

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017100702

DECISION

Sacramento City Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings on October 16, 2017, naming Student as respondent.

Administrative Law Judge Penelope Pahl heard this matter in Sacramento, California on December 7, 12, 13, 15, 19, and 20, 2017. The hearing on December 7, 2017 was dismissed early due to the unavailability of a Korean interpreter which had been requested by Parents.¹ Korean Interpreter Peter Park, having been duly sworn, translated the proceedings for Parents on December 12, 13, 15, 19 and 20, 2017.

Sarah Garcia and Erin Frazor, Attorneys at Law, represented Sacramento City

¹ No testimony was taken on December 7, 2017. Discussions were limited to securing a translator and the need to wait for translation before proceeding with preliminary motions.

Unified School District. Rebecca Bryant, Director of Special Education for Sacramento City, attended the hearing each day on behalf of the district.

Roberta Savage, Attorney at Law, represented Student. Student's Mother and Father attended each day of the hearing. Student did not attend.

A continuance was granted so the parties could file written closing arguments, and the record remained open until January 11, 2018. Closing arguments were timely received, at which time the record was closed and the matter was submitted for decision.

ISSUE

Does Student's May 25, 2017 Individual Education Program, including placement in a special day class with language emphasis program, offer Student a free, appropriate public education in the least restrictive environment?

SUMMARY OF DECISION

Sacramento City Unified School District's May 25, 2017, IEP failed to substantively offer Student a free, appropriate, public education (FAPE) in the least restrictive environment for the 2017-2018 school year. Sacramento City failed to adequately assess Student's executive functioning, sensory processing and behavior deficits to provide accurate present levels of performance on which to base Student's goals. As a result of the inadequate information regarding Student's functional behavior, which was identified by multiple assessors as a suspected area of need, the IEP team was unable to develop appropriate annual goals. In this case, the IEP was substantively flawed to a degree that it was unnecessary to reach a determination on Student's numerous alleged procedural violations. Sacramento City's request that the May 25, 2017 offer of special education and related services be declared FAPE is denied.

FINDINGS OF FACT

JURISDICTION

1. Student is a 12-year-old boy who, at all times relevant to these proceedings, lived with his Parents within the jurisdictional boundaries of the Sacramento City Unified School District.²

2. Student is eligible for special education and related services with autism as a primary eligibility category and other health impairment, due to a diagnosis of attention deficit hyperactivity disorder, as a secondary category. Student was retained in the first grade. At the time the offer that is the subject of this hearing was made, Student was completing his fourth grade year.

3. Student's most recent Sacramento City classroom assignment was a special day class at John Cabrillo Elementary School during the 2015-2016 school year. Parents were dissatisfied with the program, and withdrew him following winter break in January 2016 electing to begin a homeschool program. Ultimately, Sacramento City and Parents executed a settlement agreement whereby the parties agreed Student would be home-schooled through fourth grade, and would receive reimbursement for, among other services, private Lindamood-Bell tutoring. The agreement further specified that

² At the beginning of the hearing, the parties presented the undersigned with a list of 19 stipulated facts which included jurisdiction; special education eligibility categories; age; Parents' removal of Student from his third grade SDC class to a home-schooling program; the assessments conducted for Student's triennial evaluation and the organization that conducted them; the dates of the three IEP meetings, IEP meeting notice received by Parents; procedural safeguards received by Parents; Parents' refusal to consent to the May 25, 2017 IEP; and that prior written notice was sent to Parents' counsel in response to Parents August 13, 2017 Parent Statement.

Student's triennial assessments would be conducted in spring 2017 after which an IEP team meeting would be held by May 1, 2017.

STUDENT'S TRIENNIAL ASSESSMENTS

4. Pursuant to a prior settlement agreement between the parties, Student triennial assessments were conducted in the spring of 2017. Student was to be assessed in all areas in which he had previously received services. The assessment plan was prepared by Sacramento City and signed by Parents. Parents were not refused any assessments or any requested independent educational evaluations. Assessments included:

- A health assessment conducted by Susan Sivils, the school nurse;
- Academic assessments conducted by Caleb Greenwood Elementary School Special Education teacher Lianne Moseley;
- A speech and language assessment conducted by speech pathologist Melita Huitt;
- A psycho-educational assessment, conducted by school psychologist Linda Lee;
- An occupational therapy assessment conducted by Polly Bowser; and
- A functional behavior assessment conducted by Stefanie Asche and Theresa Davis of Learning Solutions.

No comprehensive assessment of Student's executive functioning needs or of his sensory processing needs was completed.

Health assessment

5. School Nurse Susan Sivils conducted a health assessment using information from Mother. The assessment concluded generally that Student was in good health, wore glasses for vision correction and had recently begun taking Ritalin to

control his attention deficit hyperactivity disorder symptoms. No issues were raised regarding the adequacy of the health assessment.

Academic assessment

6. Student's academic assessment was administered by Lianne Moseley, a special education teacher at Caleb Greenwood Elementary, Student's school of residence.³ Ms. Moseley conducted the assessment because Student was being home-schooled at the time. Ms. Moseley had met Student previously when she assessed him in the first grade.

7. Ms. Moseley conducted the March 2017 academic assessment using the academic tests from the Woodcock-Johnson IV.⁴ She conducted separate reading comprehension assessments using fiction and non-fiction texts and evaluations devised from her experience as a reading specialist. Most of Student's academic scores on the Woodcock-Johnson fell in the average range. However, there were a few notable

³ Ms. Moseley earned a master's of education degree in reading and language arts instruction in 1993. She has worked for the district since 2002, first as a language arts training specialist and then as a special education teacher. She has been a credentialed teacher since 1991 and currently holds a multi-subject credential, a single subject credential in English, a reading specialist credential and a special education credential for mild to moderate disabilities.

⁴ Ms. Moseley had been trained multiple times in how to conduct academic assessments using the Woodcock-Johnson academic tests. Her training had recently been updated to include changes incorporated into the newer Woodcock-Johnson IV version and she had conducted assessments on 25-30 occasions using the new version of the evaluation.

exceptions, including reading comprehension related subtests and the reading recall test, all of which were below average.

8. Ms. Moseley administered reading comprehension assessments by giving Student passages from fiction and non-fiction texts to read and listen to. She gave him a graphic organizer that summarized the story name, characters, setting, and two events that occurred in the story, as well as the problem presented by the text and the solution presented. From that, Student was asked to identify the main character; articulate the problem presented in the text and its solution; and to relate two details from the reading. Student was able to correctly answer only 40 percent of the questions asked regarding one text he read, being only able to identify the main character and provide two correct details.

9. As part of the academic assessments, Ms. Moseley collected work samples from Mother as Mother was Student's primary teacher. Mother also provided test results from reading comprehension assessments. However, Ms. Moseley was uncertain of the academic integrity of the testing environment and thus the validity of the scores. Mother reported that she repeated questions multiple times and that Student had significant difficulty with drawing inferences to answer questions about reading material. The writing samples Parent provided were produced with significant support from Parents. Ms. Moseley noted that the cohesiveness of the content was not reflective of Student's ability during testing. Ms. Moseley observed that, in testing, Student's ideas "skipped around."

10. Ms. Moseley did not assess Student's executive functioning performance. While she has occasionally written executive functioning goals, she was not asked to assess Student's executive function capabilities. Ms. Moseley believed Learning Solutions would assess executive functioning while conducting the functional behavior assessment.

11. Ms. Moseley noted during the testing that Student's conversational proficiency was limited and that he used a lot of scripting, which is repetitious comments that were not pertinent to the conversation at the time. Student also appeared tense or worried at times.

12. Ms. Moseley did not complete a comprehensive report of her assessment. She printed a score report of the Woodcock-Johnson IV testing that included a few, very brief comments about her observations of Student. The report did not provide any details about her reading comprehension evaluation of Student. Her observations of his conduct and affect during the testing were truncated to the point of being unintelligible at times. For example, "generally persisted with difficult tasks" begs the question of what generally means. The comment, "Passage Comprehension: None of the above, not observed or does not apply" is not explained and contradicts Ms. Moseley's testimony that she conducted reading comprehension assessments. Also, the comment, "Writing Samples: sentences were both complex and detailed" did not comport with Ms. Moseley's testimony regarding Student's inability to formulate a response of his own to a question or that his skills only extended to the ability to write a simple paragraph. The source of the noted work samples are also not clearly stated. Ms. Moseley's concerns about the academic integrity of the work samples she collected from Parents is not noted in the Woodcock-Johnson IV score report.

13. Ms. Moseley provided detailed testimony regarding her observations of Student's abilities during the academic assessment. The reading assessments she conducted showed that Student decoded with fluency but did not read with comprehension. He decoded the words without processing the information he was reading. Rather than synthesizing the material, Student looked for lines of the text he could read to respond to questions. He was unable to formulate a response of his own to a question about the passage he had just read. She noted that Student reads with

expression and good phrasing which can mislead the listener into believing he understands what he is reading. His brain understands the syntax of the text – the “code” of the words.” However, he does not understand the content of the text. The information to which Ms. Mosely testified was not included in the report of the academic assessment. Nor was the information referenced in the IEP notes of discussions during the April 24, 2017 IEP team meeting, so there is no evidence that this was discussed during the IEP team meeting.

Speech and Language Assessment

14. Melita Huitt assessed Student’s speech and language capabilities and made recommendations regarding needed services.⁵ Ms. Huitt had worked with Student on his speech goals from kindergarten through second grade at Caleb Greenwood Elementary School. Her testimony demonstrated that she felt a close connection to Student and cared deeply about his academic progress.

15. Ms. Huitt reviewed Student’s history via a review of records and interview of Mother. To evaluate Student’s speech and language capabilities, Ms. Huitt administered the Clinical Evaluation of Language Fundamentals, Fifth Edition; a Social Thinking Dynamic Assessment; and a Social Language Development Test –Elementary version.

16. The Clinical Evaluation of Language assesses understanding and

⁵ Ms. Huitt has earned both master’s and bachelor of science degrees in speech pathology and has been a licensed speech pathologist in California since 1993. She has worked for Sacramento City since 2000. Prior employment included work in a hospital setting as a speech pathologist. In completing continuing professional courses required to maintain her licensure, Ms. Huitt takes courses focused on speech deficits and autism as she has a particular interest in that area.

expression of language content and language memory, providing overall language skills information. Student scored in the average range on four of the nine subtests. Student's weaknesses were demonstrated to be difficulty listening to spoken paragraphs, creating meaning from the text, answering questions and using critical thinking to make inferences about the material he was reading. Formulating sentences was a particular challenge due to Student's difficulty with semantic and syntactic errors. Student also showed significant difficulty with remembering sentences of increasing difficulty. Ms. Huitt noted that an inability to recall longer sentences impacted Student's ability to follow directions, learn new vocabulary and retain subject content. The testing did not allow for repetition of the material.

17. The Pragmatics Profile is a supplement to the evaluation of language test consisting of a questionnaire completed by a parent or teacher to rate social nuances, such as non-verbal cues, sarcasm, jokes, and other aspects of social communication. Mother completed the pragmatics profile as she was both Parent and teacher at the time of the assessment. According to Mother's ratings, Student's pragmatic language capabilities were in the second percentile in all areas. He never showed a sense of humor and never used strategies for responding to interruptions or to avoid interrupting; gave or responded to advice or suggestions; understood posted rules, monitored his tone of voice, or voice intonation; expressed messages using gestures or facial expressions; used gestures or facial expressions according to the situation or present matching gestures or facial expressions and verbal messages.

18. The Social Thinking assessment, a reciprocal interview between Student and the assessor and Test of Social Language Development – Elementary, a test of Student's ability to read cues about a person in a picture. This test allowed Ms. Huitt to assess Student's ability to understand social cues, a skill which crosses over to reading comprehension as understanding of the cues described in the reading can give a reader

information about what may happen next in the text. Student's abilities to demonstrate an understanding of nonverbal language, make logical inferences, read other people's emotions, predict outcomes and why they happened, give appropriate solutions to problems, use tact and consider the consequences of remarks or actions are all evaluated in this assessment. Student scored below average on all aspects of this assessment. However, no evidence was presented regarding how detailed an assessment of the functions described was conducted.

19. Throughout the double interview portion of the testing, Student's speech was flat and sometimes too rapid. Student's eye contact during the testing was brief and fleeting and some echolalia (repetition of another's words) was observed as were verbal scripting and humming. Student made frequent off-topic comments and asked off-topic questions. His responses demonstrated an inability to formulate sentences that were grammatically correct.

20. Ms. Huitt found Student to have speech fluency and oral motor skills within normal limits. However, overall his language and social communication skills were delayed. She found that Student continued to require special education services in the area of Language and Social Communication. Ms. Huitt made a variety of recommendations of actions Parents could use to help Student, most of which were already being employed by Mother in Student's homeschool program.

21. Ms. Huitt concluded that Student's deficits in both understanding language well enough to understand another person's emotions or intentions, and his inability to articulate either those concepts or his own opinion in writing needed to be considered by Student's IEP team regarding placement options for fifth grade. These deficits also impacted Student's ability to access science, social studies, and history materials as all of those disciplines required written answers to written questions.

22. Both Ms. Moseley and Ms. Huitt remarked on their concerns regarding

Student's need to make academic progress in writing. This comported with Parents' reports to the IEP team regarding Student's reading comprehension and writing abilities. They confirmed that Student was unable to comprehend drawing inferences from text being read. Father told the IEP team he used graphs and charts to try to explain the various elements of stories or aspects of other texts. Mother noted that the reading comprehension deficits impacted Student's ability to solve math word problems and all other academic subjects requiring the need to read and act on conclusions reached from text. Father reported that, generally, Student was unable to write anything more than a simple sentence and when given a more complex assignment was focused on filling the page rather than with the content of what he was writing.

Psycho-Educational Assessment

23. The psycho-educational assessment was conducted by Linda Lee, a school psychologist for Sacramento City, who did not testify.⁶ Her report was admitted per stipulation of the parties. Ms. Lee's report assessed Student in the areas of cognitive functioning and processing abilities using tests of nonverbal reasoning, visual-spatial ability, verbal reasoning and knowledge, memory, visual motor integration, and attention. Student's continued demonstration of autistic-like behaviors was confirmed. In addition to the testing conducted, Ms. Lee also interviewed Mother and Student and collected ratings from both Parents on the Attention Deficit Disorders Evaluation Scale

⁶ Ms. Lee is listed on the report as having an M.A. No evidence was provided regarding the specifics of her degree or any licenses or credentials she holds. Student has not challenged Ms. Lee's credentials or her suitability to conduct the psycho-educational assessment.

and from Mother on the Gilliam Autism Rating scale.⁷ Ms. Lee reviewed historical information pertaining to Student and interviewed Mother. She noted information from Lindamood-Bell that Student required prompts to stay on task, has sequencing difficulties and did not work independently. Lindamood-Bell also found weaknesses in Student's vocabulary in relation to the work he was doing.

24. Based on Ms. Lee's current testing and review of ratings from Parents, Ms. Lee found that Student had average visual-spatial abilities and age appropriate hand-eye coordination. Student's verbal reasoning and knowledge were below average with scores almost identical to those achieved when Student was tested in 2014. Student has difficulty using language to communicate what he knows when the output requires communicating complex thought. Ms. Lee's findings align with language and communication deficits noted by Mother, the speech pathologist and the special education teacher who conducted Student's academic assessment.

25. Student's proclivity towards scripting, perseveration and repetitive hand and fist movements also impeded his communication and academic performance. Student's continued struggles with symptoms of autism are confirmed by Mother's ratings on the Gilliam Autism Rating Scale. Visual and verbal memory tests also resulted in below average scores. While Ms. Lee thought Student's performance might have been impacted by his desire to finish the testing, this result comported with results reported by Ms. Huitt as to Student's memory.

26. Ms. Lee concluded that Student would be very likely to struggle with

⁷ Mother's ratings on the Gilliam Autism scale and the Pragmatics Profile she completed for Ms. Huitt were not entirely consistent, raising a question as to whether Mother understood the rating rubric for the Gilliam Autism scale and possibly confused the 1 and 3 ratings on the Gilliam.

attention and focus in a classroom setting.” Her report noted at the outset that she had concerns about the validity of the testing outcomes, believing they ultimately revealed a “minimum estimate of Student’s cognitive abilities” due to Student’s limited attention span and proclivity to rush through some test items and answer impulsively.⁸ Ms. Lee noted, “Attention can be viewed as the foundation for all higher order processing. In other words, if attention is compromised, it can adversely affect other cognitive processes of language, memory visuospatial skills, etc.” [Citation omitted]

27. Overall, Ms. Lee described Student’s abilities to communicate as extremely limited. Ms. Lee’s report confirmed Student’s need special education and related services under the categories of autism and other health impairment on the basis of Student’s attention deficit hyperactivity disorder. However, it failed to fully explore Student’s executive function deficits or processing abilities or recommend additional assessment despite acknowledging the presence of deficits that would impact Student’s ability to access his education.

Occupational Therapy assessment

28. The occupational therapy assessment was conducted by Polly Bowser, of

⁸ Ms. Lee’s observations regarding Student’s attention deficits were confirmed by the attention ratings from Parents. While Parents rated Student’s attention deficits at different levels, Ms. Lee opined that Mother’s more severe ratings of Student’s attention deficit were likely more accurate given the fact that she spends many more hours per day with Student than Father. This is confirmed by Father’s testimony at hearing during which he deferred to Mother’s knowledge about the details of Student’s conditions and education.

Jabbergym, who did not testify at hearing.⁹ The parties stipulated to the admission of Ms. Bowser's report.

29. Ms. Bowser reviewed information regarding Sacramento City's prior provision of occupational therapy services to Student from 2010 to 2011 with a suspension, then re-initiation from 2014 until Student left Cabrillo Elementary in December of 2015.

30. Student's motor skills and visual perceptual skills were all determined to be in the average range. Ms. Bowser's report identified deficits in Student's sensory processing skills that were not fully explored or explained.

31. Sensory processing was defined by Ms. Bowser as "the process of organizing sensory inputs so that the brain produces a useful body response and also useful perceptions, emotions, and thoughts." Mother completed a Sensory Processing Measure to provide a picture of Student's sensory processing abilities across environments.¹⁰ Mother's narratives of Student's sensory processing deficits appear to be inconsistent with the scores noted and with the categories used to label Student's sensory processing severity levels. The scoring is not explained. Furthermore, the occupational therapy report states that the evaluations of Student's sensory processing

⁹ The occupational therapy report lists Ms. Bowser's credentials as "M.S., OTR/L." No additional evidence regarding Ms. Bowser's qualifications was submitted. Student has not challenged Ms. Bowser's credentials or her suitability to perform the occupational therapy assessment.

¹⁰ While the chart in Ms. Bowser's report notes "Teacher Response" the responses were from Mother who was his homeschool teacher at the time.

capabilities were based on a combination of the assessor's observations and Mother's ratings on the sensory processing measure; however, with the exception of Ms. Bowser's observations of Student on the platform swing, all other conclusions appear to be based on Mother's sensory processing ratings alone. Ms. Bowser uses labels of "*some difficulty*", "*minimal difficulty*" and "*mostly typical*" but fails to explain the differences or her reasons for placement of Student in one category versus another. Without an understanding of the difference between minimal difficulty and some difficulty, the IEP team members had no way of understanding the comparative importance or severity of the categories noted. No evidence was presented that information in addition to that included in the report was presented to the IEP team.

32. Ms. Bowser noted insecurity in Student's management of a platform swing. This was supplemented by Mother's comments in her sensory processing measure that Student frequently leans on people or furniture when sitting or trying to stand up, occasionally spins and whirls more than other children his age, occasionally demonstrates poor coordination and appears to be clumsy. Ms. Bowser concluded Student showed "*some difficulty*" with processing vestibular (body position and movement) input.¹¹

33. Regarding issues of tactile input, Mother noted that Student always becomes distressed with having his fingernails cut and occasionally avoids touching or playing with fingerpaint, paste, sand, clay, mud glue or other messy things. The assessor concluded Student demonstrated "*minimal difficulty*" processing tactile input.

34. Mother reported that Student occasionally is bothered by bright light, and occasionally enjoys watching objects spin or move more than most children his age. Ms.

¹¹ The use of italics in discussion of the occupational therapy report mirror Ms. Bowser's.

Bowser concluded that Student had "*mostly typical*" processing of visual input.

35. Per Mother's report, Student is occasionally bothered by ordinary household sounds such as the dryer, toilet flushing or vacuum cleaner, and is frequently distracted by background noises such as lawn mowers, air conditioners, refrigerators or fluorescent lights. Mother further reports that Student demonstrates difficulty following verbal instructions and often relies on visual supports. Ms. Bowser concluded Student had "*minimal difficulty*" with auditory processing skills.

36. The evaluation of Student's motor planning ability assessed Student's ability to organize and carry out novel motor actions. Motor planning includes the process of deciding what to do, planning how to do it, determining the sequence of steps in order to accomplish the plan and completing the task. Mother's ratings stated Student occasionally performs inconsistently in daily tasks, occasionally has trouble figuring out how to carry multiple objects at the same time; occasionally, seems confused about how to put away materials and belongings in their correct places; occasionally fails to complete tasks with multiple steps; and occasionally tends to play the same activities over and over, rather than shift to new activities when given the chance. Ms. Bowser rated Student as having "*minimal difficulty*" with organizational skills and activities that involve multiple steps. She notes he also appears to have some difficulty with ideation skills (coming up with new ideas) but she did not italicize "some difficulty" nor did she define it or include information supporting her conclusion.

37. Student was said to have "*mostly typical*" proprioceptive system function, i.e. ability to coordinate movement of muscles and joints to produce the proper direction and force of movement. Mother's only reported comment on this topic was that Student occasionally jumps a lot.

38. Ms. Bowser, met briefly with Parents, outside the meeting room prior to

the April 24, 2017 IEP team meeting to discuss her report.¹² During this discussion, Parents shared additional, specific information about how severely Student's sensory processing deficits can impair his ability to perform academic tasks. Student's aversion to certain foods and visual stimuli can be very distracting to Student, as can sound, location, certain people and animals. Discussions with Ms. Bowser and subsequently with the IEP team revealed that Student could not focus for more than a minute when faced with certain "triggers" that are not necessarily consistent or predictable. In response to this conversation, Ms. Bowser proposed a "tactile aversion" goal for Student.

39. The occupational therapy assessment and report did not thoroughly evaluate Student's occupational therapy needs, particularly in the area of sensory processing. The report also fails to explain why deficits are identified but ultimately Student is found to have no need for occupational therapy. This question is raised again in the psycho-educational report which also indicated Student struggled with processing deficits although no auditory processing deficits appear to have been examined by the school psychologist. The IEP team did not have adequate information to evaluate Student's sensory processing needs or to develop goals to address Student's deficits.

Functional Behavior assessment

40. Stephanie Asche, a behavior consultant for Learning Solutions, conducted a functional behavior assessment at the request of Sacramento City and attended the first two IEP team meetings. Theresa Davis, a Board Certified Behavioral Analyst,

¹² Ms. Bowser was unable to attend the meeting at which her report was discussed. Parents excused Ms. Bowser from attending the meeting but were frustrated at the lack of ability to ask questions of her during discussion of the occupational therapy report.

supervised Ms. Asche in conducting the functional behavior assessment; however, the supervision provided was very limited.¹³ Ms. Davis attended the first IEP meeting and presented the functional behavior assessment with Ms. Asche. Saxony Dominguez, Learning Solutions' Clinical Manager, attended the last two of the IEP team meetings and developed four behavior goals (see below.)¹⁴ Dr. Dominguez did not observe Student's behavior during his assessment or have any other recent contact with Student. Dr. Dominguez did not supervise the creation of the functional behavior assessment report.

41. This was Ms. Asche's first functional behavior assessment.¹⁵ Her education,

¹³ Ms. Davis did not testify during the hearing and little evidence regarding the details of her involvement in the assessment process was offered into evidence.

¹⁴ Saxony Dominguez is a Board Certified Behavior Analyst with a Ph.D. in psychology. She has been the Clinical Manager for Learning Solutions for over five years.

¹⁵ Ms. Asche earned a bachelor's degree in early childhood education in 2013. She holds no teaching credentials. She holds a license as a Registered Behavior Technician but could not identify the licensing organization. All of Ms. Asche's experience and training regarding behavior intervention was gained in her work for Learning Solutions. Prior to conducting this behavior assessment, Ms. Asche had taken a 2-3 hour class about functional behavior assessments and behavior intervention plans more than once and most recently in 2016. Her supervisor also trained her regarding how to conduct the assessment, advising specifically that she observe and note Student's behaviors and participation in academics with and without prompts. No evidence of formal data collection or analysis procedures, or her training in those procedures, was submitted.

training and experience had not adequately prepared her to conduct the assessment with the minimal supervision she received during the process. Ms. Asche has worked for Learning Solutions for 11 years during which time she was promoted twice, from her entry position as a tutor to her current position as a behavior technician. Ms. Asche's usual job duties included training in-home tutors and parents regarding client programs and consulting for Sacramento City regarding services being provided to students. Ms. Asche had only developed behavior intervention plans and behavior goals in the past as directed by supervisors. The evidence presented was insufficient to establish how often Ms. Asche had performed these functions or the extent to which she completed them independently.

42. Learning Solutions' behavior assessment was focused on behaviors of concern in Student's homeschool learning environment. Prior to the behavior assessment, Ms. Asche had only met Student briefly during her supervision of his third grade aide. She did not know him well. The target behaviors tracked were protest behavior and "off-topic/ task" behavior. No evidence was presented regarding when or why those particular two behaviors were chosen for tracking.¹⁶ Ms. Asche conducted three observations over three consecutive days during Student's spring break. Student was observed for a total of five hours and 45 minutes. No evidence was presented regarding the extent or details of Ms. Davis' observations or the specifics of her involvement in the data collection; nor does the report specify whether information from Ms. Davis' observations is included in the data analyzed. The extent of Ms. Davis' supervisory role during the assessment process is not described.

¹⁶ Mother informed Ms. Asche that her concerns about Student's behavior were hitting, biting and tantrums. However, Ms. Asche did not observe any of these behaviors during her observations.

43. Student objected to being required to do school work during spring break. This may have increased his protest and off-task/topic behaviors. No comparative data from a non-break period was discussed. No acknowledgment of this possible impact was noted in Ms. Asche's report.¹⁷ Although Dr. Dominguez and Ms. Asche both testified that they did not believe the timing of the assessment impacted Student's behaviors, their testimony lacked credibility. Dr. Dominguez went on to testify that she was unaware that Student complained about being required to work on his break and Ms. Asche acknowledged Student's complaints during her assessment.

44. Learning Solutions noted in the report, and during IEP team discussions, that the assessment would not be applicable to a classroom placement as the assessment was specific to the environment in which it was conducted. Learning Solutions asked twice for permission to assess Student in the Lindamood-Bell Center environment as that would be closer to a classroom environment. Parent refused to sign the necessary release.¹⁸ While neither Learning Solutions nor Sacramento City could require Parents to consent to the observation of Student in a more school-like environment, the assessment of Student's behavior needs was insufficient because of the lack of classroom-based observation.

¹⁷ The assessment was conducted during spring break because Ms. Asche would not have had time to write the report and have it reviewed by supervisors prior to the April 24, 2017 IEP, otherwise.

¹⁸ Mother testified that she refused consent because the supervisor of the Lindamood-Bell center said Learning Solutions' observation would disturb the other students. However, this testimony lacked credibility as Mother was willing to sign a consent form for Sacramento City IEP team members to observe Student at Lindamood-Bell a few weeks later.

45. Irrespective of Parents' lack of consent to observe Student in a school environment, the report was vague and created primarily from boilerplate. Although Student's name was mentioned in the document in several places, the report did not include much information personal to Student. The report included a minimal summary of observed instances of "off-task/topic" and "protest" behavior. The report did not include the antecedent, behavior and consequence data collected. Only the total frequency of the selected target behaviors was reported. Although the report includes a proposed goal regarding task completion, no data regarding Student's task completion was collected.

46. Only very general methods of possible means of addressing behaviors interfering with Student's work were described in the report and those were directed to Student's homeschool environment. Proposed approaches to behavior modification were included; however, they failed to detail which behaviors were being targeted and how changing Student's behavior would be reinforced, except in very broad terms. Similarly, "General Environmental Preventions" were rotely presented with no strategies specific to Student included in the recommendation. Moreover, Ms. Asche testified that Parents were resistant to implementing a positive reinforcement routine to modify Student's behavior because they believed he would perseverate on the reward system rather than the work that needed to be done, a fact that was not discussed in the report.

47. Ms. Asche is devoted to her work. However, Ms. Asche did not testify about her functional behavior assessment of Student with detail or confidence. She did not articulate a thorough understanding of a functional behavior assessment and its relationship to a behavior intervention plan; nor did she clearly demonstrate an understanding of the creation and implementation of a behavior intervention plan. It was unclear how much of the functional behavior assessment she wrote independently. Some sections were copied from reports written in the past by other Learning Solutions

employees. The report submitted as evidence was neither specifically dated nor signed. At times, Ms. Asche was unable to explain why certain information was included in the report.

48. The functional behavior assessment was not completed adequately to determine Student's present levels of behavior or his needs for either behavior goals or behavior support services in a classroom setting; or for transition to a classroom setting. Ms. Asche was unfamiliar with the term executive functioning and was not asked to assess Student for executive function deficits. Despite indications of executive function deficits, neither Ms. Davis nor anyone else from Learning Solutions recommended further assessment during the supervision of the behavior assessment. Nor did they refer Student for a detailed executive function evaluation or complete further assessment themselves.

Inadequate Assessment of Executive Functioning

49. During the assessment process and the IEP team meetings, Parents provided detailed information regarding Student's inability to focus on his work, follow multi-step instructions and plan how to execute a task. The IEP team was informed Student required frequent prompting to continue working and perseverated on his schedule, checking frequently for when his break was due. Mother specifically mentioned her concerns regarding Student's memory. Parents informed the IEP team that Student had outbursts at Lindamood-Bell approximately twice a week and that it could take up to an hour to get Student redirected to the task at hand. Tutors had difficulty working with Student due to his behaviors. Parents also told the IEP team that long delays in redirection due to Student's emotional outbursts occurred on a daily basis at home. Parents' reported concerns about Student's social and emotional functionality, including his aggression and emotional control, with outbursts being primarily directed to non-preferred activities, indicated a need for additional exploration

of Student's requirements in the areas of executive function training, his sensory processing deficits and the need for transition supports Parents were already utilizing a visual schedule, frequent verbal and physical prompting, pre-teaching and verbal praise in his home-schooling program. However, even with these supports, Student was unable to attend to a task for more than 20 minutes.

50. Reports from Lindamood-Bell tutors, Learning Solutions, the occupational therapist, the speech pathologist and the academic report all mention Student having executive function deficits that were not fully examined. As Student's reported executive function deficits are not isolated or discrete to one task or environment, he required a comprehensive executive function assessment to fully explore his needs and determine necessary services to assist Student in accessing his education.

GOALS DEVELOPED

Reading Comprehension

51. The proposed reading comprehension goals address identified needs for Student "to summarize fiction and non-fiction passages, providing specified details using a graphic organizer with at least 80 percent accuracy in 4 of 5 trials as measured by teacher charted records." Intermediate objectives were set for November, March and June with increasing expectations of the type of information Student would understand and increased expectations regarding accuracy. The basic reading comprehension skills identified were needed. However, the team did not have adequate information to determine whether a graphic organizer was the only executive function support Student would need to be successful in this goal. Nor did the team have adequate information to determine whether sensory processing deficits were also impacting Student's reading comprehension capabilities.

Social Communication

52. The proposed social communication goals addressed the need for Student to be able to identify other's emotions through verbal and non-verbal cues as well as the thoughts that might accompany them. Student's second social communication goal was to participate in three exchanges with another person on a non-preferred topic. While the goals expressed needed skills, all supports necessary for achieving them had not been assessed. Neither Student's auditory processing capabilities nor his complete range of executive functioning needs had been adequately assessed. The team did not have all of the information necessary to determine the supports necessary for Student to achieve the proposed goals.

Language

53. Student's language goal addresses the need for Student to be able to express himself semantically (choosing the right words to convey his meaning), syntactically (correctly ordering the words) and grammatically (choosing the correct tense, etc.). Student's proposed goal was, "When shown a social scene, Student is to verbally formulate a correct sentence with a noun, verb, adjective or adverb with 80 percent accuracy with one verbal or written cue." While this goal articulated a needed skill, no executive function supports are identified to assist Student in attaining this goal. Furthermore, no comprehensive analysis had been completed of how Student's sensory processing deficits, particularly auditory processing deficits, might be impacting his identified academic difficulties.

Behavior

54. The IEP team did not have adequate information regarding either Student's present levels of functional performance or his behavior needs prior to developing his behavior goals. Therefore, the IEP team could not know whether the

proposed goals met Student's needs. The IEP appears to contain six behavior goals. However, closer scrutiny reveals that, goals six and 11, and seven and 12, are duplicative. Some of the goals are goals to address executive function needs.

55. Behavior goals were created for Student to learn "an appropriate tone to engage in an alternative replacement phrase to request help/attention/time to talk..." (goals 6/11); and to learn "an appropriate tone to engage in an alternative replacement phrase to request a break..." (goals 7/12). The baseline data used for these goals was collected during the functional behavior assessment that assessed Student's behavior needs in his home during Student's spring break. This information did not provide the IEP team with accurate information regarding Student's ability to focus when he was not annoyed at being required to do schoolwork during his school holiday or his behavior in a classroom environment. Furthermore, the team did not have information regarding what Student's functional deficits or needs might be in a classroom.

56. Dr. Dominguez was asked to create executive functioning goals (Goals 13, 14, 15 and 16) by Ms. Huitt. Ms. Huitt made the request in response to concerns raised by Parents. Instead of being labeled executive function goals, the goals were called behavior goals. At hearing, Dr. Dominguez identified Student's executive functioning challenges as: the ability to hear and follow multi-step directions; the ability to identify goals, whether social or task based, and identify a plan to execute them; the ability to identify how his behavior is affecting himself and others; and work completion. No evidence was presented as to the source of Dr. Dominguez's conclusions regarding Student's range of executive functioning deficits or support needs. Dr. Dominguez did not attend the April 24, 2017 IEP team meeting so she was not involved in the discussion of Student's triennial assessments. Dr. Dominguez was not involved in Student's functional behavior assessment and was not asked to do any other kind of assessment by Sacramento City. Dr. Dominguez testified that she referenced data from

Student's third grade interactions with Learning Solutions in creating the goals for Student. However, later in her testimony she acknowledged that information from 2015 would not provide present levels of performance. Dr. Dominguez did not review any current data or assessments other than the Learning Solutions behavior assessment in developing behavior goals 13 through 16.

57. The specified baselines demonstrate the lack of information on which the goals are based. A summary of the goals and their articulated baselines are as follows: Goal 13: to demonstrate an ability to recall most of instructions given by his teacher to a group, including himself, with a distraction present. Goal 13's baseline states, "It has been reported that there are multiple cues or directions needed in order to complete tasks." Goal 14: to manage upcoming events, which have resulted in frustration or anxiety in the past, by creating an action plan. Goal 14's baseline states, "It has been reported that [Student] engages in behaviors when faced with frustration or difficult tasks." Goal 15: to engage in an activity with a peer during an unstructured opportunity. Goal 15's baseline states, "It has been reported that [Student] has difficulty engaging in activities with his peers." Goal 16: to advocate for his needs by seeking adult or peer support. Goal 16's baseline states, "Currently observe [Student] engaging in protest behavior during non-preferred tasks." These goals were not based on a complete evaluation of Student's needs. Goal 16, in particular, is based on data collected regarding "protest behavior" in Student's home during his spring break. Observation of protests pertaining to non-preferred tasks does not relate to Student's ability to ask an adult or peer for help on a task or to borrow a pencil, which are two examples of needs the goal would address.

58. The team was aware that Learning Solutions considered the assessment of Student's behavior insufficient to assess his classroom behaviors because Student was not observed in a school environment. The IEP team needed additional information to

determine how to meet Student's needs as he transitioned back into the classroom. Student's IEP team discussed reconvening 30 days after Student returned to a classroom setting to discuss whether additional assessments, goals or supports were necessary in an effort to remedy the lack of current information regarding Student's behavior and support needs in a classroom. This recommendation was not included in the IEP.

Writing

59. Goal number eight set Student the task of learning to write a simple paragraph including a topic sentence, three facts using linking words or phrases and topic specific vocabulary, and a concluding statement. Student was to achieve 80 percent accuracy as measured by work samples or charted records in two of three trials. Intermediate goals requiring progressively more complexity in the details prior to reaching the ultimate goals were set for December and March. There was no evidence that the team made an evaluation of whether any executive function supports were necessary for Student to be able to meet this goal. The goal itself was reasonable and measurable and focused on Student's need to learn to write paragraphs; however, Student's extraneous needs to reach the goal were not considered.

Tactile Processing

60. Ms. Bowser presented the tactile processing goal (number 9) at the May 15, 2017 IEP team meeting in response to Parents' concerns that sensory processing issues were not being adequately addressed. Although called "tactile processing" the goal's baseline identified other items of "aversive sensory input" such as sight, tasting and touching. The goal itself, however, specifies only decreased tactile defensiveness. The purpose of the goal was to keep Student engaged with his learning activities for five minutes when confronted with items he deemed unpleasant, rather than the one minute Mother reported he tolerated. The goal listed a variety of triggers for Student but did

not narrow the list to address any specific trigger in a focused way. This goal was revised after discussions with Parents in an effort to make it more specific and more measurable. However, it is not based on sufficiently specific information about Student's sensory processing deficits. No evidence was presented that this goal adequately addressed Student's sensory processing deficits. The occupational therapist is the person responsible for implementing the goal. Sacramento City offered occupational therapy on a consultation basis for one hour per month. No direct occupational therapist services were offered in the May 25, 2017 IEP. No evidence was presented that this goal could be successfully administered solely with occupational therapy consultation. Furthermore, the evidence did not support the conclusion that tactile processing was Student's only sensory processing need. No other sensory processing goal was offered despite the fact that the occupational therapy report listed several other sensory processing deficits, particularly auditory processing deficits.

ELA/Speaking (Expressing an Opinion Supported by Facts)

61. Goal number 10 was an opinion presentation goal developed in response to Parents' concern that Student tended to simply say, "yes" when asked a question. Mother had expressed specific concerns about Student being unable to formulate an opinion and therefore, being unable to advocate for his own needs. This goal presented a measurable target with two reasonable short term objectives in asking that Student present an opinion with three details to support his opinion with 80 percent accuracy. However, the goal is inadequate in that it was developed without any information about the full range of Student's executive function abilities, the impact of any sensory processing deficits, specifically auditory processing deficits or Student's need for support in these areas. While stating a skill Student needed to develop, the team did not have adequate information to determine how Student could meet this goal.

62. Sacramento City properly identified several of Student's needs in the area

of reading comprehension, sentence and paragraph writing, and pragmatic language. The goals written for these areas were deficient in that they failed to consider the impact Student's sensory processing and executive function deficits would have on reaching the goals described. Furthermore, specific executive function goals were not proposed and the sensory processing goal that was proposed was vague and not based on adequate information regarding Student's present levels of functional performance.

THE IEP TEAM MEETINGS

63. A three-part IEP team meeting was held on April 24, 2017, May 15, 2017, and May 25, 2017. The IEP team discussed the results of Student's triennial assessments on April 24, 2017 with Parents expressing concern about the failure of the assessments to adequately explore Student's sensory processing needs. Parents also emphasized Student's executive functioning deficits. Parents asked that Sacramento City observe Student during his tutoring session at Lindamood-Bell which the district agreed to do.

64. On May 15, 2017, Ms. Huitt and Ms. Moseley presented an oral report of their observation of Student at Lindamood-Bell. The observation confirmed the anecdotal information from the other assessments regarding Student's demonstrated executive functioning deficits. Student required a significant amount of prompting to complete tasks and struggled to answer the questions, at which point the tutor gave Student several options from which to choose. Student was more successful with the oral multiple choice approach; however, he required substantial repetition and scaffolding of material throughout his session. Student did not engage in a significant amount of independent work during the course of the observation. The meeting then proceeded to a discussion of goals, services and accommodations and options for placement. Parents expressed concern about the tactile processing goal proposed as they believed it was too vague. Parents were also concerned that the proposed goals did not adequately account for Student's sensory triggers. The team noted that

Student's specific triggers were unpredictable. The meeting ended with a preliminary discussion of placement options. Tours of Nor Cal Prep and the special day class with language emphasis at Theodore Judah were arranged for Parents.

65. On May 25, 2017, the IEP team discussed the executive function goals prepared by Dr. Dominguez and continued their discussion of placement. At the conclusion of the May 25, 2017 meeting, Sacramento City's offer of specialized academic instruction and related services for the 2017-2018 school year was made.

Services, Accommodations and Placement Offered

66. Student was offered a one-to-one paraprofessional (aide) throughout the school day to assist Student with his transition back into a classroom setting. The provision of an aide was to be reviewed after three months. The IEP did not specify whether the aide would be a specially trained behavior aide.

67. The IEP also included individual speech and language services for 12 sessions of 30 minutes each. Student would then receive 38, 30-minute sessions of group speech and language services to address language and social communication. Student was offered an additional eight, 30-minute sessions of speech and language services in a group setting during the extended school year to avoid regression with language skills.

68. Occupational therapy consultations of one hour per month were offered to address sensory processing concerns. This consultation was to be provided either individually or in a group setting with a non-public agency under contract with the special education local plan area or Sacramento City directly. Parents did not believe consultation services for occupational therapy were adequate to meet Student's needs. They believed Student's extensive sensory processing deficits required direct occupational therapy services.

69 Student was also to receive 80, 60-minute sessions of behavior

intervention services in a group setting with a non-public agency to provide behavior support to Student, Student's support staff and school site personnel. These sessions would provide Student, his aide and classroom teacher with support. The IEP team did not have clear information regarding Student's behavioral needs on which to base the amount of necessary consultation services.

70. Accommodations and program modifications included: visuals; manipulatives; written examples during lessons; scheduled preferred tasks; scheduled or predetermined numbers of breaks; verbal and gestural prompts; breaks as needed; scaffolding of tasks and questions; repetition, rephrasing and chunking of directions and auditory information; visual support for multi-step tasks; extra time; prompts for attending and remaining on task; breaking down questions; checking for understanding; modification of written output; allowing oral completion for part of written work; modification of homework as needed; explanation of important vocabulary prior to starting a lesson; relate new words to words already learned; point out similarities to other words; provide advance warning for changes in routines; a visual schedule with preferred activities on the schedule; and a sensory diet/being allowed sensory motor activities. The details of the sensory diet were not specified.

71. Student was offered placement in a special day class with language emphasis at Theodore Judah Elementary School.

72. In a statement dated August 13, 2017, Parents consented to the May 25, 2017 IEP's designation of continued eligibility only. They refused consent to all other aspects of the May 25, 2017 IEP.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

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

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs; and that contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme

Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ___, 137 S.Ct. 988 [197 L.Ed.2d 335]. It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001.) The high court noted that “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p. 999 [italics in original].)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. §

1415(f)(3)(B);Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62.) In this case, Sacramento City, as the complaining party, bears the burden of proof.

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

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

8. In California, if a parent will not consent to a proposed IEP, or a component of a proposed IEP, that the school district determines is necessary to provide a FAPE, the district must initiate a due process hearing. (Ed. Code, § 56346, subd. (f).) Notably, however, that statute does not then authorize a hearing officer to approve a single component of a proposed IEP. Instead, it provides "a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code." (Ed. Code, § 56346, subd. (f).) Section 1415(f), in turn, provides that "a decision made by

a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” (20 U.S.C. § 1415(f)(3)(E)(i); see also Cal. Code Regs., tit. 5, § 3042, subd. (a) [placement is “unique combination” of facilities, personnel, location or equipment necessary to provide a FAPE].) Thus, in an action brought by a district under subdivision (f) of section 56346 of the Education Code, the ALJ must consider the adequacy of the proposed IEP as a whole. (See *Dublin Unified Sch. Dist. v. Student* (OAH, Feb. 15, 2017, No. 2016080413, pp. 21-23).)

SACRAMENTO CITY’S OFFER FOR THE 2017-2018 SCHOOL YEAR

9. Sacramento City seeks a determination that its offer of May 25, 2017, constitutes an offer of FAPE to Student. As discussed more fully below, the offer was substantively defective. The IEP team attempted to craft an IEP without adequate information regarding Student’s present levels of functional performance. The behavior assessment and occupational therapy assessment that were completed were deficient and did not adequately identify Student’s needs in these areas. Furthermore, Student’s executive functioning and sensory processing needs were not thoroughly evaluated. The evidence established that behavior, executive function and sensory processing are not isolated areas of need for Student, but manifest in numerous settings and persistently throughout his day. There was no accurate foundation upon which to design an appropriate IEP, including goals and related services, or to determine an appropriate placement. Therefore, Sacramento City’s IEP is not an offer of FAPE.

Accurate Present Levels of Performance Not Provided

10. An annual IEP must contain a statement of the individual’s present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular

education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The present levels of performance create baselines for designing educational programming and measuring a student's future progress toward annual goals. Student's functional behavior assessment, occupational therapy assessment and academic assessment did not provide accurate present levels of performance. "In evaluating a child with a disability, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." (34 C.F.R. 300.304(c)(6).)

EXECUTIVE FUNCTIONING DEFICITS

11. Sacramento City's failure to assess Student's executive functioning deficits "deprived his IEP Team of critical evaluative information" and "made it impossible for the IEP Team to consider and recommend appropriate services," thus "depriving him of critical educational opportunities and substantially impairing his parents' ability to fully participate in the collaborative IEP process." (*Timothy O. v. Paso Robles Unified School District*, 822 F. 3d 1105, 1119.) Sacramento City's Speech and Language Assessment, the Psycho-educational Evaluation and Functional Behavior Assessment all acknowledged that Student had executive functioning difficulties. Additionally Ms. Moseley, Ms. Huitt, and Parents, all testified to their significant concerns about Student's executive function deficits. There were extensive discussions during the IEP team meetings of those deficits. IEP team members acknowledged that executive function goals were necessary and attempted to develop goals without conducting a thorough assessment of Student's needs.

12. Sacramento City argues that the IEP team had adequate information regarding Student's executive functioning needs to write goals. This conclusion is not supported by a preponderance of the evidence. Ms. Moseley testified that she had not

been asked to evaluate executive functioning in this case and she had not done so. The academic assessment report only mentioned some executive function concerns in passing as does the psycho-educational evaluation. Ms. Huitt assessed some but not all of Student's executive function capabilities and not completely. Ms. Moseley thought Learning Solutions would be conducting an executive function assessment. Ms. Asche testified that she was unfamiliar with the term executive functioning and had not been asked to assess Student's executive function. Dr. Dominguez did not assess Student's executive function before she drafted goals and further testified that she based the behavior goals she drafted in part on information drawn from Student's performance in the special day class in 2015. It can only be concluded that was done because inadequate current information existed. Other than Learning Solutions' flawed functional behavior assessment, she had referenced no other current assessments in developing the goals. Dr. Dominguez did not attend the IEP team meeting during which the assessments were discussed and, even had she been there, none of the assessments included a complete review of Student's executive functioning deficits. The lack of comprehensive current information of Student's present levels of functional performance is evident in the articulation of the baselines for goals 13, 14, 15 and 16. Finally, there was no evidence presented that the goals offered addressed all of Student's executive function support requirements or even the most important executive function support needs.

13. Absent the required comprehensive evaluation of his needs, determining which needs must be addressed or how they should be addressed by goals is impossible. For instance, Student may have needed supports in addition to a graphic organizer to be successful in reaching his reading comprehension goals. His social communication, behavior and language goals should have considered assessed present levels of performance regarding self-regulation to address his need to focus and his

inability to understand his impact on others. The development of Student's goals should have considered his needs in terms of his deficits in planning. In consulting a thorough executive function assessment, the team would have been informed of options for the best means of teaching Student planning as that would have been an element of executive function assessment. The various assessors' tangential observations of Student's executive function deficits, while assessing Student in other areas, does not meet the requirement that Sacramento City use a "technically sound instrument that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors," or one that is "for [a purpose for] which the assessments or measures are valid and reliable." (20 U.S.C. §§1414(b)(2)(C) and 1414(b)(3)(A); *Timothy O.*, *supra*, 822 F. 3d at p. 1111.) Finally, contrary to Sacramento City's assertion, accommodations are not a substitute for the required measurable, annual goals that carefully take into consideration Student's needs and craft a means of assisting Student in making progress in his education. (34 C.F.R. 300.320(a)(2) and (3); Ed. Code 56345(a)(2) and (3).)

Behavior Deficits

14. The behavior assessment did not produce reliable, accurate results regarding Student's present levels of functional performance that could be considered for purposes of creating goals and assessing needed services to be included in his IEP. The assessor did not yet have the necessary expertise to conduct the assessment and the evidence did not establish that she was adequately supervised. The most telling evidence was the assessment report itself which did not provide comprehensive information regarding Student's behavior deficits, focusing on only two target behaviors without explanation; and calculated the frequency that Student complained about having to do school work based on observations conducted during Student's spring break holidays. The report specifically informed the IEP team that Learning Solutions'

functional behavior assessment only assessed Student's behaviors in the specific setting of the assessment, i.e. his home. Despite that caution, the IEP team used the Learning Solutions behavior assessment and its flawed and irrelevant data to create behavior goals for Student. Relying on a functional behavior assessment in the homeschool environment to create behavior goals for Student's reentry into the classroom would not have provided an assessment capable of providing "relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).) The functional behavior assessment conducted outside of school did not provide data on Student's behavior in the educational environment, and therefore could not be used to address that behavior.

SENSORY PROCESSING DEFICITS

15. The occupational therapy assessment did not provide adequate information for the IEP team to be able to interpret the testing results pertaining to Student's sensory processing disorders. The occupational therapist was not at the IEP meeting when the report was discussed to offer additional information. Sensory processing deficits are particular concerns of Parents and the occupational therapy report confirms Student has sensory processing deficits but does not clearly explain the severity of the deficits or why, when deficits are identified, and there is no recommendation that the deficits be addressed. The report neither defines its categorization of the severity of the identified deficits nor reconciles apparent discrepancies between Mother's description of Student's sensory processing difficulties and the assessor's description of their severity. The psycho-educational assessment also failed to provide a comprehensive assessment of Student's sensory processing deficits. As a result, the IEP team did not have accurate, complete information regarding Student's needs to decide whether goals should be developed or to consider options for the possible supports he would need to manage his sensory processing needs. Although

the IEP mentions accommodations of allowing for sensory motor activities and a sensory diet, the report does not specify the sensory processing needs that must be addressed or the types or frequency of sensory motor activities in which Student should participate. Furthermore, the IEP offers only one hour per month of occupational therapy consultation "to address sensory processing concerns." There was no evidence that this was an adequate allocation of occupational therapy to meet Student's needs and without more information, the IEP could not know it was adequate.

16. Here, accurate present levels of functional performance could not be determined as assessments were not sufficiently comprehensive to provide thorough information regarding Student's executive function, behavior or sensory processing deficits. The failure to obtain sufficient information to determine a student's needs makes designing an adequate IEP impossible. (*N.B. v. Hellgate Elementary School*, (9th Cir. 2008) 541 F.3d 1202, 1210.)

Absent Accurate Information on Needs, Proposed Goals Cannot Be Adequate

17. An IEP must contain annual goals, including academic and functional goals, that are measurable, meet the unique needs of the individual that result from the disability, and enable the pupil to be involved in and make progress in the general education curriculum. The IEP must also meet each of the other educational needs of the pupil that result from the disability. (Ed. Code § 56345, subds. (a)(2)(A) and (a)(2)(B).) "The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided." (Cal.Code Regs., tit. 5, § 3040, subd. (b).)

18. The purpose of goals is to permit the IEP team to evaluate whether a student is making progress in an area of need. (Ed. Code §56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for

enhancing the education of their child, the results of the initial evaluation (or most recent evaluation) of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code § 56345)

19. In evaluating an IEP, it is not appropriate to critique it with the benefit of hindsight. Rather, it must be evaluated to determine whether the goals and methods proposed were reasonable calculated to ensure that the child would receive educational benefit at the time of implementation. An IEP is "a snapshot, not a retrospective." (*Anchorage School District v. M.P.* (9th Cir. 2012) 689 F. 3d 1047, 1057, citing *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

20. As discussed above, absent accurate and thorough assessment of present levels of functional performance, the proposed goals cannot be adequate as they would not be based on accurate information about Student's present needs.

21. It is not possible to determine the propriety of the placement proposed without adequate information regarding Student's needs.

22. Although Student raises several procedural flaws in the IEP process, it is not necessary to reach those arguments in this instance. The failure to base the IEP's proposed goals and supports on comprehensive data regarding Student's special education and related service needs results in a dispositive substantive defect in the development of the IEP.

ORDER

Sacramento City's request for relief is denied.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the sole issue presented.

RIGHT TO APPEAL

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

DATE: February 2, 2018

/s/

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings