better understood and addressed. Two of Student's seven goals, and the positive behavior intervention plan, were directed towards Student's behaviors, but no trained behavioral support at all was provided to implement the goals or the behavior plan, contrary Ms. Garcia-Thomas's recommendations.

88. Mother signed the January 11, 2018 IEP and gave written consent to all of its provisions on January 11, 2018.

#### January 11, 2018 IEP Implementation

89. The January 11, 2018 IEP provided for a paraprofessional behavior aide, speech and language services and specialized academic instruction. Oxnard did not fully implement these related services.

90. Oxnard admitted at Student's January 22, 2018 manifestation team meeting that it was failing to implement Student's January 11, 2018 IEP because it could not locate and provide Student a full-time, trained, one-on-one paraprofessional. Oxnard secured a permanent, trained behavioral technician for Student on February 8, 2018. Service was to be provided by STAR of CA Evidenced-based Resources Applied in Education ("ERA Ed."), a nonpublic agency that provided a range of behavioral health services.

91. Student's speech and language services were not fully implemented. Student was supposed to receive 100 minutes a week of small group speech services. However, Ms. Billings testified that she only provided services at her scheduled time, and did not reschedule the time if the student was not able to attend. Ms. Billings' records indicate Student received only 30 minutes of speech services on January 31, 2018, and an unspecified amount of time on February 14, 2018. Student should have received 700 minutes of speech services in the seven weeks between January 22, 2018 and March 9, 2018.

92. Ms. Llanes was to provide Student 240 minutes a week of specialized academic instruction in math and English language arts. Ms. Llanes testified that she kept records of her services, but could not explain why the records produced by Oxnard showed a total of only 276 minutes: 87 minutes provided January 23-25, 2018; 20 minutes the second week; 45 minutes the third week; 57 minutes the fourth week; and 67 minutes the fifth week. Ms. Llanes should have provided Student 1,680 minutes of specialized academic instruction during from January 22, 2018 through March 9, 2018.

#### January 12, 2018 Incident

93. On January 12, 2018 Student threw a chair at Ms. Llanes when she tried to bring him from Ms. Ponce's classroom to the special education classroom to provide him specialized academic instruction in English/language arts, and math, per his IEP. Student began throwing things at Ms. Llanes, screaming "I'm number one, you're number two, and f\*\*\* you b\*\*\*\*." After Ms. Llanes finally guided Student out of Ms. Ponce's classroom, Student continued to kick and punch her, until the Ventura County Police Department School Resource Officer, who happened to be on campus that day, walked by. When Student saw the resource officer, he immediately stopped kicking and punching Ms. Llanes.

94. Student was suspended one day – January 16, 2018 – for his behavior towards Ms. Llanes. Taking into account Student's six suspensions prior to his initial IEP, this was Student's seventh day of suspension during the school year.

#### January 19, 2018: Instruction in Conference Room

95. On January 19, 2018, at Ms. Garcia-Thomas' suggestion, Student was removed from Ms. Ponce's classroom and provided general education instruction on a one-on-one basis, in an interior conference room. Ms. Garcia-Thomas recommended this change to reduce the risk that Student might harm himself or others. Student



continued to receive his specialized academic instruction and small-group speech and language services on a pull-out basis in the special education classroom. Student received his general education instruction in the conference room from January 19, 2018 until February 26, 2018. If the substitute teacher who generally instructed Student was out, Ms. Perez or another teacher would cover. During the time Student was taught in the conference room, Oxnard implemented a plan, developed by Ms. Garcia-Thomas, pursuant to which Student was re-integrated into Ms. Ponce's class for increasing portions of the school day as his behavior improved. Parents never consented to Student being taught in the conference room instead of Ms. Ponce's classroom, and Oxnard returned him to Ms. Ponce's class on February 26, 2018, at the demand of Mother and Student's attorney at an IEP team meeting that day.

#### January 22, 2018 Manifestation Determination/IEP Team Meeting

96. On January 22, 2018, Oxnard convened simultaneously a manifestation determination team meeting, and an IEP team meeting. The manifestation determination meeting was to determine whether Student's aggressive and destructive behavior, which had led to a pattern of seven suspensions, was caused by, or had a direct and substantial relationship to, Student's disability. The IEP team meeting was to discuss proposed changes to Student's IEP. Oxnard treated the meeting as an IEP team meeting, and January 11, 2018 IEP team members Ms. Ponce, Ms. Perez, Ms. Murguia, Ms. Billings, Ms. Llanes, Mr. Olson, Ms. Madden, and Ms. Garcia-Thomas attended, along with Mother, Student's uncle, and Student's home therapist, Dain Acevedo.

97. Regarding the manifestation determination, the team members concluded: (1) Student's behavior was not caused by, nor had a direct and substantial relationship to, Student's disabilities (speech/language impairment and ADHD); and (2) Student's behavior was the direct result of Oxnard's failure to implement Student's IEP, because Oxnard had been unable to locate a district or third party trained paraeducator to

implement the positive behavior intervention plan included in Student's IEP, and was only providing Student a substitute paraeducator who was not trained. The team's conclusion was odd for at least two reasons. First, the manifestation determination form stated if the team concluded that a student's behavior was the result of a failure to implement the student's IEP, "the behavior must be considered a manifestation of the disability." Second, Student's IEP did not include any paraeducator services, but called for Student's teacher, assistant principal, and school psychologist to implement his behavior plan.

98. The January 22, 2018 meeting was documented on IEP forms that included proposed changes to Student's IEP. Ms. Madden explained to Mother that Oxnard was offering to "remedy the problem" of its failure to implement Student's IEP, by making a FAPE offer to Student of 60 days' interim placement at Casa Pacifica non-public school for diagnostic assessment. Ms. Madden said additional behavior intervention support for Student needed to be a focus, along with additional assessments. The IEP stated Oxnard "must conduct a functional behavior assessment" for the purpose of developing a behavior intervention plan based on such an assessment. Mother was given a copy of a proposed assessment plan for Oxnard to conduct a functional behavioral assessment of Student.

99. Mother did not consent to the IEP, but said she would discuss the offer to change schools with Student and respond by January 26, 2018. Ms. Madden told Mother that, pending Mother's decision on placing Student at Casa Pacifica, he would continue to receive one-on-one general education instruction from a substitute teacher, supported by the substitute paraeducator, in the conference room where he had been receiving instruction since January 19, 2018.

#### February 26, 2018 IEP Team Meeting

100. On February 26, 2018, Student's IEP team met at Mother's request.

Mother, Student's uncle, Ms. Perez, Ms. Murguia, Mr. Olson, Ms. Ponce, Ms. Llanes, Ms. Garcia-Thomas, Ms. Madden, Ms. Sagrado, Student's attorney Janeen Steel, and Oxnard's attorney Ben Nieberg attended.

101. Oxnard team members reported on Student's performance since the arrival of his full-time ABA-trained behavior aide from ERA Ed., and the implementation of his behavior plan. Student was making steady progress, and had been back in Ms. Ponce's class the past two days for the entire school day. The IEP team confirmed that Student's ABA-trained behavior aide was supervised by an ERA Ed. supervisor and Oxnard's behaviorist. Mother signed an assessment plan for a functional behavioral assessment.

102. At Mother's request, the IEP team added individual counseling services for Student at school. When Ms. Steel requested that Student be returned full-time to his general education classroom, the team confirmed that Student would no longer be back in the separate classroom with the behavior technician and substitute teacher, but that Student needed a "cool down" area. Ms. Garcia-Thomas stressed the need for a plan to keep Student and the other students at school safe.

103. The IEP offered Student: (i) placement in the general education classroom; (ii) 120 minutes per week of specialized academic instruction in English/language arts, and 120 minutes per week of specialized academic instruction in math, each in the special education classroom; (iii) 100 minutes per month of speech and language services in a small group; (iv) 30 minutes per week school based individual counseling; (v) a one to one behavioral paraprofessional provided by an outside agency from 8:20 a.m. until 2:30 p.m. with behavior paraprofessional supervision provided by the school district behaviorist for four hours per month and outside agency supervision 20 hours a month.

104. Mother initialed that she agreed with the eligibility determination, annual

goals, and services contained in the IEP, and that she agreed with the IEP, except that she disagreed it was a FAPE, and reserved her claims involving FAPE or child find. She also threatened a discrimination complaint if Student was again placed in a separate classroom.

105. On March 15, 2018, Mother returned the IEP, signed with the above reservations. Mother consented to the IEP with a statement that he should not be removed from his class. The March 15, 2018 IEP remained Student's last agreed-upon, implemented IEP at the time of hearing.

106. Mother disagreed with Oxnard's evaluation of Student for autism, and requested an independent educational evaluation at public expense. Oxnard agreed to have Betty Jo Freeman, PhD., an autism expert based at the University of California Los Angeles, conduct the autism evaluation for Student.

107. At Mother's request at Student's February 26, 2018 IEP team meeting, Student returned that day to full-time in Ms. Ponce's class.

#### March 2, 2018 and March 9, 2018 Incidents

108. On March 2, 2018, Student became upset in Ms. Ponce's class and pulled papers off the walls, threw items, broke umbrellas and hit staff.

109. On March 9, 2018, in an incident lasting almost two hours, and beyond the end of the school day, Student escalated when he returned to class from a visit to the health office and realized Ms. Ponce was giving out "Fun Friday" awards without him. He began screaming profanity and attempting to kick in the classroom door, scaring his classmates to the point where some began crying and hiding under their desks, which had not happened before. Student punched and kicked his paraeducator, destroyed school property, and used a metal rod to strike several windows, breaking one. Student bit, kicked, and slapped school staff, and punched a teacher in the face. Student also bit his paraeducator, causing her to bleed and to go to urgent care. He repeatedly

threatened to jump from a second-floor landing to the first floor below. Attempts to de-escalate Student using techniques from his behavior plan, and six holds lasting from 10 seconds to two minutes failed, as Student re-escalated every time he appeared calm. Student de-escalated when his Mother arrived at approximately 3:40 p.m., and she took him home.

110. Ms. Garcia-Thomas was present for the March 9, 2018 incident. She was on the second floor landing assisting with Student, who was in a screaming rage, and watched him de-escalate to a calm state in “about two seconds” when he heard his mother’s footsteps coming up the school stairs. Ms. Garcia-Thomas had observed Student do this before, on November 29, 2017, and others had told her of similar incidents they had observed. Ms. Garcia-Thomas thought Student’s behavior was extremely unusual, and might be associated with a mental disorder, such as bipolar disorder or oppositional-defiant disorder. She suggested to Ms. Madden that Oxnard should arrange a mental health assessment with differential diagnostics to see if the results might help Parents and Oxnard understand Student’s behavior.

#### March 12, 2018 Through April 1, 2018: Student at Home

111. Friday, March 9, 2018, was Student’s last day attending Chavez Elementary. He was suspended from March 12 through 15, 2018, and stayed home from March 16, 2018 through April 1, 2018, with home instruction during the week of March 19, 2018, and spring break the week of March 26, 2018.

#### March 15, 2018 Manifestation Determination Team Meeting and March 22, 2018 IEP Team Meeting.

112. On March 15, 2018 Oxnard convened a manifestation determination team meeting to determine whether Student’s behavior on March 9, 2018 was related to his disability and to discuss a possible change of placement for Student. The team

determined Student's actions were related to his disability, that Student's behavior was impacting his ability to access the general curriculum; and that a change of placement needed to be considered. Oxnard team members also were concerned about safety at Chavez School. Oxnard recommended placement in either a mild/moderate special day class at a different school site (since that program was not available at Chavez School), or at Casa Pacifica. The family was invited to visit Casa Pacifica and the special day class program at Rose Avenue, while Student received home instruction.

113. On March 22, 2018, the IEP team reconvened and the family agreed that Student would attend Casa Pacifica for the remainder of the school year. Following up on Ms. Garcia-Thomas's suggestion after the March 9, 2018 incident that Student should receive a mental health assessment, Ms. Madden suggested that Oxnard refer Student to the Ventura County Special Education Local Plan Area, Collaborative Educational Services Program, for an educationally-related social emotional services assessment.

114. On or about March 30, 2018, Mother, through Ms. Steel, returned a signed copy of the March 15, 2018 IEP, consenting to Student's interim alternative placement at Casa Pacifica from April 2, 2018 to June 14, 2018.

#### APRIL 2, 2018 TO JUNE 14, 2018 PLACEMENT AT CASA PACIFICA

115. Student began attending Casa Pacifica on April 2, 2018. Oxnard supported Student at Casa Pacifica with a full-time behavior specialist and a supervisor from ERA Ed. to implement Student's existing positive behavior intervention plan prepared by Ms. Garcia-Thomas for Student's January 11, 2018 IEP.

116. To prepare a detailed functional behavior assessment of Student, and develop a comprehensive behavior intervention plan to update Student's existing plan, ERA Ed. education supervisor Heather Brown and registered behavior technician Erika Andrade together observed Student's full school day at Casa Pacifica from April 2, 2018 through April 6, 2018. Ms. Andrade continued to observe Student's entire day every day

through April 24, 2018, and Ms. Brown observed Student's entire day on April 25, 2018, and portions of three other days. Ms. Brown and Ms. Andrade collected data on the antecedents, consequences and functions of Student's target behaviors such as tantrumming and physical aggression. The data was assembled into functional behavior assessment report that Student's expert, Dr. Taubman, acknowledged as "pretty thorough." The report was given to Ms. Garcia-Thomas to use to update Student's existing positive behavior intervention plan with a more detailed comprehensive behavior intervention plan that could be reviewed and approved by Student's IEP team, and implemented using applied behavior analysis methods.

117. Student arrived at Casa Pacifica defensive and uncommunicative. Observing that Student loved sports but disliked classwork, Casa Pacifica behavior specialist Anthony Pineda developed a rapport with Student by playing basketball with him and engaging in other sports. Student gradually developed a rapport with Mr. Pineda and other staff. Student also developed some friendships at Casa Pacifica, but other students often avoided him because of his aggressive behaviors, which were among the most extreme at the school.

118. Mr. Pineda observed that after Student learned things students were not allowed to do in the classroom, he would do those things to be sent from class. Mr. Pineda also found that if he asked Student a question about sports while Student was highly escalated and exhibiting extreme behaviors, Student would calmly answer the question, then return to the behavior.

119. Student began at Casa Pacifica placed in an instructional classroom with a special education teacher, other students, and his one-on-one aide. Because of his behaviors, as a form of behavior management not called for in Student's behavior plan, Casa Pacifica staff removed him from the instructional classroom when he exhibited behaviors, and placed him in a classroom with no teacher to work on worksheets. If

Student demonstrated good behavior, he was allowed to participate with the class and special education teacher. However, Student never returned to the instructional classroom for more than 10-15 minutes before being removed from the class because of his behaviors. Oxnard and Parents were unaware of this practice until it was disclosed by testimony at hearing.

120. Oxnard and Parents were also unaware until hearing that Casa Pacifica staff interfered with Student's behavior plan by reassigning Student's ERA Ed. aides to work with other students, and have male aides from Casa Pacifica, who were not trained in applied behavior analysis, work with Student. Staff did so because Student did not relate well to the female aides, who were trained in applied behavior analysis, and would escalate despite their interventions.

#### May 1, 2018 IEP Team Meeting

121. On May 1, 2018, a 30-day review IEP team meeting was held to discuss Student's transition to Casa Pacifica. Mother, Student's uncle, Ms. Steel, Mr. Nieberg, Ms. Garcia-Thomas, Ms. Madden, Ms. Brown, ERA Ed. clinical manager Jamie Vaughn, ERA Ed. clinical director Ariella Parker, Casa Pacifica principal Mark Capritto, Casa Pacifica clinical supervisor Erin Haven, Casa Pacifica clinician Catherine Race, Casa Pacifica special education teacher Shaylyn Camacho, Casa Pacifica behavior specialist Anthony Pineda, and Casa Pacifica program specialist Shannon DeSantis attended.

122. Ms. Garcia-Thomas reported she received a copy of the functional behavior analysis completed by ERA Ed., and the May 1, 2018 IEP included an updated, detailed comprehensive behavior intervention plan based on the information from ERA Ed.'s functional behavior assessment.

123. The IEP team reported that Student had shown improvement in his behavior at the start of the day and in his sustained classroom attendance. According to the IEP team, Student's behaviors during the morning routine had improved from



not wanting to participate to Student raising his hand wanting to go first.

124. The team discussed the challenges that Student continued to face. Small incidents could still throw Student off, and Student still had difficulty with transitions (e.g., time to stand up, transition to different rooms, asking to complete an academic ask, denied or delayed access to something he wants). Mark Capritto, Casa Pacifica's Principal, stated Student's behaviors were getting better, but Student would sometimes escalate to the point where additional staff was needed to prevent him from harming himself or others. Mr. Capritto said ERA Ed. was going to provide additional support so that Student would have two-on-one ERA Ed. support beginning the following week.

125. The IEP team proposed increasing Student's speech therapy time from 25 minutes per week to 30 minutes per week, and allowed the speech therapy to be provided via individual or group therapy since there had been times when peers in his class who also received speech therapy wanted to "bring a friend." Aside from the update to the behavior plan and the proposed increase in speech therapy, Oxnard's FAPE offer remained the same as his prior IEP. However, Mother never consented to implement Student's May 1, 2018 IEP, or Ms. Garcia-Thomas's comprehensive behavior intervention plan for Student.

#### May 17, 2018 Graduation From Home Therapy Program

126. On May 17, 2018, Student graduated from a 60-day in-home therapeutic behavioral services program with his home therapist, Dain Acevedo. The program successfully taught Student techniques for controlling his behaviors, at least in the home environment. Mother believed the therapists could work with children both in the home and at school. Mother was uncertain whether the therapy was based on applied behavior analysis or another therapeutic method. Following the therapeutic behavioral services program, the intensity of Student's behaviors decreased markedly at home. He would still tantrum on occasion, but no longer broke things or exhibited other extreme

behaviors. The reduction of extreme behaviors in the home following this therapy continued through the time of hearing.

#### June 7, 2018 IEP Team Meeting

127. Student's IEP team met on June 7, 2018 to review Student's functional behavior assessment, discuss Student's progress, and consider whether he was ready to return to a comprehensive campus at Oxnard. Mother, Ms. Steel, Mr. Nieberg, Oxnard general education teacher Denise Evans, Ms. Garcia-Thomas, Ms. Madden, Mr. Vaughn, Ms. Parker, Casa Pacifica clinical program manager Sean Schoneman, Ms. Race, Ms. Camacho, Mr. Pineda, and Ms. DeSantis attended.

128. Casa Pacifica and ERA Ed. personnel were asked about three incidents in which Student came home with injuries to his head or neck. In the first, which required Student to go to the hospital to receive four staples to the back of his head, staff explained that Student was playing in the Multi-Sensory De-Escalation Room as a reward when he pushed the room's swing, which came back to hit him on the back of his head. Staff administered first aid and bandaged Student's head before taking Student to the hospital. In the second incident, in which Student came home with marks on his neck, staff reported that Student had the marks when he arrived at school and they thought it was eczema. In the third incident, in which Student came home with a bump on his head, staff reported Student had fallen and bumped his head in the De-Escalation Room.

129. After presenting Student's progress on goals, ERA Ed. Supervisor Heather Brown, presented Student's functional behavior assessment. During the month of April, on average, Student exhibited tantrum behavior 1.18 times per day, physical aggression 5.45 times per day, verbal aggression 6.73 times per day, non-compliance 2.95 times per day, property destruction 0.85 times per day, and elopement 0.3 times per day. The functional behavior assessment noted that problem behavior could

occur at any time, but was most likely during academic periods and transitions from less structured periods. Also, problem behavior was less likely to occur in a small group setting, and least likely in a one-on-one instructional setting with few or no peers present. Ms. Brown recommended Student receive one-on-one instruction, or instruction in a small group setting, and be provided one-on-one support during the school day to ensure Student's participation in class, to block elopement attempts and aggressive behavior, and to follow-through with demands and redirect Student quickly to tasks.

130. Casa Pacifica and ERA Ed. Staff described Student's progress on his behaviors at Casa Pacifica. The frequency of Student's tantrums had decreased, although their extreme intensity had not changed. Student had shown improvement participating in his classroom morning routine, which included identifying his emotions and how he was feeling. Student would now say "please" and "thank you" as well as apologize for his behaviors. These were all things Student would not do when he first arrived at Casa Pacifica. Casa Pacifica's Behavior Specialist also reported that Student was making friends and that he asked to exchange phone numbers with these peer friends.

131. At hearing, Casa Pacifica staff testified that staff did not implement Students' behavior plan or IEP during his placement there.

132. Ms. Steel requested Oxnard return Student to a comprehensive campus at Oxnard with a behavior plan. Ms. Brown objected that Student was benefitting from the therapeutic program at Casa Pacifica, and should not be removed. Also, while Student's last few weeks at Casa Pacifica had been successful, there hadn't been enough time to measure his progress from implementation of his comprehensive behavior intervention plan. Casa Pacifica and ERA Ed. staff both recommended that Student not be placed at a comprehensive campus for extended school year, or for the 2018-2019 school year.

133. Ms. Steel stated Mother would not agree to have Student attend extended school year at Casa Pacifica and that he would instead stay home. The meeting concluded for the day, and was ultimately continued to July 26, 2018 to review the independent educational evaluation from Dr. Freeman.

134. Student's last day of school at Casa Pacifica was June 14, 2018. Student had not returned to school, nor received any educational program, from June 14, 2018 through the close of hearing.

#### July 26, 2018 Freeman Autism Assessment

135. Betty Jo Freeman, Ph.D., is an autism clinician and researcher with more than 40 years' experience in autism diagnostic tools and behavior intervention methods. She participated in the initial development of autism treatment methods based on the scientific discipline of applied behavior analysis, and has diagnosed, or supervised the diagnosis of, more than 10,000 children for autism.

136. Dr. Freeman prepared a Psychological Assessment of Student that evaluated Student for autism. To prepare her assessment, Dr. Freeman reviewed Oxnard's multidisciplinary assessment of Student, interviewed Mother and staff at Casa Pacifica, and observed Student at Casa Pacifica. Dr. Freeman used four rating scales to collect information on Student from Mother and teachers. Dr. Freeman met with Student and administered the Sentence Completion Test, Child Version, and the Autism Diagnostic Observation Schedule, Second Edition, Module 3.

137. Based on her assessment, Dr. Freeman concluded that Student met the Diagnostic Statistical Manual, Fifth Edition, 2013 (DSM-5) criteria for Autism Spectrum Disorder, as well as the educational criteria for special education services under the category of autism.

138. In addition to suggesting that Student's primary special education eligibility category should be changed to autism to more accurately reflect Students'

most significant areas of need, Dr. Freeman's conclusion had major implications for anyone developing a behavior management program for Student. As Dr. Freeman explained in her report and testimony, previous behavior plans developed for Student were fundamentally flawed because they failed to take his autism into account, and focused on addressing his excessive behaviors, rather than his behavioral deficits that made it difficult or impossible for him to avoid the excessive behaviors. Student's behavior plans assumed Student possessed the skills needed to act appropriately instead of becoming upset, and to de-escalate from extreme behaviors once upset, but needed to be taught how to access and employ his skills. In fact, according to Dr. Freeman, Student had no such skills and was incapable of avoiding upset or de-escalating from extreme behaviors. Student therefore needed to be carefully and systematically taught appropriate behaviors.

139. Several considerations weigh against the persuasiveness of some of Dr. Freeman's opinions in this case. Student did not present as obviously autistic. Student expert, clinical psychologist Mitchell Taubman, Ph.D., had decades of experience evaluating children for autism and applying, and teaching others to apply, applied behavior analysis principles to address behavior. Dr. Taubman met with Student for 15 to 30 minutes to see how Student presented. Student was friendly and had a positive affect. He was socially responsive and not standoffish, he responded appropriately to questions, made good eye contact, and exhibited no repetitive behaviors. Even to Dr. Taubman's practiced eye, the only aspect of Student's presentation consistent with a characteristic of autism was that Student's conversation lacked sophistication. However, Dr. Taubman acknowledged the difficulty evaluating a child's communication skills based on a short conversation with a strange adult.

140. Oxnard educators who worked with Student disagreed with Dr. Freeman's observations of him for the Autism Diagnostic Observation Schedule that he lacked eye

contact, exhibited a limited range and use of facial expressions, showed little, if any shared enjoyment in the interaction, and with respect to stereotyped or repetitive behaviors, exhibited sensory behaviors such as spinning objects, and frequent finger wiggling with the zipper on his jacket. They also disagreed with that evaluation's conclusion that Student had "substantial deficits in verbal and nonverbal communication, significant impairments in reciprocal social interaction, and repetitive, abnormal and stereotyped behaviors and restricted interests." Dr. Freeman's observations and conclusions were contrary to those obtained from rating scales provided by Mother, Ms. Murguia, Ms. Billings and Ms. Llanes for the Childhood Autism Rating Scale – 2 used in Oxnard's Multidisciplinary Assessment.

141. At hearing, Dr. Freeman was highly critical of the Childhood Autism Rating Scale, characterizing it as a screening tool for potential autism, rather than an evaluation for a diagnosis of autism. She did not, however, say that its estimates of whether a child was likely or unlikely to have autism were unreliable. Dr. Freeman thought scientific studies existed comparing findings made using the Childhood Autism Rating Scale to findings made using the diagnostic tools used by Dr. Freeman, but she was unfamiliar with them.

142. Dr. Freeman's report stated that Student had been referred to her "for updated assessment and differential diagnosis." She initially testified that she had conducted a differential diagnosis that ruled out other potential conditions such as ADHD, oppositional defiant disorder, or emotional disturbance as reasons for his behavioral symptoms. In cross-examination, Dr. Freeman admitted she had not conducted a differential diagnosis, since the only formal diagnostic instrument she had used to assess Student was the Autism Diagnostic Observation Schedule, which diagnosed only for autism. Dr. Freeman's other five test instruments were intended to be used to identify potential issues or conditions, but not make formal diagnoses.

143. Dr. Freeman characterized the Autism Diagnostic Observation Schedule she used to evaluate Student as the “Gold Standard” test instrument for diagnosing autism. The Autism Diagnostic Observation Schedule is a standardized assessment of communication skills, social interaction, and the ability to use imaginative play, intended for use by a skilled practitioner in a clinical setting. The examiner engages in specified activities with the subject and observes behaviors that have been identified as important in the diagnosis of autism spectrum disorders at different ages and developmental level. The activities use planned, as well as unstructured, social occasions in which a behavior of a particular type is likely to appear, and observe the subject’s social interactions, communication, and other behaviors relevant to autism spectrum disorders.

144. Based on the subject’s social interaction with the examiner, scores are derived for Communication, Reciprocal Social Interaction, Imagination/Creativity, and Stereotyped Behaviors and Restricted Interests to determine potential diagnostic indicators for Autism Spectrum Disorders.

145. Although Dr. Freeman reported Student’s scores for each of the four screening tools that she used to evaluate Student, she did not report Student’s scores for the Autism Diagnostic Observation Schedule, or whether they fell above or below cutoffs for autism and autism spectrum disorder. Instead, she described some of her observations during the testing, such as “In the area of reciprocal social interaction, [Student] did not use eye contact to regulate social interaction. He exhibited a limited range and use of facial expressions. He smiled occasionally but did not look at the examiner.” Her conclusion regarding the results of the Autism Diagnostic Observation Schedule also did not refer to actual test scores, and was somewhat vague as to the exact basis for her diagnosis: “Results from this measure indicate substantial deficits in verbal and nonverbal communication, significant impairments in reciprocal social interaction, and repetitive, abnormal and stereotyped behaviors and restricted interests.

Thus, taken in the context of a complete psychological evaluation, results from this measure are conclusive for a diagnosis of Autism Spectrum Disorder.”

146. As Dr. Freeman’s report noted, Title 5, California Code of Regulations, section 3030 (b)(1)(A) states: “Autism does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in subdivision (b)(4) of this section.” Dr. Freeman’s report mentions emotional disturbance only in reference to Oxnard’s multidisciplinary report: “The report also identified and described a number of behavioral incidents indicating that Isaiah was having a great deal of difficulty in his school setting. . . . While emotional disturbance was discussed, [Student] was not given that eligibility.” Despite Student’s extreme behaviors, Dr. Freeman did not evaluate Student for emotional disturbance, although she testified that based on her screening tests, she did not think that emotional disturbance applied.

147. Dr. Freeman’s report also did not discuss the possibility that ADHD might be the cause of some of Student’s behaviors. Dr. Freeman testified that she had asked for medical records relating to Student’s diagnosis of ADHD, but had not received them. She testified that she did not believe that Student’s behaviors were caused by ADHD because a child with ADHD knows how to calm down and can do so. From her review of Student’s educational records, she had found Student could not de-escalate, but had very intense behavioral episodes that lasted for a long time. This was consistent with Dr. Freeman’s opinion that, as a result of his autism-based behavioral deficits, Student did not have the skills necessary to de-escalate from extreme behaviors once upset. When it was pointed out that Student had frequently been observed to de-escalate from extreme behavior within seconds after the arrival of certain authority figures such as his mother, uncle, or the campus police officer, Dr. Freeman’s unsatisfying explanation was that autistic students frequently exhibit person-specific behaviors, and Student



apparently had some skills.

148. Many of Dr. Freeman's recommendations for addressing Student's behavioral needs appeared sound, and Oxnard agreed with them. However, while Dr. Freeman disagreed with the results of Oxnard's autism assessment, Dr. Freeman's testimony failed to demonstrate that Oxnard did not assess Student for autism.

#### July 26, 2018 IEP Team Meeting

149. On July 26, 2018, Student's IEP team met to review Dr. Freeman's independent autism assessment. Mother, Ms. Steel, Mr. Nieberg, psychologist Betty Jo Freeman, Ms. Billings, Ms. Barcia-Thomas, Mr. Vaughn, Ms. Camacho, school psychologist: Jenny Ponzuric, Casa Pacifica principal Mark Capritto, and Ms. Madden attended. Chavez Elementary principal Perez participated by phone. Also participating by phone, from Casa Pacifica, were mental health counselor Randy Osuna, Dr. Schoneman Ph.D., Mr. Pineda and Ms. Race.

150. Oxnard members of the IEP team disagreed with Dr. Freeman's opinion Student was autistic. Dr. Freeman stated that Student needed a small, structured program beginning with one-on-one instruction and gradual re-introduction to a comprehensive classroom.

151. The team resumed discussion from July 7, 2018 of the appropriate placement for Student. Based on the information from Casa Pacifica and ERA Ed. staff, the team had concerns about Student's readiness to return to a comprehensive campus because Student was not ready to be integrated. Oxnard, Casa Pacifica, and Era Ed. Team members believed Student still required a high level of support including therapeutic support and staff, which could not be provided on a comprehensive campus. In addition, Student had made steady progress on his behaviors at Casa Pacifica.

152. Mr. Pineda from Casa Pacifica and Mr. Vaughn believed ERA Ed. could

create a program to be successfully implemented at Casa Pacifica. Ms. Steel asked for Oxnard's FAPE offer, and Oxnard's counsel stated Oxnard was offering Casa Pacifica as placement. Ms. Steel said Mother would not agree with placement at Casa Pacifica. She asked Oxnard to consider a home program for Student with 40-50 hours of applied behavior analysis support. District did not reject this proposal. Ms. Madden asked whether Mother's work schedule would allow her to arrange a home program for Student. Mother said she would check, and the team agreed to continue the IEP meeting to work on placement options, including special education programs within Oxnard that could support Student on a comprehensive campus, and home instruction if Mother would be available for such a program. The IEP team agreed to hold off on finalizing Student's IEP until after it heard back from Mother about the home instruction, and Oxnard did not make a final offer of FAPE on July 26, 2018.

July 26, 2018 to August 17, 2018: Efforts to Find Mutually-Agreeable Placement for Student

153. Between August 2, 2018 and August 17, 2018, attorneys for Student and Oxnard exchanged emails continuing their efforts to locate a mutually-agreeable placement for Student. On August 2, 2018, Ms. Steel emailed Mr. Nieberg, stating that Mother did not know if she would be able to take time off to be home for Student's home instruction program until the following week. Ms. Steel asked Oxnard's attorney whether Oxnard would pay Student's grandmother on an hourly basis since she would have to stop working while Student was in his applied behavior analysis home instruction program.

154. On August 7, 2018, Mr. Nieberg asked Ms. Steel for an update regarding Mother's ability to implement Student's home instruction program.

155. On August 9, 2018, Mr. Nieberg informed Ms. Steel Oxnard was willing to refer Student to North Hills Prep School, a non-public school in Van Nuys, California

with a program for students in grades two through four focused on students with behavioral needs. Mr. Nieberg informed Ms. Steel that North Hills had eight students in a class, with one teacher and two paraeducators assigned to each classroom, and Oxnard would provide transportation to and from North Hills. If Mother agreed with referral, Oxnard would send information to staff at North Hills Prep for a final determination whether Student would be a good fit for North Hills.

156. Ms. Steel replied that Mother would be able to visit North Hills on August 15, 2018. Mr. Nieberg noted that Oxnard was set to resume school on Thursday, August 16, 2018. He asked if Mother would allow Student to stay home August 16 and August 17, while North Hills Prep would accept him as a student, and said Oxnard would provide Student compensatory education for those dates.

157. Mother never visited North Hills. Student filed his complaint in this matter on August 17, 2018.

#### SECLUSION AND HOLDS

158. During the 2017-2018 school year, Student was restrained by physical holds during 23 incidents from October 12, 2017, through June 5, 2018. Student's experts, Dr. Taubman and Ms. Freeman, testified to the importance of using functional behavior analysis to develop a behavior intervention plan to teach Student ways to avoid escalation, but they did not propose any alternatives to seclusion or safe holds to prevent Student from injuring himself and others when highly escalated.

159. Oxnard staff restrained Student using physical holds in 12 incidents. In accordance with Oxnard policy, these holds were all NCPI holds, and were administered by staff trained in their use, including Mr. Olson, Ms. Perez and Ms. Garcia-Thomas.

160. On October 12, 2017, Student began throwing rocks at other students on the playground and threatened to run away from the school campus. Ms. Perez and Mr. Olson used a standing team control hold, each holding onto an arm, to walk him to a

conference room to calm down. When released, he attacked Ms. Perez and Mr. Olson, who placed him in another hold until he de-escalated. The incident lasted 15 to 20 minutes.

161. On November 13, 2017, Student refused Ms. Ponce's request to work on an assignment and became destructive, tearing things off the walls, kicking and hitting classroom windows and doors, and throwing rocks at classroom windows. Mr. Olson tried for an hour to calm Student down, then walked with Student to Mr. Olson's office, where Student continued damaging property. Student ran from Mr. Olson's office towards some younger students. Believing Student to be a risk to himself and the younger students, Mr. Olson used a standing one-person control hold, holding Student's arms, until Student de-escalated. The incident lasted approximately 20 minutes.

162. On November 17, 2017, Student lost a quarter he was playing with, escalated, and began throwing books and other items at other students and Ms. Ponce. Ms. Ponce evacuated the class. Yelling obscenities, Student threw and kicked a chair towards Ms. Ponce and Ms. Perez. When Ms. Perez tried to use a one-person standing control hold, Student threw himself to the floor, then kicked Ms. Perez in the head when she bent down. Mr. Olson held Student's feet to keep him from kicking, and he and Ms. Perez talked calmly with Student until he de-escalated. The incident lasted 15 minutes.

163. On November 28, 2017, Student began knocking things off desks in Ms. Ponce's class and Mr. Olson was called. When Student grabbed at the lanyard around Mr. Olson's neck and tried to stomp on Mr. Olson's feet, Mr. Olson placed Student in a standing child control hold until he de-escalated. The incident lasted five to ten minutes.

164. On December 1, 2017, Student escalated in class, and ran down hallways tearing things off the walls, then outdoors. Student threw a concrete door stop at Mr. Olson, and continued tearing down bulletin boards until he agreed to go to Mr. Olson's

office, with Mr. Olson and Ms. Perez each holding a hand to escort him. Student tried to trip them and drop to the ground, so Ms. Perez and Mr. Olson used a two-person standing control hold to walk Student to Mr. Olson's office. In Mr. Olson's office, Student tried to kick and bite, and was placed in a child control hold. After 10 to 15 minutes, Student de-escalated and Mr. Olson released him, but Student then threw a chair at Ms. Perez, and tried to flip over a table. Mr. Olson placed Student in a child control hold again, until a special education teacher came into Mr. Olson's office and succeeded in distracting Student with a paper project until he de-escalated. The incident lasted approximately one hour, with holds totaling 25 to 35 minutes.

165. On January 19, 2018, his first day of instruction in the conference room, Student became agitated when he was not allowed to immediately deliver a party invitation to another student. Student ran down the hallway, and Mr. Olson believed Student intended to elope from campus. To prevent Student from eloping and possibly injuring himself, Mr. Olson, placed Student in a standing transport hold to lead him to the conference room. In the conference room, Student began to throw papers, desks, and chairs. Staff removed items that Student could throw. When there was nothing left to throw, Student began to hit, kick, spit, pinch, and attempt to bite Mr. Olson. Mr. Olson used the block and move technique to evade Student's assaults. Student climbed on a counter and reached for items on top of the upper cabinets, including a fire extinguisher and a large metal box. Mr. Olson believed Student was in danger of hurting himself and removed him from the counter. The incident lasted about 45 minutes.

166. On January 23, 2018, Student escalated while in Ms. Ponce's classroom. Student ripped pages out of a workbook and threw them onto the floor, covering the entire floor with paper and creating an unsafe environment for him and the other students in the classroom. "Lower level interventions were implemented" including

being prompted to calm down, and take a break, and given choices for his actions. However, Student was hitting with an open hand, punching, kicking, spitting, and attempting to bite adults, so a child control hold was administered by Ms. Garcia-Thomas for 5-10 seconds.

167. On January 24, 2018, after realizing that recess was over, Student pushed over a desk, grabbed a chair, and began throwing it against walls and towards Ms. Garcia-Thomas and Mr. Olson. Student attempted to bite staff and successfully climbed on top of a three and a half foot counter in order to kick the thermostat, creating a dangerous situation for himself. To prevent a fall, Mr. Olson guided Student onto a safe surface to stand. Student continued to attempt to bite and Mr. Olson held him in a child control position for about 10 seconds.

168. On January 25, 2018, Student was observed in the school's bicycle cage, trying to remove another student's scooter. When approached by Ms. Perez, Student escalated to a violent tantrum, during which he struck Ms. Perez three times in the face with rocks, grabbed his paraeducator's buttocks, lifted her blouse, tried to grab her cell phone, chased and hit her when she began to walk away. Student chased Ms. Perez around the bicycle rack, trying to bite her arms and hands, while screaming extremely derogatory gender expletives and threats.

169. On February 5, 2018, Student escalated on his way to class. In the conference room, Student flipped over his desk and threw wooden sticks from one of the games in the classroom at Mr. Olson, striking him in the head and causing him to bleed. Student also threw sand, covering the floor and creating a dangerous situation in which Student could slip, fall and hurt himself. Mr. Olson and Ms. Perez placed Student in an emergency hold until the sand was swept up. Ms. Perez was trained in NCPI techniques.

170. Casa Pacifica staff, and Student's paraeducators, were trained in the use of

safe holds for Student's safety or their own safety, and used them as a last resort only after interventions such as blocking and moving, verbal redirection, and distraction were unsuccessful in controlling dangerous behavior. Staff used holds during 11 incidents.

171. On Student's first day at Casa Pacifica, April 2, 2018, transitioning from outdoors to class, Student entered the class and began screaming loudly. Student responded to each prompt from the teacher by screaming. He escalated as he was guided into the hallway, and attempted to bite, hit with an open fist, pull hair, throw chairs, and kick people and walls. Staff placed Student in a transportation hold and took him to the Multi-Sensory De-escalation Room (MSDR), a padded room with play equipment, where Student calmed down after a seven-minute hold. Later that day, Student was on a break using a computer, and refused to leave the computer when the break was over. He spit at staff, hit, and attempted to bite staff, and tried to pick up and throw the computer. Student refused staff requests to leave the computer, and escalated as staff offered warnings and suggested alternatives. Student hit staff, spit at staff, attempted to bite, hit with an open fist, pull hair, throw chairs, and kick people and walls. Casa Pacifica staff placed Student in a standing two-person transport hold and walked him to MSDR.

172. On April 12, 2018, Student threw sand at a classmate, eloped to the classroom, punched his ERA Ed. paraeducator in the face and bit her in the arm. Student's paraeducator placed him in a NCPI hold to prevent Student from injuring her, and walked him back outside, where he escalated and attempted to hit staff with sticks, kick and strike his paraeducator, and elope from campus. When Student ignored redirection, reminders of expected behaviors, and suggested options, staff placed him in a seated hold, then a standing transport hold to the MSDR. The hold duration totaled 13 minutes.

173. On April 17, 2018, after Student assaulted his ERA Ed. paraeducator and

threw chairs and other items on the floor, Casa Pacifica staff transported Student with a standing hold to the MSDR. The hold duration was two minutes.

174. On April 18, 2018, Student objected to the seat he was assigned on the campus van, began spitting on staff, and moved to the front seat and attempted to move the shifter. Casa Pacifica staff physically removed Student from the van to prevent property damage. When Student then spit on staff and tried to elope from campus, Casa Pacifica staff placed him in a standing hold and walked him to the MSDR.

175. On April 20, 2018, Student attempted to hit staff with an open and closed fist, but no contact was made due to other staff using body positioning. Student was verbally redirected and provided options. Strategies such as responsive blocks and ignoring were used. Student continued to hit, bite and kick staff. Student was held in a seated position and taken in a transport hold to the MSDR. The hold duration was 14 minutes.

176. On April 24, 2018, Student threw sticks at staff, spit on staff, and threatened to kill them. Student also attempted to punch and kick staff, who used blocking techniques to avoid being injured. To keep Student from injuring himself or others, his ERA Ed. paraeducator placed him in a NCPI safe hold. After Student calmed down, his paraeducator and Casa Pacifica staff walked with him to the MSDR.

177. On April 30, 2018, Student became physically and verbally aggressive with staff, including spitting on staff, and was walked to the MSDR to de-escalate. He escalated in the MSDR, and spit on, hit, kicked, and punched staff, and attempted to bite them. ERA Ed. and Casa Pacifica staff placed him in a two-person seated hold for two minutes.

178. On May 16, 2018, Student eloped to the pool area and escalated when staff asked him to return. Student cursed staff, threatened to kill them, and spit at, hit, kicked, punched, and threw objects at staff. Staff used a 30-second child control hold to



transport Student to the MSDR, where he de-escalated. Later the same day, the scenario repeated itself. Student was again transported to the MSDR in a child-control hold, then placed in a one-person seated hold until he de-escalated. Later that day, Student eloped to the pool area for a third time, and began to throw rocks at staff. Staff reminded Student to make good choices, but Student attempted to stab the staff member with a stick. Student was transported for 30 seconds, away from the pool area. Student continued to escalate, told staff he was going to kill them and started to hit with open hand, bite, spit, and kick. Staff placed him in a one-person control hold and transported Student for about 1 minute to the MSDR. The total duration of the holds was two minutes.

179. On June 1, 2018, when asked to not spit at lunch, Student escalated and spit at, kicked, hit, and threw things at staff. Staff used a standing transport hold for 15 seconds to take Student to the MSDR.

180. On June 5, 2018, Student started following a classmate, taunting him, causing the classmate to lunge at Student, who fell to the ground. Staff separated Student and the classmate. Later, when Student again taunted the classmate into lunging at him, staff placed Student in a two-person standing transport hold for 15 seconds to separate him from the classmate, and prevent injury to either student. When staff released him from the transport hold, he spit at, scratched, hit, bit, and kicked them, and was placed in a four-person seated hold for four minutes until calm. When released from the hold, Student tried to run back to the classmate, and two staff members used a seated hold for three minutes to remove him from the area. The hold duration totaled seven minutes.

POST-FILING COMMUNICATIONS, FILINGS, AND EXPERT TESTIMONY REGARDING AN APPROPRIATE PLACEMENT AND EDUCATIONAL PROGRAM FOR STUDENT, RELEVANT TO REMEDIES

August 30, 2018 Oxnard FAPE Offer

181. On August 30, 2018, Oxnard communicated an offer to conduct a new functional behavior assessment of Student, and a FAPE offer of: (1) placement at Casa Pacifica, in a self-contained special education program with a 1:3 student staff ratio, and intensive social/emotional services from an Intensive School-Based Therapist (ISBT) available at all times within the daily program; plus related services of: (2) 1500 minutes per week of one-on-one behavioral trained paraprofessional provided by a non-public agency; (3) outside agency supervision provided on (what frequency of a basis?) [sic]; (4) implementation by the paraprofessional and Casa Pacifica Staff of a new behavior support plan based on results of the functional behavior assessment, and serving Student's behavior goals; (5) 1500 minutes per week specialized academic instruction; (6) 30 minutes per week individual speech services; (7) 30 minutes per week counseling; (8) 60 minutes per month social work services. Other services to address the social emotional and behavioral needs of Student while at Casa will include music and fitness, and bi-weekly family nights are offered along with daily feedback about student progress to parents/caregivers, via e-communication.<sup>2</sup> Student did not respond to this offer.

Proposed Placements for Student

182. Ms. Garcia-Thomas believed the most appropriate placement for Student as of June 2018, was Casa Pacifica, implementing the comprehensive behavior

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<sup>2</sup> Oxnard's August 30, 2018 FAPE offer is not at issue in this matter, but was considered with regard to remedies.

intervention plan she developed for Student's May 1, 2018 IEP based on Student's April 2018 functional behavior assessment.

183. As demonstrated by expert testimony at trial, and expressed in the parties' post-trial briefs, the parties agree that Student, as a result of his behaviors, is not ready to return to any Oxnard public school classroom, in either a general education class or special day class, due to concerns over his safety or that of others.

184. Between the filing of the complaint and hearing of the matter, the parties continued to attempt to locate a mutually-agreeable placement. In addition to North Hills Prep, the parties considered The Academy for Advancement of Children With Autism, a non-public school in Chatsworth, California; Phoenix-Los Nogales School in Camarillo, California, operated by the Ventura County Office of Education for students with significant social-emotional and behavioral needs; and Triton Academy, also operated by the Ventura County Office of Education, serving students with autism spectrum disorder. The parties found no mutually-agreeable placement that would accept Student.

#### Proposed Educational Program for Student

185. Dr. Freeman, Dr. Taubman and Ms. Garcia-Thomas recommended Student receive one-on-one systematic behavior programming based on applied behavior analysis principles for an entire school day, with educational opportunities as planned by a behavior team. The behavior program would be developed as a result of a behavior assessment, monitored by staff trained in applied behavior analysis, supervised by a qualified behavior specialist, with behavioral data collected.

186. Dr. Freeman, Dr. Taubman and Ms. Garcia-Thomas recommended a behavior team be put in place for Student consisting of a teacher, Parent, a full-time one-on-one behaviorist, a full-time behavior supervisor, and an expert in development of proactive applied behavior analysis programs, such as Dr. Peggy Van Fleet or Autism

Partnership.

187. In the opinion of Dr. Taubman, and Ms. Garcia-Thomas, Student requires an intensive one-on-one educational program for at least one year to address behaviors before attempting re-integration to a general education environment.

187. Mother and Father work full time outside the home and would seek reimbursement for the costs of a caretaker if Student was placed in the home.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>3</sup>

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20

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<sup>3</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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 California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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

4. In a recent unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than

the de minimus test'..." (*Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_\_\_\_ [137 S. Ct. 988, 1000-1001] (*Endrew F.*)). The Supreme Court in *Endrew F.* stated that school districts needed to "offer a cogent and responsive explanation for their decisions" and articulated FAPE as that which is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstance." *Id.*

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, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).)

6. 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].) Here, Student was the filing party and carried the burden of proof.

#### ISSUE 1: CHILD FIND

7. Student contends Oxnard denied Student a FAPE by failing in its child find duty from February 26, 2016 to May 18, 2017. Student argues Oxnard failed its child find duty to refer Student for assessment before May 18, 2017, and from May 18, 2017 to the filing of the complaint, because it failed to appropriately assess Student for autism.

8. Oxnard contends it did not have reason to suspect, before May 18, 2017, that Student might have a disability requiring special education, and its child find duty to Student was satisfied and ended when it referred Student for assessment on May 18, 2017.

9. The IDEA and Education Code place an affirmative, ongoing duty on the state and school districts to identify, locate, and assess all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); Ed. Code, § 56301, subd. (a).) This duty is commonly referred to as “child find.” “The purpose of the child-find evaluation is to provide access to special education.” (*Fitzgerald v. Camdenton R-III School Dist.* (8th Cir. 2006) 439 F.3d 773, 776.)

10. Through the child find requirement, Congress acknowledged the “paramount importance” of properly identifying each child eligible for special education services. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 245 [129 S.Ct. 2484, 2495, 174 L.Ed.2d 168].) The purpose of child find is to ensure that children with disabilities are found and have the opportunity to enter into the special education system. (*DL v. District of Columbia* (D.D.C. 2006) 450 F.Supp.2d 21, 22.)

11. “Child find” does not guarantee eligibility for special education and related services under the IDEA. It is merely a locating and screening process which is used to identify those children who are potentially in need of special education and related services. Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child’s eligibility for special education. (34 C.F.R § 300.301; Ed. Code, § 56302.1.)

12. “Child find” does not address disputes about the content of assessments, eligibility categories, or IEP offers after children have been located and identified. “Child find” relates to the location and identification of students who may be in need of

assessment, and not to the results of those assessments once conducted.

13. A school district has a child find duty whether or not the parent has requested special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) A school district's child find obligation toward a specific child is triggered when there is reason to suspect that he or she may be an individual with exceptional needs<sup>4</sup> as defined under Education Code section 56026 and in need of special education, even if the child is advancing from grade to grade. (Ed. Code, § 56301, subd. (b)(1).) A disability is "suspected," and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. (*Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F. 3d 1105, 1119 [citations omitted] *cert. denied*, 137 S. Ct. 1578, 197 L. Ed. 2d 704 (2017).) "Once either the school district or the parents suspect a disability, a test must be performed so that parents can 'receive notification of, and have the opportunity to contest conclusions regarding their children.'" (*Id.* at p. 1120.)

14. The duty to assess for exceptional needs is broader than the duty to provide special education, and more easily triggered. In deciding whether there is reason to suspect that a student has exceptional needs, a school district's appropriate inquiry is whether the student should be referred for an assessment, not whether the student actually qualifies for special education services. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1195 ("*Cari Rae S.*").) Thus, the suspicion that a student has an impairment that is affecting the student's educational performance is sufficient to trigger a need for assessment. (See, e.g., *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1032 ["The District

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<sup>4</sup> The Education Code generally uses the term "exceptional needs" instead of the term "disability" found in the IDEA.



is not required to assess double vision or optic nerve damage if it does not affect a child's educational needs"], citing Ed. Code, § 56320.) A school district's duty to assess a student's eligibility for special education and related services is also triggered by any request for special education or assessment from the student's parent. (Cal. Code Regs., tit. 5, § 3021(a).) If the parent's request is verbal, the district must offer to assist the parent in preparing a written request. (*Ibid.*)

15. Clear signs that trigger the child find duty include a pupil who is performing below grade average in basic academic functions such as reading; failing grades; behavior and discipline problems; a significant amount of absences from school; concerns expressed by parents and teachers; signs of substance abuse; a medical diagnosis of a recognized disability; psychiatric hospitalizations; suicide attempts; and a request for an evaluation from the parents. (See e.g., (*Compton Unified School Dist. v. Addison* (9th Cir. 2010) 598 F.3d 1181, at pp. 1182-1183; *Cari Rae*, supra, 158 F.Supp.2d at p. 1195; *Wiesenberg v. Bd. of Education of Salt Lake City School Dist.* (D.Utah 2002) 181 F.Supp.2d 1307, at pp. 1311-1312; *Hicks v. Purchase Line School Dist.* (W.D.Pa. 2003) 251 F.Supp.2d 1250, at p. 1254; *N.G. v. District of Columbia* (D.D.C. 2008) 556 F.Supp.2d 11, at pp. 18-21.)

16. The relationship between the duty to assess, the duty to provide special education services, and the duty to utilize general education resources where appropriate was concisely summarized in *Los Angeles Unified School District v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 819-820:

To prevent districts from 'over-identifying' students as disabled, Congress mandated that states develop effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education. (20 U.S.C. §

1400(c)(5)(f).) Schools, however, are charged with the 'child find' duty of locating, identifying and assessing all children who reside within its boundaries who are in need of special education and related services. (20 U.S.C. § 1400(a)(3); [Ed. Code, §§ 56300- 56303].) If a school district suspects that a general education student may have a disability, it must conduct a special education assessment to determine whether the student qualifies for special education services. (20 U.S.C. § 1414(a)(1)(a); [Ed. Code, § 56320].) However, a student 'shall be referred for special education instruction and services only after the resources of the regular education program have been considered, and, where appropriate, utilized.' ([Ed. Code, § 56303].)

17. Although a district is required to utilize the resources of its regular education program, where appropriate, to address a student's exceptional needs, it may not delay its assessment of a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in the regular education program. A district may deny a request to evaluate a student if it does not suspect a disability, but it must notify the parent of the basis of the decision and that basis cannot be that the district is waiting to see how the student responds to general education interventions. (Office of Special Education Programs (OSEP) *Memorandum to State Directors of Special Education* (January 21, 2011) 56 IDELR 50.)

18. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae S., supra*, 158 F.Supp. 2d 1190 at p.1196); *Park v. Anaheim, supra*, 464 F.3d 1025 at p. 1031.) A procedural violation results in liability for denial of a FAPE only 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; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*).)

19. A child who is not eligible for special education is not denied a FAPE by a procedural violation of the IDEA. (*F.B.v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 942.) Failure to identify and assess a child is not an actionable child find violation unless the child is subsequently found eligible for special education. However, a child find violation leading to a failure to assess a child who is subsequently found eligible for special education generally results in liability for denial of a FAPE, because the absence of any information concerning the child's disability significantly impedes the child's right to a FAPE, and the parent's opportunity to participate in the decision-making process, and may cause a deprivation of educational benefits. (See, e.g., *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, at p. 1124 ("On more than one occasion, we have held that the provision of a free appropriate public education is 'impossible' when the IEP Team fails to obtain information that might show that the child is autistic").)

20. Parents must file a request for a due process hearing within two years from the date they knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (I).) Mother authorized the student success team meeting to proceed on October 25, 2016 in Parents absence. Ms. Rodriguez reviewed the notes of the meeting with Mother on November 17, 2016. On that date, Mother received and signed notes of the follow-up October 25, 2016 success team meeting, at which team members again reviewed Student's progress and behavior and did not refer him for assessment. The evidence did not support Student's

claim the statute of limitations should not apply to claims going back to February 26, 2016, under either of the statutory exceptions. (20 U.S.C. § 1415(f)(3) (D); Ed. Code, § 56505, subd. (l).)

21. Student started kindergarten in August 2015 kind, energetic and happy, and enjoyed being at school. He earned satisfactory marks for effort in all four academic subjects in which he was graded for effort, indicating that he was trying to learn. However, despite his good attitude and effort, he did not make academic progress. Instead, he had difficulty understanding new concepts, was easily distracted, and immediately began to struggle with his language arts, mathematics, meeting none of the 14 first-trimester common core state standards benchmarks for language arts and mathematics. Student also struggled to master the 16 skills for successful learning that he was supposed to learn in kindergarten, and his teacher rated him at risk for retention. Although Student's attitude and effort remained satisfactory in his second trimester, he made little improvement academically, or towards mastering the learning skill he would need for first grade.

22. Student's referral to a student success team at the end of his second trimester was appropriate because there was no evidence Parents, teachers or staff suspected a disability. Oxnard did not violate its child find duties by holding the student success team meeting on February 25, 2016. Oxnard's practice, confirmed by Oxnard teachers and staff at hearing, was to attempt general education interventions through a student success team before assessing a student for possible disabilities requiring special education. Oxnard discussed Student's challenges and proposed a three step intervention approach to accommodate the Student in his regular education program. The team intended to follow up on Student's progress in eight to ten weeks and schedule another meeting. Student's academic progress improved marginally, and behaviors improved, from March to June 2016. Mother was concerned about his

progress and thought Student needed to repeat kindergarten. She spoke to Ms. Hawkins who informed her Oxnard did not have students repeat a grade and that Student would catch up in first grade.

23. Student started first grade in Ms. Moran's class at a different school in August 2016. Oxnard held a second student success team meeting on October 25, 2016. By that time all of the strategies developed at the first meeting were implemented, completed and unsuccessful. The team discussed Student's challenges and Ms. Moran reported Student was at risk to repeat first grade. Oxnard should have, but did not, discuss whether Student's lack of academic progress, behavioral difficulties and continuing speech impediment might be due to any suspected disability. These were all significant indicators of a potential disability affecting Student's learning, but the student success team did not even discuss the possibility of assessments. Instead, Oxnard adopted a wait and see attitude, returned Student to the boys' social skills group and, if Parent agreed, offered an after school tutoring program.

24. With Mother's permission Student continued participating in the boys' social skills group and began after school tutoring in January 2017. From January to June 2017, Student failed to make academic progress and his aggressive behavior escalated.

25. The student success team met again on April 26, 2017. The team discussed whether Student should be assessed, the team decided to continue general education interventions, even as Oxnard's New Dawn therapist diagnosed Student with unspecified disruptive, impulse-control and conduct disorder. On May 18, 2017, as the result of another extreme behavior incident, the team met again and recommended a full special education assessment. An assessment plan was sent to Parents on May 31, 2017, near the end of the school year.

26. Parents returned the plan on September 30, 2018, near the beginning of

the next school year. As part of the resulting assessment, Ms. Murguia assessed Student using standardized tests and questionnaires which, overall, rated Student as having minimal or no characteristics associated with autism.

27. Student proved that, by October 25, 2016, Oxnard knew the success team strategies were completed, the strategies did not work and there was reason to suspect Student's challenges were caused by disabilities that required assessment. Student proved Oxnard violated its child find obligation from October 25, 2016 through May 31, 2017. Student did not prove Oxnard failed to assess Student for autism.

#### ISSUE 2(A): FAILURE TO MAKE FAPE OFFER BEFORE JANUARY 11, 2018

28. Student contends Oxnard denied him a FAPE by failing to assess him and make a FAPE offer in early 2016, when his potential disability should have been identified and assessed. Oxnard contends its January 11, 2018 FAPE offer was timely.

29. When a student is referred for a special education assessment, whether by a school district or a parent, the district must provide the parent a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, § 56321, subd. (c)(4).) The district then has 60 days from the date it receives the parent's written consent, excluding days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. ((20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56043, subds. (c) & (f).)

30. When Oxnard eventually referred Student for assessment on May 18, 2016, nearly seven months after the October 25, 2016 student success team meeting, the referral led to assessments that confirmed Student's eligibility for special education

under categories of other health impairment based on attention deficit hyperactivity disorder, and speech impairment based on a frontal lisp. Moreover, the October 25, 2016 success team meeting occurred near the beginning of Student's first grade school year and assessments would have been completed and an IEP team meeting held within that school year. Oxnard would have been required under the statutes to have developed an initial IEP for Student's second grade year.

31. Oxnard denied Student a FAPE by failing to make any offer of FAPE prior to January 11, 2018.

#### ISSUE 2(B): FAILURE TO OFFER FAPE IN THE JANUARY 11, 2018 IEP.

32. Student contends Oxnard failed to offer Student a FAPE in IEPs dated January 11, 2018, January 22, 2018, February 26, 2018, May 1, 2018, June 7, 2018, and July 26, 2018, because each failed to offer Student a one-on-one applied behavior analysis program, when, Student contends, the need for such a program was known to Oxnard behavior specialist coordinator, Ms. Garcia-Thomas.<sup>5</sup> Oxnard contends each of its IEPs offered Student an appropriate behavior program.

33. In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect

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<sup>5</sup> Student's only stated contention regarding Student's IEPs dated January 11 and 22, February 26, May 1, June 7 and July 26, 2018 was that Oxnard denied Student a FAPE by failing to offer applied behavior analysis services. Therefore, this is the only issue analyzed regarding Issue 2(b).

academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

34. If a child's behavior interferes with his or her learning or the learning of others, the IDEA requires the IEP team, in developing the IEP, to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) An IEP is evaluated based on information available to the IEP team at the time it was developed; it is not judged exclusively in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) However, after-acquired information may be used to assess the reasonableness of a school district's determinations. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2009) 652 F.3d 999, 1004.)

35. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*) School districts need to "offer a cogent and responsive explanation for



their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Endrew F.*, supra, 580 U.S. \_\_\_\_ [137 S.Ct. 988].)

36. As of Student's initial IEP meeting on January 11, 2018, Oxnard was aware that Student engaged in aggressive, violent behaviors that interfered with his learning and the learning of others. Ms. Garcia-Thomas, had conducted a special circumstances educational support assessment of Student, and concluded that consistent, intensive, individualized support addressing Student's behaviors was absolutely necessary for Student to control his behaviors, and to learn. She recommended Student receive full time one-on-one support from a trained behaviorist.

37. Oxnard's January 11, 2018 and January 22, 2018 IEPs did not offer Student any one-on-one behavior support services. Instead, an untrained substitute paraprofessional provided one-on-one services that were not included anywhere in the IEP document, and not approved by Parents. The January 11, 2018, and January 22, 2018 IEPs failed to offer Student a FAPE.

38. Oxnard's February 26, 2018 IEP offered Student placement in a general education classroom with substantial behavior support, including a one-on-one ABA behavior aide, from a non-public agency, for the entire school day. Mother subsequently signed this IEP on March 15, 2016, although she disagreed the IEP offered a FAPE, and it remains Student's last implemented IEP.<sup>6</sup> The ABA one-on-one behavior aide offered in

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<sup>6</sup> At Student's request, official notice is taken of *Oxnard School District v. I.H. et. al.*, No. 2:18-cv-07357-SVW-AS (C.D. Cal. Oct. 31, 2018 Minute Order), in which the court denied Oxnard's motion for a preliminary injunction enjoining Student from attending or otherwise being present at Chavez Elementary School. The court found Oxnard failed to show irreparable harm because Oxnard made clear it would turn Student away from Chavez, and Student's counsel stated "there is no threat that [Student] will try to attend

the February 26, 2018 IEP was appropriate behavior support. While reasonably calculated, on February 26, 2018, to provide educational benefit to Student, Student's behaviors further escalated at the beginning of March.

39. On March 30, 2018, following the manifestation determination and IEP team meeting on March 22, 2018, Oxnard and Parents agreed to an interim alternative placement at Casa Pacifica from April 2, to June 14, 2018.

40. Oxnard's May 1, 2018 IEP offered Student placement at Casa Pacifica with intensive social/emotional services available at all times within the daily program, provided by an intensive school-based therapist; a one to one behavioral paraprofessional provided by an outside agency 1500 minutes weekly, with outside agency supervision. The IEP included a comprehensive positive behavior intervention plan to be implemented using applied behavior analysis methods.

41. Ms. Garcia-Thomas was familiar with applied behavior analysis methods and used them in Student's program. She prepared a comprehensive behavior intervention plan for Student that was incorporated into Student's May 1, 2018 IEP. Parent never consented to the IEP or the behavior plan, but Ms. Garcia-Thomas believed implementing the comprehensive behavior intervention plan with Student at Casa Pacifica would have been the best program for him as of June 2018. There was no indication she found Oxnard's behavior program deficient.

42. Oxnard's June 7, 2018 and July 26, 2018 IEPs offered Student placement at Casa Pacifica with: (1) intensive social/emotional services available at all times within the daily program, provided by an intensive school-based therapist; (2) one to one

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Cesar Chavez elementary." Student does not seek placement at Chavez Elementary School as a remedy in this matter, and has agreed in his closing brief that Chavez Elementary is not an appropriate placement for Student at this time.

behavioral trained paraprofessional provided by an outside agency 1500 minutes per week with outside agency supervision; (3) a one-to-one behavioral aide with the support of behavior interventionist as well as site staff to implement the behavioral support plan created specifically for Student following a functional behavioral assessment; (4) 1500 minutes per week specialized academic instruction; (5) 30 minutes weekly of individual speech services; (6) 30 minutes weekly of counseling; and 60 minutes per monthly social work services.

43. Student made progress addressing his behaviors during the times he was placed at Casa Pacifica, before Parents withdrew Student from Casa Pacifica. Student proved the January 11 and 22, 2018 IEPs denied Student a FAPE by failing to offer appropriate behavior support. Student did not prove the IEPs dated February 26, 2018, May 1, 2018, June 7, 2018, and July 26, 2018 failed to offer behavior support.

#### ISSUE 2(C): FAILURE TO IMPLEMENT JANUARY 11, 2018 IEP

44. Student contends Oxnard failed to implement the January 11, 2018 IEP, because, as Oxnard admitted in its manifestation determination meeting on January 22, 2018, it failed to provide Student a trained paraeducator, and failed to provide Student speech and language services and specialized academic instruction included in the IEPs. Oxnard does not dispute these contentions.

45. A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).) A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) "There is no statutory

requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 at p. 7.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn, supra*, 502 F.3d at p. 822.)

46. Oxnard acknowledged it did not provide a properly trained paraeducator and the evidence showed that Student's ability to access his education declined during the period in which he did not receive this service. The records of Oxnard's speech and language pathologist and resource specialist proved that Oxnard failed to implement a material portion of the speech and language services and specialized academic instruction offered in his January 11, 2018 IEP. Accordingly, Student prevailed on Issue 4(a).

### ISSUE 3: EMERGENCY INTERVENTIONS AND SECLUSION

47. Student contends between May 2017 and June 2018 Oxnard and Casa Pacifica staff used inappropriate restraints as a systematic behavior intervention, and on several occasions between January 11, and March 8, 2018 Oxnard used inappropriate seclusion to control Student's behaviors. Oxnard contends it used appropriate interventions and used restraints and seclusion according to law to prevent harm to Student and others.

48. The IDEA does not directly address the use of restraint and seclusion in school. However, if such methods are permitted by state law, and necessary for a particular child to receive a FAPE or to enable the child to participate in extracurricular and non-academic activities, they should be incorporated into the child's IEP or behavior

plan. (*Letter to Anonymous*, 57 IDELR 49, 111 LRP 45428 (OSERS 2010); *Letter to Trader*, 48 IDELR 47 107 LRP 29537 (OSEP 2006).)

49. Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Ed. Code, § 56521.1, subd. (a).) Emergency interventions may not be used as a substitute for a systematic positive behavior plan which is designed to change, replace, modify, or eliminate a targeted behavior. (Ed. Code, § 56521.1, subd. (b).)

50. An emergency intervention shall not be used for longer than is necessary to contain dangerous behavior posing serious harm to others or self. A situation requiring a prolonged emergency intervention requires staff to seek the assistance of a school administrator or law enforcement agency. (Ed. Code, § 56521.1, subd. (c).) Emergency interventions shall not use an amount of force exceeding that which is reasonable and necessary under the circumstances. (Ed. Code, § 56521.1, subd. (d)(3).) A physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purposes of inducing a student who is acting out to walk to a safe location. (*U.S. Dept. of Education Restraint and Seclusion: Resource Document*, p. 10 (May 15, 2012).)

51. The use of a separate classroom is appropriate where, as here, a student engages in conduct that is substantially likely to result in injury. (See e.g. *Rialto Unified School District v. Student* (2013) OAH Case Number 2013090966 [Student was physically aggressive and engaged in eloping behaviors and caused, attempted, or threatened to cause physical injury (including death) to staff and students].) Conduct that has been found substantially likely to result in injury includes hitting, kicking, shoving, biting,

climbing on classroom furniture and cabinets, shouting obscenities, throwing objects at people, running out of the classroom, and banging on the doors of other classrooms.

(*Long Beach Unified School Dist. v. Student* (2008) OAH Case Number 2008030017.)

Behaviors that have been found likely to result in injury also include: hitting an adult in the back, lunging at the teacher and trying to punch and hit her, yelling at and threatening people (*Fort Bragg Unified School Dist. v. Parent on behalf of Student* (2008) OAH Case Number 2008100507); throwing desks, knocking over a computer, yelling and screaming, hitting, kicking, punching, and biting adults (*Fullerton Joint Union High School Dist. v. Student* (2007) OAH case number 2007040584); and throwing objects, kicking other children, punching and kicking school staff, eloping from school and running into the street, knocking over another child, screaming, and destroying property (*Lancaster Elementary School Dist. v. Student* (2006) OAH case number 2006030771.)

52. Oxnard did not use emergency interventions as a substitute for a systematic positive behavior plan. Oxnard used emergency physical interventions, including physical escort, when Student presented a danger to himself or others. Student's behavior was unpredictable and spontaneous. His physical attacks on staff and other students caused physical harm, including injuries that resulted in physical injury and open wounds. His severe tantrums included throwing things, pushing furniture, destroying property and using profanity and threats resulting in evacuation of his classroom. Student's behaviors required properly trained Oxnard staff to use the temporary application of restraint for short periods of time to protect Student and others from injury and were not applied for longer than necessary. Similarly, seclusions were not used for longer than necessary to protect Student and others from harm and did not exceed what was reasonable and necessary under the circumstances.

53. Student did not prove that Oxnard used inappropriate behavior interventions or improper emergency procedures or seclusion under the circumstances.

ISSUE 4(A): FAILURE TO MAKE CLEAR WRITTEN OFFER IN IN JANUARY 11, 2018  
IEP

54. A determination of whether Oxnard failed to make a specific, written offer of FAPE at the January 11, 2018 IEP is not required in light of the conclusion that the January 11, 2018, IEP denied Student a FAPE.

ISSUE 4(B): FAILURE TO COMPLETE INITIAL IEP WITHIN 60 DAYS OF SIGNED  
ASSESSMENT PLAN,

55. Student contends Oxnard denied him a FAPE by failing to assess Student and develop an initial IEP within 60 days of September 20, 2017, the date on which Mother returned consent to Oxnard's assessment plan for Student. Oxnard contends that Mother consented to extend the 60-day deadline for developing Student's IEP when she signed the November 9, 2017 IEP and agreed to reconvene the meeting at a later date.

56. Procedurally, a school district has 60 days from the date it receives a parent's written consent to assess a child, excluding days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56043, subds. (c) & (f).) When a district delays the assessment of a child who is ultimately found eligible for special education and related services, the delay deprives parents of the assessment results they need to participate in the decision-making process, and it deprives the child access to educational benefits that begin upon the determination of eligibility.

57. Here, the 60-day deadline for Oxnard to develop Student's initial IEP was November 20, 2017. On November 9, 2017, Mother agreed in writing: (i) she was informed that more time was needed to complete additional assessments; (ii) she gave permission to open the meeting; and (iii) per her request, she would be notified with

advance notice when the meeting was to reconvene. Mother could have agreed to any of those three things while still refusing to agree to an extension of time to complete the assessments, or an extension of time to develop Student's initial IEP. Mother's signature on the November 9, 2017 IEP did not constitute a written agreement for an extension of time to complete the assessments and develop an initial IEP for an unknown period of time unilaterally determined by Oxnard.

#### ISSUE 4(C) FAILURE TO INCLUDE GENERAL EDUCATION TEACHER AT IEP TEAM MEETINGS

58. Student contends Oxnard denied him a FAPE by failing to have a general education teacher present at Student's IEP meetings on May 1, 2018, June 7, 2018 and July 26, 2018. District admits no general education teacher attended the May 1, 2018 or July 26, 2018 meeting, but contends a Oxnard general education teacher did attend the June 7, 2018 meeting, and absence of a general education teacher on May 1, 2018 and July 26, 2018 did not deny Student a FAPE because it did not significantly impede Parent's opportunity to participate in the decision-making process, cause a deprivation of educational benefits, or impeded Student's right to a FAPE.

59. Each meeting to develop, review or revise the IEP of an individual with exceptional needs must be conducted by an IEP team. (Ed. Code, § 56341, subd. (a).) The IEP team must include, "not less than one regular education teacher *of the pupil*, if the pupil is, or may be, participating in the regular education environment. If more than one regular education teacher is providing instructional services to the individual with exceptional needs, one regular education teacher may be designated by the local educational agency to represent the others." (Ed. Code, § 56341, subd. (b)(2) (emphasis added).)

60. The Ninth Circuit has held that "the plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that at least one



regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary.” (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2005) 394 F.3d 634, 643 (*M.L.*)). In *M.L.*, the Ninth Circuit found that a general education teacher was required at the IEP team meeting for preschooler in an integrated general education preschool classroom, even though information was available to the team about the teacher’s opinions, and despite the recommendation of district team members for a special education classroom placement. (*Ibid.*) A regular education teacher, to the extent appropriate, must participate in the development, review and revision of the student’s IEP, including assisting in the determination of appropriate positive behavioral interventions and supports, and other strategies for the pupil, and the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the student. (20 U.S.C. § 1414(d)(3)(C); Ed. Code, § 56341(b)(2).)

61. Mother never consented to anything more than temporary placement of Student in Casa Pacifica’s non-public school environment. At the time of the May 1, 2018, June 7, 2018 and July 26, 2018 IEP team meetings, it was thus contemplated, at least by Parents, that Student might be returning to the regular education environment, and that any IEP meeting would involve discussion of the least restrictive environment appropriate for Student. Ms. Evans, an Oxnard general education teacher attended Student’s June 7, 2018 IEP.

62. The absence of a regular education teacher at Student’s IEP team meetings on May 1, 2018, and July 26, 2018, impeded Mother’s participation in the decision making process.

## REMEDIES

1. Student prevailed on Issues 1, 2, and 4(b) and (c). Oxnard prevailed on Issue 3. Issue 4(a) was not decided. As a remedy with respect to the issues on which

Student prevailed, Student requests that Oxnard be directed to: (i) place Student in an intensive one-on-one instruction program – in home, or alternatively in a dedicated classroom on an Oxnard school campus – initially focused on addressing Student’s behaviors using applied behavior analysis principles; (ii) set up a behavioral team using providers of Student’s choosing, or agreed-upon by Student, to create, implement and supervise Student’s behavioral program team; (iii) fund a behavioral evaluation for use by Student’s behavior team; (iv) find Student eligible for special education as a student with autism; and (v) provide substantial compensatory education.

2. Oxnard agrees that a behavioral program based on applied behavior analysis principles is appropriate, but contends that the most appropriate placement for such a program would be at Casa Pacifica. It is clear from the evidence at trial and the post-trial briefing that Oxnard is committed to developing an appropriate program to help Student access his education and make progress on his behavioral issues and academics. However, the parties learned at hearing that Casa Pacifica did not implement Student’s IEP during his placement there.

3. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (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, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra*, 557 U.S. 230, 244, n. 11.)

4. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id.*; *Student W. v. Puyallup School*

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

5. Student is currently receiving no education, and his greatest need is immediate access to a placement and program appropriate for his unique needs. The nature of Student’s unique needs remains unclear. Student’s medical diagnoses of attention deficit hyperactivity disorder and unspecified disruptive, impulsive and conduct disorder were unsupported by any reports or testimony. The two available assessments of Student – Oxnard’s multidisciplinary assessment and Dr. Freeman’s autism assessment contained conflicting observations and conclusions, and each had flaws. Dr. Freeman’s autism diagnosis was undercut by her not evaluating for possible emotional disturbance, not disclosing test scores generated by her primary diagnostic tool, her observation of Student’s behaviors not observed by others, and her emphasis of Student’s inability to deescalate as a result of his autism, which was at odds with numerous observations by others of Student’s ability to calm down from extreme

escalation within moments of the arrival of Mother, his grandfather, his uncle, or a police officer.

6. The parties shall be ordered to obtain an independent psychoeducational assessment of Student by a mutually agreed-upon independent assessor at public expense. The assessor selected and the cost of the assessment shall be within Oxnard's guidelines for independent educational evaluations.

7. If the parties cannot agree to an assessor, each party shall provide the other with three names of qualified assessors. If the parties name the same assessor, that person shall conduct the assessment. If the parties name two of the same assessors, Student shall designate who will conduct the assessment. If the parties do not name any of the same providers, Oxnard shall provide Student a list of at least five qualified assessors that meet Oxnard's guidelines for independent educational assessments and Student shall pick an assessor from the list. The parties shall select an assessor by this method no later than January 18, 2019.

8. Although Oxnard and Student disagreed on the nature of Student's disability, they agreed an appropriate educational program for Student at this time would focus on a one-on-one behavior program based on applied behavior analysis. In addition to the psychoeducational assessment, the parties shall be ordered to obtain an independent functional behavior assessment by a mutually agreed-upon independent assessor. The assessor selected and the cost of the assessment shall be within Oxnard's guidelines for independent educational evaluations. If the parties are unable to agree on the assessor, the provider will be selected in the manner set forth above.

9. Oxnard shall obtain an educationally-related social emotional services assessment of Student from an assessor of Oxnard's choosing, at its expense.

10. In order to provide an educational environment in which Student may be assessed, the parties shall convene an IEP team meeting no later than February 1, 2019,

to develop an interim educational placement. The placement must include one-on-one systematic behavior programming based on applied behavior analysis principles for an entire school day, with educational opportunities as planned by a behavior team. The behavior program shall be provided by and monitored by staff trained in applied behavior analysis, and supervised by a qualified behavior specialist, with behavioral data collected.

11. As compensatory education for services that were not provided according to the January 11, 2018 IEP, Oxnard shall be ordered to provide Student ten hours of speech/language therapy services and 100 hours of intensive academic instruction. The compensatory services shall be provided by Oxnard or a mutually agreed-upon non-public agency. If the parties are unable to agree on any of the providers, a provider shall be selected in the manner set forth above for the selection of independent assessors.

12. Student's IEP team will be ordered to meet within 10 days of completion of Student's psychoeducational assessment and social emotional services assessments to review the assessments and revise Student's IEP. If the parties cannot agree on a new IEP, Student's program implemented pursuant to this order will be stay-put.

## ORDER

1. Oxnard shall provide, at public expense, an independent psychoeducational assessment of Student by a mutually agreed-upon independent assessor. The assessor selected and the cost of the assessment shall be at public expense within Oxnard's guidelines for independent educational evaluations.

2. If the parties cannot agree to an assessor, each party shall provide the other with three names of qualified assessors. If the parties name the same assessor, that person shall conduct the assessment. If the parties name two of the same assessors, Student shall designate who will conduct the assessment. If the parties do not name any of the same providers, Oxnard shall provide Student a list of at least five qualified

assessors that meet Oxnard's guidelines for independent educational assessments and Student shall pick an assessor from the list. The parties shall select an assessor by this method no later than January 18, 2019.

3. Oxnard shall provide, at public expense, an independent functional behavior assessment by a mutually agreed-upon independent assessor. The assessor selected and the cost of the assessment shall be at public expense within Oxnard's guidelines for independent educational evaluations. If the parties are unable to agree on the assessor, the provider will be selected in the manner set forth above.

4. Oxnard shall obtain an educationally-related social emotional services assessment of Student from an assessor of Oxnard's choosing, at its expense.

5. The parties shall convene an IEP team meeting no later than February 1, 2019, to develop an interim educational placement for the purpose of assessment. The placement must include one-on-one systematic behavior programming based on applied behavior analysis principles for an entire school day, with educational opportunities as planned by a behavior team. The behavior program shall be provided by and monitored by staff trained in applied behavior analysis, and supervised by a qualified behavior specialist, with behavioral data collected.

6. Oxnard shall complete the assessments and hold an IEP team meeting within the statutory time lines unless Oxnard obtains written consent to waive a timeline from Parent.

7. Oxnard shall provide Student 100 hours of intensive academic instruction and ten hours of speech/language therapy as compensatory education. The intensive academic instruction and speech language therapy shall be provided by Oxnard or a mutually agreed-upon non-public agency. If the parties are unable to agree on any of the providers, a provider shall be selected in the manner set forth above for the selection of independent assessors. Student shall have until the end of the 2019-2020

school year to use these compensatory hours. Hours not used by the end of the 2019-2020 school year are forfeited.

All other relief sought by Student is denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party on Issues 1, 2 and 4(b) and (c). Oxnard prevailed on Issue 3.

## RIGHT TO APPEAL

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

DATED: December 18, 2018

/s/

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ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings