

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGUITO UNION HIGH SCHOOL  
DISTRICT.

OAH Case No. 2017110183

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on October 31, 2017, naming San Dieguito Union High School District. On January 16, 2018, OAH granted Student's request to amend his complaint and to continue the due process hearing.<sup>1</sup>

Administrative Law Judge Paul H. Kamoroff heard the consolidated matter in Encinitas, California, on March 29, April 3, 4, and 5, 2018, and in San Diego, California on April 18, 19, and 24, 2018.

Margaret H. Adams, Attorney at Law, represented Student. Student's mother and father attended the hearing. Student did not attend the hearing.

Ernest L. Bell, Attorney at Law, represented District. Tiffany Hazlewood, District's

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<sup>1</sup> District filed its response to Student's amended complaint on January 26, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200.)

special education supervisor, attended the hearing.

At the request of the parties, OAH continued this matter for closing briefs. The record closed on May 8, 2018, upon receipt of written closing briefs.

## ISSUES<sup>2</sup>

1. Did District deny Student a free appropriate public education by placing Student at La Costa High School, a comprehensive school, during the 2016-2017 school year, without sufficient therapeutic services, per his May 25, 2016 individualized education program?

2. Did District seriously infringe on Parents' opportunity to meaningfully participate in the IEP process, and substantively deny Student an educational benefit, thereby denying him a FAPE, by failing to refer Student for an educationally related mental health services reassessment, prior to February 13, 2017?

3. Did District seriously infringe on Parents' opportunity to meaningfully participate in the IEP process, by offering FAPE in a prior written notice on January 30, 2017, rather than at an IEP team meeting; and substantively deny Student a FAPE because District's FAPE offer was for placement at Sierra Academy in San Diego, when Student required a residential treatment center placement?

4. Did District seriously infringe on Parents' opportunity to meaningfully participate in the IEP process, and deprive Student of educational benefit, by failing to

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<sup>2</sup> At the beginning of the hearing, Student withdrew an issue alleging that District failed to refer Student for a functional behavior assessment. The remaining issues have been rephrased and reorganized for clarity. The ALJ has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

have an IEP in place at the start of the 2017-2018 school year?

5. Did District seriously infringe on Parents' opportunity to meaningfully participate in the educational decision making process at the October 5, 2017 IEP team meeting, by offering a placement that could not be implemented and by failing to make any other FAPE offer until November 30, 2017?

6. Did District deny Student a FAPE at the November 30, 2017 IEP team meeting, because that IEP offered placement at the Sierra Academy of San Diego?

## SUMMARY OF DECISION

Student had a complex anxiety disorder that was intertwined with educational problems. As a result, he was unable to access his education. Student asserts that he was unable to access his education because District failed to provide a small, structured placement, including, in January 2017, at a residential treatment center. District counter-argues that Student's failure to attend school was attributable to a lack of structure at home.

District's argument overlooks that Student was unable to access his education even when structure was superimposed at home via wrap-around services. Even with trained behaviorists in the home, Student was unable to attend school. Parents eventually had Student transported to an out-of-state residential treatment center, which was able to ameliorate his anxiety and attendance problems. Following the residential treatment center, Student was able to return to California and attend a small, structured day school.

The Decision finds that District's May 25, 2016 IEP was reasonably calculated to provide Student a FAPE, at the time it was offered. However, by January 2017, Student required placement at a residential treatment center. District's failure to offer that placement, and to have an IEP in effect for Student at the beginning of the 2017-2018 school year, denied him a FAPE. Finally, the October and November 2017 IEPs were

appropriate, based upon information that was available to District when the IEPs were formulated.

## FACTUAL FINDINGS

### THE STUDENT

1. Student was a 16-year-old boy whose parents resided within District's boundaries during the applicable time frame. Since 2015, Student received special education under various eligibility categories, including autism, emotional disturbance, specific learning disability, and other health impairment due to attention deficit hyperactivity disorder.

2. Student had complex emotional needs and was diagnosed with attention disorder, major depression, generalized anxiety disorder, a human growth hormone deficiency, and catechol-O-methyltransferase genotype variation, referred to as COMT Met/Met; a rare genetic disorder that is correlated to increased psychiatric symptoms, including anxiety and depression. Student sometimes exhibited suicidal ideation, somatic problems (pain or illness without a medical explanation), and irrational fears.

3. Student's primary educational problem was school attendance. Although motivated to attend school, Student would freeze, or shut down, in the morning prior to the school day. It was normal for Student to, after getting ready for school, refuse to leave his bed, room or home. Other times, he would refuse to leave his parents' car while in the school parking lot. When he could attend school, Student was polite and receptive to instruction.

4. During kindergarten and elementary school, Student attended various private schools. By second grade, Student had difficulty keeping up with his peers and demonstrated problems in attention, distractibility, reading, spelling, and math. Beginning in third grade, Parents placed Student at the Edison Academy, a small, private

school. Student remained at the Edison Academy through the end of the 2014-2015 school year, his seventh grade. At that time, Parents decided to transition Student to public school and referred him to District for an initial evaluation, to determine if Student qualified for special education.

5. On May 29, 2015, District timely completed a comprehensive assessment to determine whether Student qualified for special education and related services. District selected school psychologist Cathy Marquardt, education specialist Jesse Mindlin, and speech and language pathologist Kristin Gluhak to conduct the assessment. The school assessors observed Student, interviewed Student and his teachers, reviewed school records, collected data using inventories, and formally assessed Student.

6. Standardized testing revealed that Student was functioning in the below average to average range of intellectual ability, and had delayed processing speed, at the second percentile. Student had auditory memory and oral language scores in the below average range. Student attained average scores in math and written language, and low average scores in reading. The assessors provided rating scales to Student, his parents, and teachers, in the areas of behavior and emotion. Scores varied, but revealed problems in the areas of hyperactivity, anxiety, and depression. District's assessors recommended that Student be found eligible for special education under the handicapping condition other health impairment due to attention deficit hyperactivity disorder, and specific learning disability in reading comprehension with processing deficits in attention and association.

#### THE 2015-2016 SCHOOL YEAR

7. Following its initial assessment, District convened a two-part IEP team meeting for Student, on June 4 and August 17, 2015. Student was 13 years old and entering the eighth grade. Parents attended the meetings, along with their advocate

and necessary District staff. Student did not attend the meeting. At the time, Student demonstrated anxiety related to going to school. He could attend for a few weeks, followed by an emotional meltdown. Student had been diagnosed with ADHD, inattentive type, growth hormone deficiency, apraxia, and abnormal blood tests for minerals. He was under the care of a private psychiatrist and prescribed various medications to control attention, anxiety, and depression, including, but not limited to, Cymbalta, Humatrope, Focaline, Vvanysa, and Stratera. Student's medication use fluctuated, and he sometimes experienced negative side effects from the medicine.

8. During the meeting, Parents provided District a letter dated August 12, 2014, from Student's psychiatrist, medical doctor Jane Tanaka. Dr. Tanaka reported that Student had major depression, moderate suicidal ideation, and thoughts of self-harm with knives. She diagnosed Student with ADHD, generalized anxiety disorder, and obsessive compulsive disorder. During hearing, Dr. Tanaka provided uncontroverted testimony that she had diagnosed Student with those disorders during the course of her normal psychiatric care of Student. Dr. Tanaka also established that Student experienced increased emotional problems correlated to COMT Met/Met, which had been diagnosed through independent medical testing in October 2014.

9. The June and August 2015 IEP team reviewed District's initial assessment and adopted the findings of the District assessors. Student qualified for special education under other health impairment and specific learning disability. Based upon District's testing and Parents' input, the team developed seven goals for Student in the areas of social-emotional, writing, reading, and math. To meet those goals, the IEP team offered Student various accommodations and related services. The accommodations included access to a word processor; copies of notes; auditory information paired with visual supports; preferential seating; reduced work; extra time for vocabulary assignments; and directions given in a variety of ways. Services included specialized

academic instruction, 550 minutes weekly; counseling, 30 minutes each week; and speech and language services, 60 minutes monthly

10. The June and August 2015 IEP offered Student placement at Diegueno Middle School, a comprehensive District school. Student would spend 33 percent of the time in special education, and 67 percent of his school day in regular education. Parents expressed concern that Diegueno was too large a campus for Student. They feared that a large campus would intensify Student's anxiety disorder. Nonetheless, Parents wanted to cooperate with District, and signed their consent to the IEP on August 24, 2015.

11. Student was not successful at Diegueno. His anxiety and depression increased. It was normal for Student to get ready for school in the morning and then refuse to leave his parents' car while in the school parking lot. School psychologist Ms. Marquardt would often meet Student at the car to help transition him to the school. When successful, Student was generally able to function while at school. However, he sometimes froze during school, before entering a classroom. When frozen, Student was immovable and District staff would call Parents to remove him from school.

12. District convened an addendum IEP team meeting for Student on October 21, 2015. Student had frequent absences due to anxiety and his absences were impacting his grades. District viewed Student's anxiety and related absences as an IEP related disability, and began developing a behavior plan, specifically for school attendance.

13. The IEP team reconvened on November 12, 2015, to review the behavior plan. Student's anxiety and school absences had grown worse. Since the last meeting, he had missed 11 out of 12 school days. Student's depression had also increased. At home, he normally lied in bed and felt depressed by his inability to go to school. Parents blocked Student's access to electronics when he was unable to attend school. Student's anxiety was cyclical; anxiety caused him to be unable to attend school, and his inability

to attend school increased his anxiety. For example, during the IEP team meeting, Ms. Marquardt pointed out that Student's anxiety was related to concerns about missed work after an absence, fear of holding back group projects when he was absent, and fear of what his peers would think of him because of his frequent absences. Hence, absences caused by illness or anxiety increased Student's anxiety, thereby causing more absences.

14. Parents again expressed their concern that Diegueno was too large of a school campus for Student. Dr. Tanaka shared Parents' concern. Student was afraid to go to that campus because there were too many people. Student wanted to go to school, but was overwhelmed and afraid. District staff still believed that Student's school refusal was a problem that needed to be addressed in his IEP, and offered the behavior plan to address his anxiety and related school absences. District also requested to conduct a functional behavior analysis and educationally related mental health services assessment to help address Student's increased anxiety. Parents agreed to the behavior plan, assessments, and District's IEPs.

15. The next week, on November 20, 2015, District convened another addendum IEP team meeting for Student. Student had been unable to attend school since the last meeting. Due to anxiety, attendance problems, and resulting academic struggles, the IEP team determined that a school change was necessary. District staff determined that the learning center program at Earl Warren Middle School, a different District school, was more structured and therefore a better fit for Student than Diegueno, and offered to transfer Student to Earl Warren after the Thanksgiving break. Although a comprehensive District school, Earl Warren was smaller in size and student population than Diegueno. Parents agreed to the school transfer.

16. Student's fall 2015 semester was a loss. From August 25, 2015, through November 3, 2015, his last day at Diegueno, Student had 93 period absences. His grades



were impacted by his absences and he was unable to attain school credits at Diegueno. District eliminated those grades, and permitted Student to retake classes at Earl Warren.

17. On January 8, 2016, District completed an educationally related mental health services assessment for Student. District selected Troy Nickell, an assessor at Vista Hill, a private agency contracted by District, to conduct the assessment. Mr. Nickell observed Student, interviewed Parents, Student, school psychologists, teachers and staff, and reviewed educational records. Ms. Marquardt, who had been Student's school psychologist at Diegueno, reported to the assessor that Student struggled with anxiety and school avoidance. She again reported that Student's school avoidance stemmed from anxiety about school work and what his peers would think when he was absent.

18. Mr. Nickell found that Student had generalized anxiety disorder and major depressive disorder, recurrent, a mental health condition that affected Student's academic performance. Mr. Nickell recommended individualized case management and daily support in a small structured setting. He also recommended weekly mental health therapy services to assist Student in managing his anxiety and mood disorders. He reported that the mental health therapy could be provided at a comprehensive campus.

19. On January 27, 2016, District completed its functional behavior report, conducted by Ms. Marquardt. The sole targeted behavior was Student not leaving his house or Parents' car to attend school. As a result, Student had missed 57 percent of school at Diegueno. The primary function of Student's behavior was avoidance of negative affectivity such as anxiety, depression, and somatic complaints, with a secondary function of escape of aversive social or evaluative settings. Student also sought attention from family members. Antecedents included missed work when absent, difficult workloads, having multiple teachers, and a large school campus. The behavior report recommended various strategies, but did not find that Student required a formal behavior intervention plan. At the time of the report, Student had been successfully

attending Earl Warren for several weeks and the team saw that as a positive shift in his ability to attend school and to cope with his anxiety.

20. District convened an IEP team meeting on January 27, 2016, to review the educationally related mental health services assessment and behavior report with Parents and school staff. The team agreed to add two hours per month, individual and group, of mental health counseling. Like all prior IEPs, Parents consented to District's offer.

21. Student was not successful at Earl Warren. Although he was able to attend school when he initially transferred there, by February 2016, Student's anxiety intensified and he began exhibiting significant school refusal. Student was frequently absent from mid-February through the end of the school year, due to his anxiety disorder. Between November 30, 2015, and his last day of attendance at Earl Warren, April 29, 2016, Student had 216 period absences. By the end of the school year, he was not attending school at all. As a result of his disability, he could not access his education during May and June 2016.

#### THE MAY 25, 2016 IEP

22. District convened an annual IEP team meeting for Student on May 25, 2016. Student was 14 years old and finishing the eighth grade. In part, the meeting was held to transition Student to high school for ninth grade. Student had not attended school for the three weeks prior to the meeting due to anxiety. Like past IEP teams, the team considered Student's anxiety disorder and related school refusal as a school-based problem that should be addressed in Student's IEP. Consequently, school staff gave no consideration to addressing Student's many absences through any other means, such as referring Student to the student attendance review board or child protective services. Rather, school refusal was related to Student's IEP.

23. Mother, Father, Student's private therapist, and Student's advocate

attended the May 2016 IEP team meeting. District participants included a combination of staff from Earl Warren and La Costa Canyon High School, a District high school. Attendees included program supervisor Rebecca Gallow; education specialist Dianne Dekker; learning center teacher Ryan Gold; school psychologists Heather Lutz and Garciela Sanchez; general education teacher Amy Olson; and speech and language pathologists Julia Chowdury and Lisa Krasney. Student briefly attended the meeting before he was escorted from the meeting by Ms. Lutz. Student became emotional and cried because he was afraid to attend La Costa Canyon, a comprehensive high school, due to its large campus and student population. At 88 acres and 2000 students, it dwarfed Earl Warren's campus of approximately 11 acres and 600 students.

24. The team listened to Parents concerns, which included Student's inability to consistently attend school and increased anxiety related to attending a large comprehensive campus for high school. Parents and their advocate requested that District offer Student a small school placement because Student felt overwhelmed by a large school campus. Parents recommended that District place Student at one of its emotionally disturbed programs, which included small, structured and self-contained classrooms. District considered, but did not agree to, Parents' request.

25. The team next reviewed Student's present needs. Anxiety inhibited Student's ability to access special education and related services as well as his general education classes; affected his grades; and was denoted as a behavior that impeded his learning. School psychologist Ms. Lutz reported that Student's anxiety was self-sustaining; absences because of illness or anxiety caused Student to worry about what his peers would think of him, which increased his anxiety and caused more absences. Student wanted to attend school, but often froze when anticipating going to school. Student frequently got ready for school and then froze at home or in his Parents' car. It was normal for Mother to spend hours sitting with Student in the car in the school

parking lot, trying to coax him out and into the school. When able to attend school, Student normally did not demonstrate any negative behaviors. The team discussed Student's communication, gross and fine motor development, social, emotional and behavior, health, vocational development, adaptive, daily living skills, classroom performance, and academic development. Overall, Student's greatest disability was an anxiety disorder that impeded his learning.

26. To meet Student's needs, the team drafted nine new goals in the areas of social-emotional; writing; reading; mathematics; and task completion. District staff, including teachers, psychologist, school therapists, and school selected behaviorists, were responsible for helping Student meet the goals.

27. The IEP offered similar accommodations and supports as the last annual IEP, including access to a word processor and audio books; copies of notes; paired auditory information with visual supports; preferential seating; reduced work; directions given in a variety of ways; options for oral presentations, such as presenting only to the teacher and not to the class, and not calling on Student during class without advance preparation; access to the learning center throughout the school day; and collaboration between general education and special education staff.

28. In light of Student's education needs, District offered Student the following services: weekly specialized academic instruction provided in a fundamental English class, a fundamental math class, and a learning center class; monthly group counseling; monthly individual mental health counseling; monthly consultative speech and language therapy; and a minimum of three hours per week of individual behavior services provided at Student's home. Student would spend 42 percent of the school day receiving special education and related services, and 58 percent of the school day in regular education. In addition, the May 2016 IEP offered Student extended school years services.

29. District perceived Student's anxiety and related absences as both a mental health and behavior problem. Accordingly, the May 2016 IEP provided Student mental health counseling and behavior intervention therapy at his home. District selected New Haven Community Based Services, a private agency, to deliver the home behavior services, sometimes referred to as wrap-around services. The behavior therapy was designed to address Student's anxiety as a behavior problem by superimposing structure and behavior interventions in the home each morning before school, by a trained behaviorist, referred to as a behavior coach. For example, if school was a non-preferred activity, and staying home was preferred, the behavior coach would attempt to motivate Student to go to school by using behavior modification techniques. Techniques included punitive measures, like taking away Student's cell phone and other electronics when he was unable to attend school.

30. Notwithstanding Parent and Student concerns, District offered placement at La Costa Canyon. Parents did not believe that La Costa Canyon was appropriate for Student, and raised that claim during the IEP team meeting and in Student's complaint. However, they consented to the IEP, because they desired to work cooperatively with District. Although District offered Student a large school campus, the overall educational plan was thoughtful, added new related services, including intensive at-home behavior services, and addressed each of Student's disabilities.

#### La Costa Canyon

31. Student was not successful at La Costa Canyon. The 2016-2017 school year began August 30, 2017. By September, Student struggled with attendance. Even with a trained behavior coach in his home each morning, he was unable to attend school. Student wanted to go to school and Parents got him ready for school each morning. Then, as before, Student froze when it came time to attend school. New Haven behavior coach Mike Heineman tried various behavior and coping strategies to alleviate Student's

anxiety, yet nothing worked. Student's anticipatory anxiety related to attending a large school campus was too great. It was normal for Mr. Heineman to go to Student's home each morning, five days weekly, for over an hour each day before the school day began. In addition, Mr. Heineman often met with Student in the school parking lot. Similar to Mother, Mr. Heineman spent hours trying to coax Student out of the car and into school. Yet, even with structure superimposed in the home, Mr. Heineman was unsuccessful approximately 80 percent of the time, and Student's attendance problems worsened during fall 2016.

32. Student's anxiety disorder impacted him at school as well. On days that Student was able to attend school, he frequently avoided any class other than the learning center, and often left school after a partial day, due to anxiety. From August 30, 2016, through October 19, 2016, Student's last day of attendance at La Costa Canyon, Student had 119 period absences. He attended only seven full days at school, during which he avoided his fundamental classes, where he received specialized academic instruction, and regular education classes; and instead isolated himself in the learning center classroom. Student was unable to access his general education classes and special education and related services as a result of his disability.

33. On November 17, 2016, the IEP team convened again. Mother, Father, Student, and Student's advocate attended. District staff included program supervisor Ms. Gallow; school psychologist Ms. Cordova; mental health therapist Mona Hogan; New Haven clinical supervisor Jesse Hiatt; and speech and language pathologist Lisa Krasny. Student had not attended school since October 24, 2016, and again requested a smaller school. Ms. Hiatt reported that New Haven services had not been effective in remediating Student's attendance problems. Student had regressed to a 10 percent baseline, from 45 percent in May, on the social emotional goal that New Haven had been responsible for implementing. District staff now agreed that La Costa Canyon was

not an appropriate placement for Student, finding that La Costa Canyon “is not able to provide the services that [Student] requires to make progress.” Student required a small, structured, school to receive a FAPE. The team would explore smaller placements, including nonpublic schools, within the next three weeks, and reconvene to discuss those options. During the interim, from November 28, 2016, to December 16, 2016, District offered Student home instruction, two hours daily. District removed Student’s school placement, including the fundamental classes and the specialized academic instruction provided therein, as a result of his disability; but continued to offer the New Haven behavior services and the mental health counseling. Parents consented to the IEP.

34. On December 1, 2016, District began providing Student instruction at his home by a credentialed teacher, two hours daily. The home instruction was not successful. Student was overwhelmed by the amount of work that needed to be completed and, after a few sessions, was unable to participate. Home instruction ended on December 16, 2016.

35. During December 2016 and early January 2017, New Haven behavior coaches and staff, along with school psychologist Ms. Lutz, worked with Student at home to support him to attend shadow days at potential nonpublic and private schools.<sup>3</sup> Although schools like The Winston School and The Fusion Academy were preferred by Parents and Student, Student was unable to attend shadow days at those schools. On several occasions, while accompanied by a behavior coach, Student was unable to leave the car to enter Winston. On 15 occasions, Parents attempted to have

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<sup>3</sup> As part of the enrollment process, some nonpublic and private schools required a potential student to audit the school for one-to-two days, where staff could observe the student to determine if he/she was an appropriate candidate for the school. This audit was referred to as “shadow days.”

Student shadow at Fusion, but he was too overcome by anxiety to do so. Student became rigid, or froze, and was unable to be moved into the school buildings. For example, on January 10, 2017, Ms. Lutz met with Student to prepare him to visit Fusion. During the counseling session, Student shut down and could not talk. He eventually agreed to visit Fusion, but would not get out of the car when taken there. By mid-January, Student's anxiety continued to increase, and it was normal for him to refuse to leave his bed or room. During therapy, behavior coach Robert Meyers would pull up a chair next to Student's bed.

36. Immediately following the winter break, on January 3, 2017, Parents provided District a notice of unilateral placement at a private or nonpublic school. Parents were concerned that District had not reconvened an IEP team meeting since the November 17, 2016 IEP, and that the temporary home instruction had not met Student's individual needs.

37. On January 4, 2017, Mr. Gold emailed Parents and offered to convene an IEP team meeting on January 23, February 2, or February 6, 2017. After various emails, Parents and District agreed to hold an IEP team meeting on February 13, 2017.

38. Absent a team meeting, District developed an amendment IEP on January 12, 2017. District had not yet identified a school placement for Student and offered to continue home instruction, two hours daily. Parents did not consent to the IEP, and the home instructor did not attempt to deliver services in January 2017.

39. Parents initially wanted Winston as a placement for Student but, as his anxiety and school refusal increased, they preferred Fusion. Fusion was a smaller, private school, which provided individual instruction in a structured environment. However, by mid-January 2017, after many failed attempts to place Student at Fusion, Parents began researching residential treatment centers for Student. Parents eventually selected Discovery Ranch, a residential treatment center in Utah.



## DISCOVERY RANCH

40. On January 20, 2017, Parents sent District an updated notice of unilateral placement, this time identifying Discovery Ranch as the unilateral placement. On that same day, Parents hired West Shield, an agency sometimes used by District, to physically transport Student to Discovery Ranch. Due to Student's size and disability, it was necessary to hire West Shield to physically transfer Student to the residential treatment center. During hearing, Mother submitted invoices and proof of payment for West Shield. Mother also provided testimony and documents showing expenses incurred to visit Student at Discovery Ranch, for Student's home visits, and Student's discharge from Discovery Ranch. District failed to submit any evidence that impugned the reasonableness of those expenses.

41. Discovery Ranch was a small, highly structured, accredited residential treatment center located in Mapleton, Utah. Discovery Ranch utilized various therapies, including individual, group and family counseling, dialectical behavioral therapy, cognitive behavioral therapy, and experiential therapies, such as equine and recreational therapies. For Student, Discovery Ranch also provided specialized academic instruction for each class, approximately 36 hours per week, individually or in a small group.

42. Staff at Discovery Ranch had experience treating students with complex educational and emotional problems. Andrew Rigdon was Student's primary therapist at Discovery Ranch. Along with Discovery Ranch's academic director Allison Anderson, Mr. Rigdon credibly testified that Student benefited from Discovery Ranch. Student attended classes daily, progressed academically, socially, and emotionally, and exhibited only minor difficulty with anxiety while at Discovery Ranch. Student performed well in Discovery Ranch's small, highly structured, and therapeutic environment. Student felt comfortable with his peers, who also had emotional and/or behavioral problems.

43. Student practiced coping skills and was able to apply those skills in a

lesser restrictive environment, Winston, which he attended during the next school year. Student met the levels needed to timely exit Discovery Ranch's program, and graduated from the program on August 3, 2017.

#### THE JANUARY 30, 2017 PRIOR WRITTEN NOTICE

44. On January 30, 2017, District sent Parents a prior written notice, denying their request for District to fund placement at Discovery Ranch. The letter was accompanied by an amended IEP, which offered a similar educational program to that contained in the May 2016 IEP; except that it offered placement at Sierra Academy, through May 24, 2017. Extended school year services were not offered in the amendment.<sup>4</sup>

45. Sierra Academy was a nonpublic day school located in San Diego, California, which provided small group instruction in a special day class setting. During hearing, Mother testified that Sierra Academy served a much lower functioning student population than that served by Winston. However, Sierra Academy's director Brandi Eagling more persuasively testified that Sierra served a similar population to that served by Winston; students with learning, behavior, and emotional disorders.

46. However, Ms. Eagling also testified that Sierra had not accepted Student as a client and seemed unfamiliar with the January 30, 2017 offer. Similar to Winston and Fusion, Sierra Academy required potential students to complete two shadow days as a prerequisite to admission. Student had not completed those shadow days. In light of

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<sup>4</sup> While Student challenged the appropriateness of District's January 30, 2017 offer as it pertained to placement, he did not challenge District's failure to offer extended school year services and that issue was not litigated during the due process hearing.

Student's inability to enter Winston, or even Fusion, a more structured placement than either Winston or Sierra Academy, evidence did not show that Sierra Academy was appropriate when District offered it on January 30, 2017.

47. District convened an addendum IEP team meeting on February 13, 2017. Mother attended along with necessary District staff. Student did not attend the meeting. Ms. Lutz shared that Student had difficulty expressing insight regarding his anxiety, which made it difficult for her to treat during therapy. She also hypothesized that Student did not have the skill set necessary to attend a large campus. Ms. Lutz had some success teaching Student coping strategies and breathing techniques, which he had begun demonstrating at Discovery Ranch. However, Ms. Lutz had been unsuccessful in getting Student to visit the nonpublic schools, even when using the breathing and coping strategies.

48. The IEP team discussed the need to obtain updated information and referred Student for psycho-educational and educationally related mental health services reassessments. District requested to assess Student at Discovery Ranch and Mother consented to the request.

#### THE SPRING 2017 ASSESSMENTS

49. District assessors Debra Lawler, Psy.D., and Ms. Lutz conducted a psycho-educational and educationally related mental health services assessment of Student over 10 days in March, April and September 2017. The psychological testing occurred on April 10, and 11, 2017. The assessors observed Student at Discovery Ranch, reviewed his school records, interviewed Parents, therapists, and educators, and utilized various inventories and rating scales to assess Student. A summary of their findings established that Student had delays in processing speed, working memory, attention, fluid reasoning, reading, spelling, executive functioning, and speech. Based upon a records review, interviews with various therapists and doctors, and observations of

Student's behavior, the assessors found that Student had generalized anxiety, social anxiety, school based anxiety, depression, irrational fears, and obsessive thoughts and behavior. Consistent with Dr. Tanaka's testimony that Student experienced increased emotional problems correlated to COMT Met/Met, the District assessors found that Student became "easily overwhelmed and flooded by emotions under typical daily stress (e.g. going to school, being at school when the academic demands become too challenging)." Anxiety generated by school was cyclical and was "exacerbated by his lack of attendance which then causes him to miss more school and therefore increases his anxiety." Student was kind and got along well with others, but presented with a blunt, monotone, and lethargic affect, and used limited facial expressions and gestures, consistent with characteristics of autism.

50. District's assessment determined that Student met the criteria for several disabling conditions. First, Student qualified under specific learning disability in the areas of reading fluency and reading comprehension, with psychological processing deficits in the areas of attention, sensory motor, phonological processing, visual processing, auditory processing, processing speed, association, and conceptualization. Second, Student qualified under other health impairment due to ADHD, anxiety, depression, and COMT Met/Met. Third, Student met the disabling conditions for emotional disturbance, meeting three of six possible prongs, including having inappropriate types of behavior or feelings under normal circumstance; a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problems. Student exhibited these characteristics "over a prolonged period of time, to marked degree, and across multiple settings and have significantly impacted [Student's] educational progress." Fourth, Student met the criteria to qualify under autism. Finally, the assessors recommended that additional testing should be conducted to determine if Student qualified under

speech and language impairment.

#### THE MAY 4, SEPTEMBER 11, AND OCTOBER 5, 2017 IEP TEAM MEETINGS

51. On May 4, 2017, District held part one of a three-part IEP team meeting. The meeting was an annual and triennial review of Student's educational program. Student was 15 years old and finishing ninth grade at Discovery Ranch. Mother, Father, and Student's advocate attended, along with Ms. Gallow, Mr. Gold, and Dr. Lawler. Student did not attend.

52. The primary purpose of the meeting was to review District's assessments and make Student a FAPE offer for the 2017-2018 school year. District's last offer, made on January 30, 2017, was not consented to by Parents, and expired on May 24, 2017. The offer was for Sierra Academy, a nonpublic school that had not yet accepted Student. Student's last agreed upon and implemented IEP, dated November 17, 2016, offered home instruction which expired on December 16, 2016. Consequently, District did not have an IEP in effect for Student. District did not complete the IEP team meeting or make a FAPE offer during the May 4, 2017 meeting. The team reviewed part of District's assessments and agreed to reconvene on June 9, 2017.

53. On June 5, 2017, District canceled the June 9, 2017 meeting, due to the unavailability of District educators. District offered to meet at specific times on June 13, or 15, 2017, but Parents and their advocate were not available. By email on June 9, 2017, Parents proposed July 5, 6, 10, 11, or 12, 2017, to hold the meeting. District did not respond to the email.

54. In early July 2017, Student visited home from Discovery Ranch. During that visit, he successfully completed two shadow days at Winston, thereby completing the admissions process to attend Winston. Part of Discovery Ranch's discharge protocol was for Student to have a school placement in place prior to his exit from the residential treatment center. Student's ability to attend Winston met that requirement.

55. By letter on July 13, 2017, Student's attorney informed District of Student's successful visit to Winston, his pending discharge from Discovery Ranch in early August, and the need to have a program in place prior to his discharge. She requested that District convene an IEP team meeting as soon as possible for those reasons, as there was no present offer of FAPE from District.

56. By email on July 25, 2017, Ms. Gallow informed Parents that District could not convene an IEP team meeting over the summer, but would send a meeting notice in September, when school team members returned from the summer break.

57. For Parents, it was critical to have a school program in place by the start of the school year, August 28, 2017. Parents believed that without a placement, Student's discharge from Discovery Ranch would be delayed. They were also worried about securing a spot at Winston, which had limited enrollment space. For those reasons, Parents contracted with Winston, which required that Parents agree to a private-pay contract for the entire 2017-2018 school year.

58. On August 23, 2017, Parents notified District that they had unilaterally placed Student at Winston. Student began attending Winston on August 28, 2017, following his discharge from Discovery Ranch.

59. On August 30, 2017, Ms. Gallow sent parents a letter offering for Student to tour Sierra Academy on September 12, 2017, and offering September 7, 11, or 14, 2017, as possible dates to convene part two of Student's annual/triennial IEP team meeting.

60. District held part two of Student's annual/triennial IEP team meeting on September 11, 2017. Parents attended along with their advocate. Ms. Gallow, Mr. Gold, Dr. Lawler, and Ms. Lutz attended for District. Student did not attend the meeting. Student was doing well at Winston and attending classes there on a regular basis. The team reviewed the remaining portions of District's assessments. District staff requested

to observe Student at Winston, and Parents cooperated with that request by signing all necessary authorizations. The meeting was brief, and ended without an offer of FAPE.

61. District held part three of Student's annual/triennial IEP team meeting on October 5, 2017. Parents, their advocate, and the same District team attended. The team reviewed Student's present levels of performance, including communication, gross and fine motor development, social, emotional and behavior; vocational, transition, and adaptive living needs. Although Student's behavior impacted his ability to make educational progress, he had been successful at Winston. The team discussed accommodations, modifications, goals and services. In sum, District's FAPE offer was for placement at Winston, which it named in the IEP document. Parent's consented to the IEP.

62. On October 9, 2017, Ms. Gallow contacted Winston regarding placing Student there as a publicly funded student. On that same day, Holly Reed, Director of Special Education at Winston, emailed Ms. Gallow, stating that Winston had not accepted Student as a publicly funded Student, but it would consider District's application packet.

63. On October 17, 2017, Ms. Reed informed District that it did not have any publicly funded spaces available for Student. Although Student was attending Winston, he did so under a private contract, which placed different financial and legal obligations on the school. For example, unlike private-pay students, each publicly funded pupil received an individual case manager, which increased school costs. Consequently, the school set a cap for both its private and publicly funded students at the beginning of each school year, to accommodate both student populations. By mid-October, 2017, Winston had reached its maximum capacity for publicly funded students and was unwilling to re-designate Student from a private-pay to a publicly funded student.

64. On October 19, 2017, Ms. Gallow informed Parents of Winston's

unavailability and offered to convene an IEP team meeting on November 2, 6, or 9, 2017, to discuss alternative placements. Parents were unable to meet on those dates and the team eventually met on November 30, 2017.

65. Parents continued to privately pay for Student's attendance at Winston. During hearing, Mother testified that Winston had required Parents to sign a contract for the entire 2017-2018 school year. Parents had done so, and had paid in full for the school year. Ms. Reed similarly testified that, per its policy, Winston had required Parents to sign an annual contract to secure Student's placement at the school. However, she clarified that Winston sometimes made exceptions to its policy, such as when a family had to move during the school year.

#### THE NOVEMBER 30, 2017 IEP

66. On November 30, 2017, District convened an amendment IEP team meeting for Student. The team discussed that Winston was unable to accept Student and explored other nonpublic school options. Given Student's goals, services, and unique needs, District offered Sierra Academy. Although Sierra Academy had not yet accepted Student, by this point it had reviewed his school records and would admit him upon completion of the shadow days. In sum, the IEP offered Student placement at Sierra Academy, upon trial dates and acceptance. However, Parents did not believe that Sierra Academy was academically rigorous enough for Student, and declined the offer. Unlike Winston, Sierra Academy did not provide a-g curriculum, and Parents were worried that Student would not receive a high school diploma, or have difficulty being admitted to a four-year college, if he was placed there.<sup>5</sup> Parents mistakenly believed that

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<sup>5</sup> "A-g" refers to the classes, and number of credits for each class, that are required to meet the minimum admission requirements for University of California



Sierra Academy served only pupils who were anticipated to receive a certificate of completion rather than a high school diploma.

67. During hearing, Ms. Eagling more persuasively testified that Sierra Academy was not too low functioning for Student. Although Sierra Academy did not provide a-g classes, several of its students were on par with Student's academic abilities and were anticipated to receive a high school diploma after the regular four years of high school. Ms. Eagling was familiar with the November 30, 2017 IEP offer, and had reviewed Student's educational file. She credibly testified that Sierra Academy could implement Student's IEP, and would accept him upon his completion of the shadow days.

68. Student had not completed the shadow days at Sierra Academy. Yet, he had completed shadow days at Winston, a similar nonpublic school, in July 2017. Winston and Sierra Academy were sufficiently similar in size and structure, and there was no credible evidence provided which showed that Student would not have been able to complete the shadow days at Sierra Academy in November 2017, had Parents taken him there. In light of the facts that Winston was not an available placement, and that Student required a small, structured day school that could accommodate his IEP, Sierra Academy was an appropriate placement when offered on November 30, 2017.

#### WITNESS TESTIMONY

69. The parties called 14 witnesses to testify during the hearing, including Mother; Dr. Tanaka; New Haven clinical director Ms. Hiatt; New Haven behavior coaches Mr. Heineman and Mr. Meyers; Winston director Helen Reed; Discovery Ranch director Allison Anderson and therapist Andrew Rigdon; Student's expert Dr. Julie Weckerly;

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colleges.

school psychologists Ms. Marquardt and Ms. Lutz; teacher Mr. Gold; Sierra Academy director Ms. Eagling; and District's expert Robyn Moses.

70. Mr. Heineman was Student's New Haven behavior coach during the fall 2017. Mr. Heineman believed that punishing Student by taking away his cell phone and other electronics if he did not attend school was necessary to motivate Student. He testified that Mother occasionally failed to take away electronic items in accord with New Haven's behavior plan. As an example, Mr. Heineman once saw Student watching a television show on his cell phone while eating breakfast and postulated that Parents' lack of fidelity to the behavior plan may have contributed to Student's poor attendance. This sole example was outweighed by Mother's testimony, who more persuasively testified that she consistently implemented New Haven's behavior strategies; and volumes of contemporaneous daily logs from New Haven, including by Mr. Heineman, which copiously reported that Parents were receptive and cooperative with New Haven's therapists and behavior plan.

71. Some District witnesses extrapolated on Mr. Heineman's testimony and theorized that Student would have attended school if his parents had been more consistently punitive. For example, Ms. Moses testified that Student's school refusal stemmed, in part, from a family structure that did not sufficiently punish Student for not attending school. However, Ms. Moses had not observed Student at home and did not have first-hand knowledge whether Parents punished Student with fidelity. Moreover, evidence did not support that Student was responsive to punitive interventions. For example, New Haven's clinical supervisor Ms. Hiatt believed that Student was not receptive to Mr. Heineman's therapy because of his punitive methods. Student saw Mr. Heineman as an authority figure, which increased his anxiety. Rather than motivate Student to attend school, Student withdrew from Mr. Heineman, and his anxiety and school refusal intensified during fall 2016. By December 2016, Ms. Hiatt replaced Mr.

Heineman as Student's behavior coach with Mr. Meyers for those reasons. Overall, there was no evidence provided that Student benefited from punitive interventions. Consequently, evidence did not support that Student would have done better had Parents punished him with more fidelity.

72. Some District witnesses hypothesized that Student's father's work schedule was a reason for his poor school attendance, because Father worked out of town for several weeks each month. No credible evidence was submitted which supported that theory.

73. District's attempt to place blame on Student's family for his school refusal was not borne out by a preponderance of evidence. For example, Student's IEPs reflected that Parents were cooperative with District and its therapists, and that Student's school refusal stemmed from an anxiety disorder. Daily logs from New Haven staff praised Parents, and often cited their cooperation and receptiveness to behavior interventions. School records, including assessments, IEPs, emails, and other reports, identified Student's inability to access his educational placement as an IEP based disability; nothing in Student's voluminous school records suggested that Parents were uncooperative or blameworthy. To the contrary, in District's April 2017 assessment, Ms. Hiatt reported to District's assessors that Mother worked consistently with New Haven's behavior plan, yet "even with [Mother's] consistency and her diligence in the implementation of the behavioral system [Student] continued to experience attendance concerns."

#### Student's Expert

74. Student's expert Dr. Jill Weckerly credibly testified in support of Student's need for a small, structured placement due to complex emotional disorders, including the need to place Student at Discovery Ranch in January 2017. Dr. Weckerly was a licensed clinical psychologist who had a master's degree in linguistics and two doctorate

degrees, in cognitive science and clinical psychology. She had a private clinical psychology practice since 2001, and was an adjunct professor at the University of California, San Diego, School of Medicine, and a clinical psychologist for the San Diego Unified School District, since 2002. Dr. Weckerly routinely conducted mental health assessments for school districts and independent evaluations for parents. At Parents' request, Dr. Weckerly conducted a psychological evaluation of Student over four days in December 2017, and January and March, 2018.

75. Dr. Weckerly reviewed school and independent records, interviewed Parents, District teachers and psychologists, and Discovery Ranch educators and therapists, and observed Student in various classes. She utilized inventories to assess Student, including the Child and Adolescent Symptom Inventory- Fifth Edition, and the Million Adolescent Clinical Inventory. Dr. Weckerly concluded that Student had generalized anxiety disorder, major depressive disorder, in remission, learning disability, ADHD, and autism spectrum disorder. During hearing, Dr. Weckerly credibly testified that Student had a history of cognitive and emotional issues, and family history of anxiety and depression, which placed Student at having a higher risk for those disorders. Along with Dr. Tanaka, Dr. Weckerly provided uncontroverted testimony that the severity of Student's emotional disorder was related to the COMT Met/Met genotype variation. The COMT Met/Met genotype was also associated with lowered emotional resistance and a decreased ability to handle non-preferred or negative events.

76. For Student, his high anxiety and behavioral rigidity in response to changes in routines was also indicative of autism spectrum disorder. Testing results from school educators Ms. Marquardt, Ms. Lutz, Ms. Mindlin, and Ms. Gluhak revealed a profile that would contribute to anxiety. Student had impaired processing speed, deficits in memory, learning issues, difficulty with retention, and a slow rate of work production. In light of Student's unique needs, he required a small, structured educational

placement with on-site counseling, and individual and/or small group instruction. Staff should be experienced working with students with complex cognitive and emotional issues.

77. Similar to Mr. Rigdon and Ms. Anderson, Dr. Weckerly credibly opined that Discovery Ranch had successfully met Student's individual needs. Moreover, Student's witnesses persuasively testified that, by January 2017, there was no other placement option for Student. District had attempted a continuum of placements, including three different public schools of varying size, shadowing non-public and private day schools, and home instruction. None had been successful. By late-January 2017, the only placement option that had not been attempted was a residential treatment center. By all accounts, Discovery Ranch worked for Student. He did well academically, socially and emotionally there, and was able to timely exit the program. Following his exit, he was able to attend Winston, a day nonpublic school he was unable to enter prior to Discovery Ranch, on a regular basis.

#### District's Expert

78. District's witnesses were conflicted by Student's progress at Discovery Ranch. Some, like school psychologist Ms. Lutz, testified that Student did well there because of its structure. Others, like District's expert Robyn Moses, were skeptical of Student's progress at the residential treatment center. Ms. Moses surmised that Student was eventually able to attend Winston, not because of anything provided at Discovery Ranch, but because Student may not have had an anxiety disorder at all. Rather, she opined that Student's school attendance problems were attributable to a poor family structure, not a disability. This opinion was based primarily upon Father's sometimes absence from the home due to work and failed to explain how students from less traditional homes than Student managed to attend school daily.

79. Ms. Moses was a licensed educational psychologist and credentialed

school psychologist. She previously served as the Program Director of the West Orange County Consortium for Special Education and presently contracts with various school districts to assist with their psychological and mental health programs and assessments. Ms. Moses was an experienced and highly qualified witness. However, Ms. Moses' testimony was less persuasive for this matter than Student's expert because she was not directly familiar with Student. Unlike Dr. Weckerly, Ms. Moses had not assessed Student; met Student or his parents; interviewed Student's educators and therapists, including staff from Discovery Ranch; or reviewed all of Student's educational records. Moreover, Ms. Moses' testimony was inconsistent with a preponderance of evidence submitted for this matter.

80. For example, Ms. Moses' testimony that Student's school refusal was the result of a poor family structure and not because of an anxiety disorder was inconsistent with District's IEPs, which cited Student's anxiety as the basis for his school refusal. It was also at odds with District and independent assessments, which found that Student had, amongst other disabilities, an anxiety disorder. Ms. Moses's testimony was inconsistent with testimony from school psychologists Ms. Lutz and Ms. Marquardt, who believed that Student's difficulty attending school was caused, in significant part, by anticipatory anxiety, which increased after absences because he became anxious thinking about what his peers would think because he was absent. Ms. Moses' testimony overlooked New Haven progress notes, which established that Parents diligently cooperated with District's therapists, services, and behavior plan. Most significantly, Ms. Moses overlooked that Student was unable to attend school even when structure was superimposed at home; similar to Parents, New Haven's trained behaviorists were unable to get Student to attend La Costa Canyon or to shadow a nonpublic or private school. In sum, Ms. Moses' testimony in this area was contradicted by a preponderance of evidence.

81. Ms. Moses believed that, by November 2016, Student required a small, structured day nonpublic school. She was averse to home instruction or a comprehensive public school for Student. However, she opined that Parents should have kept trying to get Student to shadow a nonpublic day school, for an indefinite period of time if necessary, rather than send him to Discovery Ranch. She believed that a residential treatment center was never appropriate for a pupil who, like Student, demonstrated school refusal without accompanying behavior problems. However, that opinion required Student to be excluded from special education and related services for an indefinite period of time, and was therefore less persuasive than Student's witnesses' testimony that Discovery Ranch was appropriate and necessary for Student in January 2017. Parents and District had tried every other placement option, yet none had met Student's complex needs.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>6</sup>

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 et seq. (2006)<sup>7</sup>; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special

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

<sup>7</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to



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

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School District*, the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Endrew F. v. Douglas County School District* (2017) 580 U.S. \_\_ [137 S.Ct. 988] (*Endrew F.*.) The Ninth Circuit recently affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. Feb. 14, 2018, No. 15-56452) \_\_ Fed.Appx. \_\_, 2018 WL 847744.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer*

*v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Student had the burden of proof for her issues, and District had the burden of proof for its issue.

6. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

7. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.

#### ISSUE 1: THE MAY 25, 2016 IEP

8. Student alleges that District denied him a FAPE by placing him at La Costa Canyon, a large comprehensive school, without sufficient therapeutic services, per his May 25, 2016 IEP.

9. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in

hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149. (*Adams*).)<sup>8</sup> 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*, 137 S.Ct. at p. 999.)

10. Student primarily argues that District denied him a FAPE by failing to offer a smaller school campus to address his anxiety disorder and related school refusal. In sum, District denied Student a FAPE because it offered La Costa Canyon, a large comprehensive school. During hearing, Student did not argue that the May 25, 2016 IEP was defective because it failed to provide additional services or failed to address delays unrelated to his anxiety disorder.

11. Mother, Father, Student’s private therapist, and Student’s advocate attended the May 25, 2016 IEP team meeting. District participants included a combination of staff from Earl Warren and La Costa Canyon, including teachers and therapists who were directly familiar with Student. District had recently conducted an educationally related mental health services assessment, and school psychologist Ms. Lutz, who was able to interpret the results of the assessment, participated in the

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<sup>8</sup> In *E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2009) 652 F.3d 999, 1004-1005, the Ninth Circuit declined to apply the *Adams* snapshot rule to a 2007 assessment that had relevance to a 2004 IEP team decision on eligibility. However, that was an interpretation of the IDEA’s provision that a district court “shall hear additional evidence at the request of a party.” (20 U.S.C. § 1415(i)(2)(C)(ii).) More recent decisions of the Ninth Circuit have routinely applied the snapshot rule established in *Adams*. (See *L.J. v. Pittsburg Unified Sch. Dist., supra*, 850 F.3d at p. 1004; *Baquerizo v. Garden Grove Unified Sch. Dist.* (9th Cir. 2016) 826 F.3d 1179, 1187; *Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1058.)

meeting. The team reviewed Student's present needs, including communication, gross and fine motor development, social, emotional and behavior, health, vocational development, adaptive, daily living skills, classroom performance, and academic development. Student's greatest disability was an anxiety disorder that impeded his learning. Anxiety inhibited his ability to access special education and related services; affected his grades; and was denoted as a behavior that impeded his learning.

12. Parents and their advocate actively participated in the meeting. To address Student's anxiety, Parents requested a smaller school campus. District considered, but did not agree to, Parents' request. Rather, District attempted to address Student's anxiety disorder through a variety of ways. The team drafted nine new goals, including social- emotional; writing; reading; mathematics; and task completion. District staff, including teachers, psychologist, school therapists, and school selected behaviorists, were responsible for helping Student meet the goals. The IEP offered a variety of accommodations and supports, many designed to alleviate anxiety, including access to a word processor and audio books; copies of notes; paired auditory information with visual supports; preferential seating; reduced work; directions given in a variety of ways; options for oral presentations, such as presenting only to the teacher and not the class, and not calling on Student during class without advance preparation; access to the learning center throughout the school day; and collaboration between general education and special education staff.

13. District perceived Student's anxiety and related absences as both a mental health and behavior problem. In accord with this belief, the May 2016 IEP provided Student mental health counseling and behavior intervention services. The services District offered included weekly specialized academic instruction provided in a fundamental English class and a fundamental math class; a learning center class; monthly group counseling; monthly individual mental health counseling; monthly

consultative speech and language therapy; a minimum of three hours per week of individual behavior services provided at Student's home; and extended school year services. District selected New Haven to deliver the home behavior services. The behavior therapy was designed to address Student's anxiety as a behavior problem by superimposing structure and behavior interventions in the home each morning before school, by a trained behaviorist. The IEP services cogently correlated with Student's disability.

14. Although District offered Student a large school campus in contradiction to the requests by Parents and their advocate, the overall educational plan was thoughtful and reasonable in light of Student's circumstances and the information the IEP team had at the time. With mental health counseling services, wrap-around services in the home, specialized academic instruction, fundamental and learning center classes, and various accommodations and supports, the IEP offered a solid plan to address Student's anxiety disorder.

15. Student's central argument is that the May 2016 IEP denied him a FAPE because placement at La Costa Canyon, even with increased services, was unsuccessful. Student correctly points out that his anxiety intensified during the fall 2016, and that he was unable to access special education and related services at La Costa Canyon. Student stopped attending school altogether in October 2016. By November 2016, the IEP team agreed that Student required a different placement; a small, nonpublic school. However, District had the obligation to make a FAPE available to Student, not to guarantee its results. An IEP must be "reasonably calculated to enable the child to receive educational benefits." (*Rowley, supra*, 458 U.S. at 207.) It need not guarantee any particular outcome. (*Id.* at p. 192; see also *Endrew F., supra*, 137 S.Ct. at p. 999 [IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; *A.H. v. Illinois High Sch. Assn.* (7th Cir. 2018) 881 F.3d 587, 596; *Nack v.*

*Orange City Sch. Dist.* (6th Cir. 2006) 454 F.3d 604, 614.) Here, the May 25, 2016 IEP offer was reasonably calculated to provide Student an educational benefit in light of his circumstances, based upon the information that District had at the time it was offered. Although it was incumbent upon District to modify its offer when new information revealed that, even with increased services, Student could not access his education at La Costa Canyon, that information was not available to District in May 2016.

16. For the forgoing reasons, Student failed to show by a preponderance of the evidence that District's IEP offer of May 25, 2016, denied him a FAPE.

## ISSUE 2: DISTRICT'S FAILURE TO REFER STUDENT FOR AN EDUCATIONALLY RELATED MENTAL HEALTH SERVICES REASSESSMENT, PRIOR TO FEBRUARY 13, 2017

17. Student complains that District failed to refer him for an educationally related mental health services assessment, prior to February 13, 2017. District initially assessed Student in May 2015, and completed an educationally related mental health services assessment in January 2016. Therefore Students' issue pertains to a reassessment.

18. A reassessment shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and shall occur at least once every three years, unless the parent and the agency agree in writing that a reassessment is unnecessary. (Ed. Code, § 56381 (a)(2).) Here, neither Parents nor District requested an educationally related mental health services reassessment for Student. Therefore, by the foregoing authority, the earliest District could have reassessed Student in that area was January 2017, a year following the prior assessment.

19. District completed its first educationally related mental health services assessment for Student on January 8, 2016. The assessor, Mr. Nickell, observed Student, interviewed Parents, Student, school psychologists, teachers and staff, and reviewed educational records. He found that Student struggled with anxiety and school

avoidance. Mr. Nickell diagnosed Student with Generalized Anxiety Disorder and Major Depressive Disorder, recurrent. Mr. Nickell recommended individualized case management, daily support in a small structured setting, and mental health counseling. District convened an IEP team meeting on January 27, 2016, to review the educationally related mental health services assessment with Parents and school staff. There was no evidence submitted which impugned the credibility of the assessor or assessment.

20. District referred Student for an educationally related mental health services reassessment during an IEP team meeting held on February 13, 2017. District conducted the reassessment in April 2017. District assessors Dr. Lawler and Ms. Lutz observed Student, reviewed his school records, interviewed Parents, therapists, and educators, and utilized various inventories and rating scales to assess Student. Similar to the January 2016 assessment, the April 2017 assessment established that Student had an anxiety disorder and depression, amongst other disabilities. District reviewed the assessment with Parents and their advocate on May 4, September 11, and October 5, 2017. There was no evidence submitted which impugned the credibility of the assessors or assessment.

21. Student does not allege that either the January 2016 or the April 2017 assessments were inadequate; that the assessors were unqualified; or that the IEP team did not sufficiently review the assessments with Parents. Rather, Student asserts that District should have referred Student for a reassessment sometime prior to February 13, 2017. Student argues that his anxiety and attendance problems intensified following the January 27, 2016 IEP team meeting, where the first assessment was reviewed, thereby qualifying him for an updated assessment. However, because neither Parents nor District requested a reassessment, Student's argument pertains only to January 9, 2017, one year following the first assessment, to February 13, 2017, when District referred Student for a reassessment.

22. It was reasonable for District to wait until the February 13, 2017 IEP team meeting to refer Student for the reassessment. The team reviewed Student's present needs, which included input from Parents, therapist and educators. Parents participated in the educational decision making process, including the team's decision that reassessments were warranted. Based upon that discussion, the team agreed to move up Student's triennial psycho-educational evaluation and to reassess in the area of educationally related mental health services. That determination was appropriate in light of the information that was available to the February 2017 IEP team, including Student's increased anxiety and placement in a residential treatment center. A prior decision to reassess Student would have run afoul of the education code, or lacked Parents' input in the development of Student's educational program.

23. Given the foregoing, Student failed to show that he was denied an educational benefit, or that his parents were denied the opportunity to meaningfully participate in the development of his educational program, because District waited until February 13, 2017, to refer Student for a reassessment in the area of educationally related mental health services.

### ISSUE 3: PLACEMENT AT A RESIDENTIAL TREATMENT CENTER

24. Student contends that District seriously infringed on Parents' opportunity to meaningfully participate in the individualized education program process, by offering FAPE in a prior written notice on January 30, 2017, rather than at an IEP team meeting; and substantively denied Student a FAPE because District offered placement at Sierra Academy, when Student required a residential placement. The Decision finds for Student on the substantive claim that he required placement at a residential treatment center as of January 30, 2017. It is therefore unnecessary for the Decision to address the procedural allegation.

25. A school district must provide a residential placement to a student with a



disability if such a placement is necessary to provide the student with special education and related services. (34 C.F.R. § 300.104.) The test for determining whether a residential treatment center placement provides FAPE is whether the placement is necessary to provide special education and related services to meet the student's educational needs. (*Ashland School District v. Parents of RJ* (D. Or. 2008) 585 F. Supp.2d 1208, 1231, affirmed, (9th Cir. 2009) 588 F.3d 1004.) The analysis for determining whether a residential treatment center placement is appropriate hinges on whether the placement is necessary for educational purposes. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.3d 635, 643 (*Clovis*)). The Ninth Circuit Court of Appeals identified three possible tests for determining when a school district is responsible for the cost of a residential placement: (1) when the placement is "supportive" of the child's education; (2) when medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement primarily aids the student to benefit from special education. (*Ibid.*) By this standard, Student had the burden of proving that a residential treatment center was necessary for educational purposes.

26. District, in its closing brief, argues that the gravamen of this dispute is whether Discovery Ranch "fixed" Student. It is not. Courts have long held that a unilateral placement need not be perfect or meet all of a student's individual needs; the unilateral placement is not held to the same requirements as a local educational agency's FAPE offer. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S.Ct. 36, 1126 L.Ed.2d 284] (*Florence County*)). Rather, the gravamen of this dispute is whether Student required a residential treatment center because of an IEP based disability and because it was necessary to benefit from special education. (*Clovis, Ibid.*) In this regard, District's argument that Student did not have an anxiety disorder and/or it was not the basis for his attendance problems, was not

consistent with evidence submitted for this matter. To the contrary, a preponderance of evidence established that Student had an anxiety disorder that was intertwined with his education. Evidence also established that Student was unable to access his education or to benefit from special education until he was placed at the residential treatment center.

#### District's IEPs Found That Student Had An Anxiety Disorder Which Impacted His Education

27. District's initial IEP of May 25, 2016, identified that Student had an anxiety disorder which caused school refusal, and was a problem that should be addressed in his IEP. Student demonstrated anxiety related to going to school and could only attend school for a few weeks before experiencing an emotional meltdown. District attempted to remediate Student's anxiety disorder through goals, accommodations, counselling, and a learning center classroom at Diegueno middle school. Similarly, addendum IEPs held on October 21 and November 12, 2015, found that Student had an anxiety disorder that impacted his education. School psychologist Ms. Marquardt pointed out that Student's anxiety was related to concerns about missed work after an absence, fear of holding back group projects when he was absent, and fear of what his peers would think of him because of his frequent absences.

28. Student did not benefit from special education at Diegueno because of his anxiety disorder. Student had 93 period absences during his short time at Diegueno, and had to retake his classes. For that reason, District's November 20, 2015, IEP offered to move Student to a more structured learning class and smaller campus at Earl Warren middle school.

29. District's January 27, 2016, IEP team again found that Student had an anxiety disorder that impacted his education, and added mental health counseling to his IEP due to his anxiety disorder. However, even with mental health counseling, Student was unable to access special education at Earl Warren because of his disability. In mid-

February 2016, Student's anxiety intensified, and by April 29, 2016, his last day of attendance at Earl Warren, Student had 216 period absences. By the end of the school year, he was not attending school at all. Because of anxiety, Student was unable to access any education during May and June 2016.

30. District's May 25, 2016 IEP also found that Student had an anxiety disorder which impacted his education. Like all of Student's IEP teams, the team considered Student's anxiety disorder and related school refusal as a school based problem that should be addressed in Student's IEP. Consequently, school staff gave no consideration to addressing Student's many absences through any other means, such as referring Student to the student attendance review board or child protective services. The IEP team determined that Student's attendance problems were related to Student's IEP based disability. Anxiety inhibited his ability to access special education and related services; affected his grades; and was denoted as a behavior that impeded his learning. School psychologist Ms. Lutz described Student's anxiety as self-sustaining; absences because of illness or anxiety caused Student to worry about what his peers would think of him, which increased his anxiety and caused more absences.

31. Student was not able to access special education at La Costa Canyon. Even with a trained behavior coach in his home each morning, he was unable attend school. Each morning, Parents woke Student, got him dressed, and prepared him for school. Then, overcome with anticipatory anxiety, Student froze. New Haven behavior coach Mike Heineman tried various behavior and coping strategies to alleviate Student's anxiety, yet nothing worked. Similar to Mother, Mr. Heineman spent hours trying to coax Student out of the car and into school. Yet, even with structure superimposed in the home, Mr. Heineman was unsuccessful, and Student's attendance problems worsened during fall 2016.

32. Student's anxiety disorder impacted him at school as well. On days that

Student was able to attend school, he frequently avoided any class other than the learning center, and often left school after a partial day, due to anxiety. In particular, Student avoided regular education classes and his fundamental classes, where he received specialized academic instruction, because of his anxiety disorder. Therefore, Student was unable to access his education or to benefit from special education even when at school.

33. From August 30, 2016, through October 19, 2016, Student's last day of attendance at La Costa Canyon, Student had 119 period absences, most which were attributable to his anxiety disorder. This evidence overwhelmingly showed that Student was unable to access regular education, special education, and related services, as a result of his disability.

34. District's November 17, 2016, IEP team again found that Student had an anxiety disorder that impacted his education. New Haven services had not been effective in remediating Student's attendance problems and Student regressed to a 10 percent baseline, from 45 percent in May, on the social emotional goal that New Haven had been responsible for implementing. District agreed that La Costa Canyon was too large a school due to Student's anxiety disorder and "not able to provide the services that [Student] requires to make progress." District offered to explore nonpublic school options and provide home instruction during the interim. Consequently, District was forced to remove necessary special education, including specialized academic instruction provided in the fundamental classes, altogether from Student's IEP because of his anxiety disorder.

35. Student was unable to access special education during home instruction, and after a few sessions stopped participating altogether. During hearing, Mother and Ms. Moses provided uncontroverted testimony that home instruction was not appropriate for Student in light of his disabilities.

36. During December 2016 and early January 2017, New Haven behavior coaches and staff, along with school psychologist Ms. Lutz, worked with Student at his home to support him as he attempted to attend shadow days at potential nonpublic and private schools, a prerequisite to admission. On several occasions, while accompanied by a behavior coach, Student was unable to leave the car to enter Winston. On 15 occasions, Student was unable to enter Fusion. Student became rigid, or froze, and was unable to be moved into the school buildings. Student's anxiety continued to increase, and it was normal for him to refuse to leave his bed or room. During therapy, behavior coach Mr. Meyers would pull up a chair next to Student's bed. Consequently, Student was unable to attend public school, non-public school, or private school, because of his anxiety disorder.

37. Finally, District's May 4, September 11, October 5, and November 30, 2017 IEP teams found that Student had an anxiety disorder that impacted his education. At no time during any IEP team meeting did any team member suggest that Student did not have an anxiety disorder or that it was not within the province of the IEP team to attempt to address that disorder. There was also no reflection in Student's various IEPs that Student did not attend school because of a poor family structure.

#### District's Assessments Found That Student Had An Anxiety Disorder That Impacted His Education

38. District's assessments corroborated that Student had an anxiety disorder that was intertwined with his education. For example, District's January 2016 educationally related mental health services assessment found that Student struggled with anxiety and school avoidance because of his anxiety. District's mental health assessor Mr. Nickell diagnosed Student with an anxiety disorder and other emotional problems that affected his academic performance. There was no question that Student's disability was intertwined with his education, and Mr. Nickell recommended daily

support in a small structured setting and weekly mental health therapy services at school to assist Student in managing his anxiety and mood disorders.

39. District's January 2016, functional behavior report similarly found that Student had an anxiety disorder that impacted his education. The primary function of Student's behavior was avoidance of negative affectivity such as anxiety, depression, and somatic complaints, with a secondary function of escape of aversive social or evaluative settings. Antecedents included missed work when absent, difficult workloads, having multiple teachers, and a large school campus.

40. Recent District assessments also confirmed that Student had a complex anxiety disorder that impacted his education. In March, April, and September 2017, District assessors Dr. Lawler and Ms. Lutz concluded that Student had learning delays, generalized anxiety, social anxiety, school based anxiety, and depression, amongst other delays. Consistent with Dr. Tanaka and Dr. Weckerly's findings that Student had COMT Met/Met, the District assessors found that Student became "easily overwhelmed and flooded by emotions under typical daily stress (e.g. going to school, being at school when the academic demands become too challenging)." In sum, District's own assessments provided uncontroverted evidence that Student had an anxiety disorder that impacted his education.

41. For the foregoing reasons, District's argument that Student did not have an anxiety disorder and/or the disorder was not the basis for his attendance problems, was outweighed by a preponderance of evidence submitted for this matter. To agree with District's argument, the ALJ would have to disregard District's IEPs, assessments, and school records, along with a preponderance of Student's evidence.

#### Discovery Ranch

42. It was not until mid-January 2017, after many failed attempts to have Student shadow nonpublic and private schools, that Parents began researching

residential treatment centers for Student. Parents' selected Discovery Ranch and hired professionals to physically transport Student there. Discovery Ranch was a small and highly structured, accredited residential treatment center that utilized various therapies, including individual, group and family counseling, dialectical behavioral therapy, cognitive behavioral therapy, and other therapies. Discovery Ranch also provided Student specialized academic instruction for each class, approximately 36 hours per week, individually or in a small group. Staff at Discovery Ranch had experience treating students with complex educational and emotional problems.

43. Along with Mr. Rigdon, Ms. Anderson, and Mother, Dr. Weckerly credibly testified in support of Student's placement at Discovery Ranch in January 2017. Along with Dr. Tanaka, Dr. Weckerly provided uncontroverted testimony that the severity of Student's emotional disorder was related to the COMT Met/Met genotype variation. Student's disability was complex and intertwined with his education. In sum, Student's witnesses persuasively testified that Discovery Ranch had successfully met Student's individual needs in light of his complex disability. He benefited educationally and was able to consistently access his educational program while at the small, structured placement. He practiced coping skills and was able to apply those skills in a lesser restrictive environment, Winston, which he attended during the next school year.

44. Significantly, Student's witnesses persuasively testified that, by January 20, 2017, there was no other placement option for Student. District had attempted a continuum of placements, including three different public schools of varying size, non-public day school, and home instruction. None had been successful. By January 20, 2017, the only placement option that had not been attempted was a residential treatment center. By all accounts, Discovery Ranch worked for Student. He did well academically, socially and emotionally there, and was able to timely exit the program. Following his exit, he was able to attend Winston, a day nonpublic school he was not able to enter

prior to Discovery Ranch, on a regular basis.

45. In the alternative, District argues that Student's attendance problems were caused by a poor family structure. District points out that Student's older siblings also had disabilities and that Student's father was sometimes absent due to work. In sum, District argues that Student would have been able to attend school if Mother had not been overwhelmed and implemented New Haven's behavior plan with fidelity.

46. A parent's non-cooperation with an IEP component, such as an assessment, may diminish a school district's obligation to provide a FAPE. (*G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, *affd.* (11th Cir. 2012) 668 F.3d 1258.) That was not the case here. Scant evidence showed that Mother failed to abide by District's IEPs or behavior plan, or to cooperate with Student's therapists and educators. To the contrary, New Haven progress notes established that Parents were cooperative and receptive to New Haven's therapists and behavior plan. New Haven's clinical supervisor reported that Mother was consistent and diligent in her implementation of the behavior plan. Evidence also showed that Student was not receptive to the punitive measures that District complains Mother failed to implement with fidelity. Finally, District overlooks that Student was unable to attend school even when structure was superimposed at home; similar to Parents, New Haven's trained behaviorists were unable to get Student to attend La Costa Canyon or to shadow the nonpublic and private schools. The evidence therefore does not support a finding that Student would have attended school if only Mother had been more austere in her implementation of New Haven's behavior plan.

47. Finally, District's argument that Parents should have kept trying to get Student to shadow at a nonpublic day school for an indefinite period of time, rather than send him to Discovery Ranch, was not reasonable or consistent with applicable law. Students are not required to languish indefinitely without an educational program



because a school district is averse to providing placement at a residential treatment center. Here, Student met the necessary legal requirements for placement at a residential treatment center; including that Student's disability was intertwined with his education and a residential treatment center was necessary for Student to benefit from special education. (*Clovis, supra*, 903 F.3d 635 at p. 643.)

48. For the foregoing reasons, a preponderance of evidence shows that District denied Student a FAPE, by failing to offer Student a residential treatment center on January 30, 2017.

#### ISSUE 4: DISTRICT'S FAILURE TO HAVE AN IEP IN PLACE AT THE BEGINNING OF THE 2017-2018 SCHOOL YEAR.

49. Student complains that he was denied a FAPE, based upon various grounds, because District failed to have an IEP in place at the start of the 2017-2018 school year.

50. A school district must have an IEP in effect for each child with exceptional needs at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (b).) Developing an IEP is a necessary predicate to offering a FAPE, and the obligation to offer a FAPE also includes an obligation to develop an IEP. (Cf. *Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 238–39 [129 S.Ct. 2484, 174 L.Ed.2d 168] ["[W]hen a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP"].)

51. Student met his burden of proof for this issue. There was little dispute that District did not have an IEP in place for Student at the start of the 2017-2018 school year. Mother's testimony that District failed to have an IEP in place at the start of the school year was not refuted by any District witness. A preponderance of evidence also supported Mother's testimony regarding this issue.

The May 4, September 11, and October 5, 2017 IEP Team Meeting

52. On May 4, 2017, District held part one of a three-part IEP team meeting to offer Student a FAPE for the 2017-2018 school year. District's last FAPE offer, made on January 30, 2017, had not been consented to by Parents. District did not submit a complaint against Student to enforce its FAPE offer, and the offer expired by its own terms on May 24, 2017. Moreover, the offer was for Sierra Academy, a nonpublic school that had not accepted Student and would not do so until he completed shadow days at the school. As found herein, Student did not possess the skills to shadow at Sierra Academy when it was offered in January 2017. Consequently, Sierra Academy was not a placement in effect for Student.

53. Student's last agreed upon and implemented IEP, dated November 17, 2016, offered home instruction, which expired on December 16, 2016. Subsequently, District did not have an IEP in effect for Student as of May 4, 2017. However, District did not complete the IEP meeting or make a FAPE offer on May 4, 2017, and the team agreed to reconvene the meeting on June 9, 2017.

54. On June 5, 2017, District canceled the June 9, 2017 meeting, and offered to meet at specific times on June 13, or 15, 2017. Parents and their advocate were not available during those times, and proposed July 5, 6, 10, 11, or 12, 2017, to hold the meeting. District did not respond.

55. On July 13, 2017, Student's attorney informed District of Student's successful shadowing at Winston, his pending discharge from Discovery Ranch in early August, and the need to have a program in place prior to his discharge. She requested that District convene an IEP team meeting as soon as possible for those reasons, as there was no present offer of FAPE from District. On July 25, 2017, Ms. Gallow informed Parents that District could not convene an IEP team meeting over the summer, but would send a meeting notice in September, when school team members returned from

the summer break.

56. For Parents, it was critical to have a school program in place by the start of the school year, August 28, 2017. Parents believed that without such placement, Student's discharge from Discovery Ranch would be delayed. They were also worried about securing a spot at Winston, which had limited enrollment space. For those reasons, Parents contracted with Winston, which required that Parents agree to a private-pay contract for the entire 2017-2018 school year.

57. District held part two of Student's annual/triennial IEP team meeting on September 11, 2017. Parents attended along with their advocate and necessary District staff. The meeting was brief, and ended without a FAPE offer.

58. District did not make a FAPE offer for the 2017-2018 school year until part three of the IEP team meeting was held on October 5, 2017, more than a month after the school year began. Evidence therefore showed that it was necessary for Parents to have unilaterally placed Student at Winston to avoid losing an educational benefit. District's offer was for Winston, which did not have a public-funded space available. As found herein, District did not seriously infringe on Parents' ability to meaningfully participate in the IEP process because it offered Winston. However, because there was no placement available for Student, District's failure to have an IEP in effect at the beginning of the school year extended to November 30, 2017, when District offered Sierra Academy, a placement that could be implemented.

59. Given the foregoing, evidence overwhelmingly showed that District did not have an IEP in place at the start of 2017-2017 school year, and denied Student a FAPE on that basis.

#### ISSUE 5: THE OCTOBER 5, 2017 IEP

60. Student alleges that District seriously infringed on Parents' opportunity to meaningfully participate in the educational decision making process at the October 5,

2017 IEP team meeting, by offering Winston, a placement that could not be implemented, and by failing to make any other FAPE offer until November 30, 2017.

61. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

62. Here, District convened a three part IEP team meeting for Student on May 4, September 11, and October 5, 2017. Mother, Father and Student's advocate attended each meeting. District team members included necessary District staff, including school psychologist, teachers, administrators and therapists who were directly familiar with Student. For example, school psychologist had recently assessed Student and reviewed the results of District's recent psycho-educational and educationally related mental health services assessment with the IEP team. Parents and their advocate actively participated during each meeting. They asked questions and District considered their concerns and input. For example, Dr. Lawler made changes to District's assessment based upon Parents' input. There was no evidence provided which showed that Parents' ability to meaningfully participate during each IEP team meeting was infringed upon in any manner.

63. On October 5, 2017, based upon Parents' request, District offered Student placement at Winston. There was no question that Parents were active members of the IEP team meeting that determined Student's educational placement. In light of Student's present placement at Winston, and Parents' request for that placement, it was reasonable for District to believe that Winston would accept Student at that time. It was

not until October 17, 2017, that Winston director Ms. Reed informed District that it did not have any publicly funded spaces available for Student.

64. On October 19, 2017, Ms. Gallow timely informed Parents of Winston's unavailability, and offered to convene an IEP team meeting to discuss additional placements on November 2, 6, and 9, 2017. Parents were unable to meet on those dates and the team eventually met on November 30, 2017. Consequently, District was unable to offer an alternative placement until November 30, 2017, by no fault of its own.

65. Due to the foregoing, evidence did not support Student's contention that District denied him a FAPE by seriously infringing on Parents' opportunity to meaningfully participate in the educational decision making process at the October 5, 2017 IEP team meeting, by offering a placement that could not be implemented, and by failing to make any other FAPE offer until November 30, 2017.

#### ISSUE 6: PLACEMENT AT SIERRA ACADEMY AS OF NOVEMBER 30, 2017

66. Student alleges that District denied him a FAPE because the November 30, 2017 IEP offered placement at Sierra Academy.

67. For the 2017-2018 school year, Parents made clear that their preference for Student's placement was at Winston. However, starting with *Rowley*, courts have held that an educational agency is not held to a standard of parental preference. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21 [the IDEA does not require a potential-maximizing education]; see also *Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658; *N.T. v. Garden Grove Unified School Dist.* (C.D. Cal. May 19, 2016, No. SA CV 15-1013-GHK (JPRx)) 2016 WL 2984192, \* 5.) An appropriate education under the IDEA need not be "the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the best choice." (*G.D. v. Westmoreland School Dist.* (1st Cir. 1999) 930 F.2d 942, 948 (italics in text).)

68. Here, while Winston may have been more academically rigorous than

Sierra Academy, and therefore more attractive to Parents, the proper focus is on District's offered placement. Student failed to show that Sierra Academy was not reasonably calculated to confer Student with an educational benefit as of November 2017. (*Rowley, supra*, 458 U.S. at pp. 206-207.)

69. Similar to Winston, Sierra Academy was an accredited nonpublic day school located proximate to Student. Similar to Winston, it provided small group instruction in a special day class setting. During hearing, Mother testified that Sierra Academy served a much lower functioning student population than that served by Winston and was therefore inappropriate. Unlike Winston, Sierra Academy did not offer an a-g curriculum, and Mother mistakenly believed that Student would be unable to receive a regular high school diploma there. However, Sierra Academy's director Ms. Eagling more persuasively testified that Sierra served a similar population to that served by Winston; students with learning, behavior, and emotional disorders. While Sierra Academy did not provide a-g classes, several students at Sierra Academy were on par with Student's academic abilities and were anticipated to receive a high school diploma after the regular four years of high school.

70. Although Sierra Academy had not yet accepted Student, Ms. Eagling was familiar with the November 30, 2017 IEP offer, and had reviewed Student's educational file. She credibly testified that, based upon his school records, Sierra Academy could implement Student's IEP and would accept him upon his completion of the shadow days.

71. Student had not completed the shadow days at Sierra Academy. However, he was able to shadow at Winston, a similar nonpublic school, in July 2017. Winston and Sierra Academy were sufficiently similar in size and structure, and there was no credible evidence provided which showed that Student would not have been able to complete the shadow days at Sierra in November 2017, had Parents taken him there.

72. Moreover, Winston was not an available placement. It is inequitable to require District to offer a placement that it was not able to provide. Nonetheless, evidence established that Sierra Academy could meet Student's need for a small, structured day school that could accommodate his IEP. Therefore, Sierra was an appropriate placement when offered in November 2017.

73. Based upon the foregoing, Student failed to prove that he was denied a FAPE because District offered placement at Sierra Academy on November 30, 2017.

## REMEDIES

74. 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 School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11.)

75. 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. (*Ibid*, *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*).) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid*.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is

appropriate. (*Id.* at p. 1496.) 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. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

76. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (Ed. Code, §56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington*, *supra*, 471 U.S. at pp. 369-370 (reimbursement for unilateral placement may be awarded under the IDEA where the district’s proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R. § 300.148(c); *Florence County*, *supra*, 510 U.S. at p. 14].)

77. As found herein, District denied Student a FAPE, by failing to offer a residential treatment center as part of its January 30, 2017 FAPE offer. The residential treatment center selected by Parents, Discovery Ranch, was an accredited, small, structured and therapeutic residential treatment center. Its therapists and educator had experience educating pupils like Student, who had complex emotional disorders. Dr. Weckerly, Mr. Rigdon, Ms. Anderson, and Mother persuasively testified that Student benefited from Discovery Ranch and it is therefore equitable to award Parents reimbursement for that placement. Student also proved that it was necessary to professionally transport him to Discovery Ranch; to visit him there; for him to visit home; and to incur costs to discharge him from the placement. Mother provided evidence of related costs and District failed to provide any evidence to reduce those costs. It is therefore equitable to award Parents reimbursement for transportation costs related to



Student's placement at Discovery Ranch.

78. However, the facts of this case warrant a reduction in reimbursement costs. Reimbursement may be reduced or denied if, at the most recent IEP team meeting the parents attended prior to removing the child, the parents did not inform the IEP team they were rejecting the proposed placement, and state their concerns and intent to enroll their child in a private school at public expense; or at least 10 business days prior to the removal of the child, the parents did not give written notice to the public agency of this information. (Ed. Code, § 56176; 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(e).)

79. Parents failed to notify District of their intent to unilaterally place Student at Discovery Ranch until January 20, 2017, the same day they placed him there. While Parents provided a notice of unilateral placement to District on January 3, 2017, that notice was for an unspecified day nonpublic school; which District had already agreed to provide on November 17, 2017, and was actively exploring. Moreover, beginning January 4, 2017, District had taken steps to convene an IEP team meeting, which was briefly delayed by Parents. Consequently, it is equitable to reduce reimbursement for Discovery Ranch to costs incurred 10 days following Parents' January 20, 2017 notice letter.

80. Next, while Student challenged the appropriateness of District's January 30, 2017 offer as it pertained to placement, he did not challenge District's failure to offer extended school year services and that issue was not litigated during the due process hearing. Had it been litigated, District would have had the opportunity to show that extended school year placement was not necessary to prevent regression. It is therefore equitable to reduce reimbursement to costs incurred through the last day of the regular school year, June 16, 2017, in alignment with the issue heard and decided.

81. For the foregoing reasons, reimbursement shall include \$2,889.74, the

costs for West Shield to professionally transport Student to the residential treatment center; \$2,054.06, for Parents' visit to Discovery Ranch, Student's visit home and discharge costs; and reimbursement for Discovery Ranch from January 30, 2017, to June 16, 2017. Parents failed to present evidence of prorated tuition costs and payment during hearing for that time frame. Parents shall therefore provide District evidence of tuition and payment for Discovery Ranch from January 30, 2017, to June 16, 2017, to receive reimbursement.

82. Student also proved that District denied him a FAPE by failing to have an IEP in place at the start of the 2017-2018 school year. As a result, Student was required to privately contract with Winston to ensure that Student had an educational placement. Winston is certified as a nonpublic school by the California Department of Education, and regularly contracts with District to provide students placement and special education. District's October 5, 2017 IEP team offered Student placement at Winston, and there was no evidence which impugned the appropriateness of Winston during the fall 2017. District did not offer Student an alternative placement to Winston until November 30, 2017, at which time it offered Sierra Academy. As found herein, Sierra Academy was appropriate for Student when offered on November 30, 2017.

83. Mother testified that Winston required her to sign a private-pay contract for the entire 2017-2018 school year, and therefore seeks reimbursement for the entire school year. However, Winston director Ms. Reed persuasively testified that Winston makes exceptions to its annual contract requirement. Moreover, District attempted to publically place Student at Winston, but was unable to do so because of Winston's school policies. In light of those facts and because District offered Student a FAPE on November 30, 2017, it is inequitable to order District to reimburse Parents for the entire school year.

84. Given the foregoing, it is equitable to order that District reimburse Parents

for Student's placement at Winston from August 28, 2017, to November 30, 2017. Parents failed to present evidence of prorated tuition costs and payment for the time frame specified herein. Parents shall therefore provide District evidence of tuition and payment for Winston from August 28, 2017, through November 30, 2017, to receive reimbursement.

## ORDER

1. Within 60 calendar days of the date of this Decision, District shall reimburse Parents for \$2,889.74, the costs to professionally transport Student to Discovery Ranch; and \$2,054.06, for related visitation and discharge costs.

2. District shall reimburse Parents for the cost of Student's attendance at Discovery Ranch, from January 30, 2017, to June 16, 2017. Within 60 calendar days of the date of this Decision, Parents shall provide District evidence of tuition and payment for Discovery Ranch, prorated from January 30, 2017, to June 16, 2017, to receive reimbursement. District shall reimburse Parents within 60 calendar days of receiving that documentation. The award of reimbursement for tuition is a compensatory award and shall not constitute Student's stay put placement.

3. District shall reimburse Parents for Student's placement at Winston, from August 28, 2017, to November 30, 2017. Within 60 calendar days of the date of this Decision, Parents shall provide District evidence of tuition and payment for Winston, prorated from August 28, 2017, through November 30, 2017, to receive reimbursement. District shall reimburse Parents within 60 calendar days of receiving that documentation. The award of reimbursement for tuition is a compensatory award and shall not constitute Student's stay put placement.

4. District shall reimburse Parents' transportation costs for Student's attendance at Winston from August 28, 2017, to November 30, 2017, one round trip per

day, based upon the mileage reimbursement rate established by the United States' Internal Revenue Service. Parents shall have until 60 calendar days to provide District proof of Student's daily attendance during this time. District shall reimburse Parents within 60 calendar days of receiving that information.

5. Student's additional claims for relief are 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. Student prevailed on issues 3 and 4. District prevailed on issues 1, 2, 5, and 6.

## 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: June 15, 2018

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/s/

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearing