

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PALO ALTO UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017110106

DECISION

Parent on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on October 31, 2017, naming Palo Alto Unified School District. On November 16, 2017, OAH granted the parties' joint request to continue the matter.

Administrative Law Judge Charles Marson heard the matter in Palo Alto, California, on February 20, 21, and 22, and March 6, 7, 12, 13, 14, 15, 19 and 20, 2018.

Christian M. Knox and Barbara R. Shufro, Attorneys at Law, represented Student. Student's Mother attended the hearing except for brief absences. Student was not present except when he testified.

Elizabeth J. Rho-Ng and Michael L. Turner, Attorneys at Law, represented Palo Alto. Dr. Stephanie Sheridan, Palo Alto's Director of Special Education (Secondary), attended the hearing on its behalf.

On March 20, 2018, at the request of the parties, OAH continued the matter to April 9, 2018 for closing briefs. On that day the parties filed closing arguments, the record was closed, and the matter was submitted for decision.

## ISSUES<sup>1</sup>

1. Did Palo Alto deny Student a free appropriate public education during the 2016-2017 school year, by:
  - a. failing to provide measurable goals in all areas of need, including executive functioning, social skills, and social emotional functioning;
  - b. failing to provide adequate accommodations;
  - c. failing to implement Student's accommodations in his October 2016 and May 2017 IEP's;
  - d. failing to provide Student with adequate services to address his executive functioning deficits;
  - e. failing to provide Student with adequate mental health services;
  - f. failing to provide an adequate structured social skills program;
  - g. failing to timely provide an assessment plan in response to Parent's requested referrals for assessments, including assistive technology, speech and language, and educationally related mental health services;<sup>2</sup>

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<sup>1</sup> The issues are as stated in the Order Following Prehearing Conference filed on February 12, 2018, except that Student withdrew two issues at the start of the hearing so they are not set forth here. The issues have been renumbered for clarity. (See *J.W. v. Fresno Unified Sch. Dist.* (2010) 626 F.3d 431, 442-443.)

<sup>2</sup> At the beginning of the hearing, Student moved to add to this issue a reference to Palo Alto's alleged failure to act on an assessment plan generated in spring 2016 at a charter school. The request was taken under submission, and is now denied. The formulation of the issue in the Order Following Prehearing Conference is sufficiently broad to encompass those alleged facts, and the issue is decided here.

- h. predetermining Student's May 9, 2017, individualized education program placement and services;
  - i. failing to provide Student with adequate speech and language therapy services;
  - j. failing to provide Student with assistive technology services, equipment, and software;
  - k. failing to offer or provide Student with one-to-one support; and
  - l. failing to provide prior written notice in response to Parent's requests for more emotional support for Student and more Student supports in the area of executive functioning?
2. Did Palo Alto deny Student a FAPE during the 2017-2018 school year, to October 31, 2017, by:
- a. failing to provide measurable goals in all areas of need;
  - b. failing to provide adequate accommodations;
  - c. failing to implement Student's May 2017 IEP;
  - d. failing to provide Student with adequate services to address his executive functioning deficits;
  - e. failing to provide Student with adequate mental health services;
  - f. failing to provide an adequate structured social skills program;
  - g. predetermining his September 11, 14 and 26, 2017, IEP's;
  - h. failing to provide Student with adequate speech and language therapy services;
  - i. failing to provide Student with assistive technology services, equipment, and software;
  - j. failing to offer or provide Student with one-to-one support; and
  - k. failing to provide prior written notice in response to Parent's August 29, 2017, letter?

3. Did Palo Alto fail to adequately assess Student in all areas of suspected disability during the 2016-2017 and 2017-2018 school years, to October 31, 2017, by
  - a. failing to conduct an assistive technology assessment; or
  - b. failing to conduct a speech and language assessment?

## SUMMARY OF DECISION

Student did not prove that Palo Alto denied him a free appropriate public education. Although Student's anxiety and resultant executive functioning difficulties were often serious, they did not prevent him from being successful academically, socially and in extracurricular activities in a rigorous and demanding environment. His anxiety was centered in the home, which limited Palo Alto's ability to address it. The many measures Palo Alto took to ameliorate his anxiety were not particularly successful, but that was not the fault of its educational programming.

The wide array of measures Palo Alto took to facilitate Student's executive functioning, through goals, accommodations, instruction and individual assistance, were frequently successful, and helped him achieve academically except when he was too anxious to function. Student did not need, and probably would not have benefited from, an hour a day of one-to-one executive functioning support from a trained adult professional.

Overall, Palo Alto provided Student legally compliant goals, accommodations, and assistive technology support. Student did not need further speech and language support or social skills training. Palo Alto did not predetermine his programs, fail to give prior written notice of decisions concerning him, or otherwise fail to comply with the requirements of the Individuals with Disabilities Education Act.

## FACTUAL FINDINGS

### JURISDICTION

1. At the time of hearing, Student was a 15-year-old boy who resided with his Mother within Palo Alto's boundaries. He was a sophomore at Palo Alto High School. He was eligible for, and had been receiving, special education and related services in the primary disability category of Other Health Impaired and the secondary category of Speech and Language Impairment.<sup>3</sup> He has been diagnosed with autism, anxiety, and attention deficit hyperactivity disorder.

2. Student entered Palo Alto High as a freshman in August 2016. His triennial review occurred in May 2017 and produced an IEP that Mother approved, but the parties have been unable to agree on changes to the IEP since then. The period of time addressed here (the "complaint period") is from August 15, 2016, Student's first day of high school, to October 31, 2017, the day the request for due process hearing was filed.

### STUDENT

3. Student was on the autism spectrum and was high functioning. He was intellectually gifted; one standardized test showed his full scale IQ as 129, and another suggested it was higher. He excelled at academics except for frequent difficulty in completing and turning in assignments and homework, which lowered some of his grades. Student's anxiety was serious, and frequently undermined his executive functioning. Although he was sometimes capable of finding and understanding assignments and homework, completing them, and turning them in, those skills suffered greatly when his anxiety was elevated. At those times he could not deal well with paper;

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<sup>3</sup> In California this eligibility category is officially entitled Language or Speech Disorder. (Ed. Code, § 56333.)

he lost it or stuffed it into the bottom of his backpack and lost track of it for days or weeks. During those times, he could not maintain papers in a binder. He could not bring to class the materials he needed. He became confused and could not find assignments even though they were easily available, and sometimes did not fully understand them when he found them. He fell behind in his homework and assignments, sometimes became overwhelmed by the tasks facing him, and then fell further behind in his assignments.

4. Due to his autism, Student sometimes displayed rigidity of thinking and was overly literal, which caused him to have many questions about the details of assignment that his peers did not have, and sometimes to perseverate in pursuing those questions. He could have as many as 15 minutes of questions about a single assignment. Student became easily frustrated when he did not immediately get answers to those questions, which worsened his anxiety.

5. Student's anxiety also undermined his social skills. Student had received substantial social skills training, and had the social skills to succeed with peers and adults. He was sometimes blunt and could appear rude, and sometimes showed disdain for those less intelligent. However, he had friends, could be social, and engaged readily with peers and adults. Yet when he was overly anxious he was unable to employ the social skills he had, which interfered with his relationships.

6. In his early years, Student was educated in New York and Argentina, and began attending school in Palo Alto in the fourth grade. A Palo Alto school psychologist assessed Student in his sixth grade year (school year 2013-2014), and found he qualified for special education as autistic. The psychologist convinced Mother that categorizing Student as autistic might carry a stigma, so with Mother's agreement the IEP team declared him eligible in the primary category of Other Health Impaired and the secondary category of Speech and Language Impairment.

7. Student attended seventh grade in the school year 2014-2015 at Palo Alto's Jordan Middle School, where he excelled at academic subjects except for late or missing assignments and homework. He received specialized academic instruction in a small class called Academic Communications, which taught a combination of executive functioning and social skills, and he was given various accommodations to address his executive functioning deficits. Palo Alto also conducted an Educationally Related Mental Health Services assessment of Student, but found he did not require mental health services at the time.

8. Mother was dissatisfied with Student's progress at Jordan and, for eighth grade (the school year 2015-2016), enrolled him in Summit Public Schools, a charter school, at its Denali campus in Sunnyvale. Summit was an independent educational agency chartered or supervised by the El Dorado County Special Education Local Plan Area. Its Denali campus offered computer-based learning; it gave every student a Chromebook and built its curriculum around that device in order to eliminate most paper. Student did well academically at Summit and had fewer difficulties with assignments and homework, but Mother was not satisfied with the school, primarily because she thought the courses lacked academic rigor. For ninth grade, she returned Student to Palo Alto and enrolled him at Palo Alto High.

#### STUDENT'S SUCCESS AT PALO ALTO HIGH

9. Student was successful at Palo Alto High by almost any measure, notwithstanding his significant deficits.

#### Student's Grades

10. At the end of the first semester of ninth grade, Student received these grades:

Academic Communications 1	B-
Honors Biology	A
English 9A <sup>4</sup>	B+
Geometry A	B
PE	A
Stage Tech	B
Theatre 2	B-
World History	A-
GPA: 3.375	

11. At the end of the second semester of ninth grade, Student received these grades:

Academic Communications 1	B-
Honors Biology	A-
English 9A	A
Geometry A	B
PE	A
Theatre 2	D
World History	A
GPA: 3.266	

Student's D in Theatre 2 was caused by his failure to turn in a "portfolio," the largest and most important written assignment of the spring semester. In class he performed well.

12. By October 13, 2017, the end of the first quarter of Student's 10th grade

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<sup>4</sup> An "A" in a class designation meant an advanced class, more difficult than regular classes.

year and about two weeks before the end of the complaint period, he was receiving these grades:

U.S. Government Teacher's comment: "missing work"	F
Algebra 2 / Trigonometry A	B
PE	B-
Honors Chemistry	A+
Spanish 3	A
Algebra 2 Workshop	A
English 10A	A+

Before the end of the semester, Student's F in U.S. Government rose to a B when he turned in missing assignments.

13. These are more than just passing grades. With exceptions caused by late or missing work, Student was receiving high grades in difficult courses, at a school well known for its competitiveness and academic rigor, throughout the period of time relevant here.

#### Teacher Opinions

14. Most of Student's teachers testified at hearing. These witnesses were well qualified and had more extensive training and experience than typical secondary school teachers. Their testimony was uniformly detailed and knowledgeable, and in no case did cross-examination reveal any weaknesses in their testimony. All of them were credible and persuasive witnesses, and their testimony is given substantial weight here. The examples that follow are typical of Student's teachers' opinions of him.

15. Student's Honors Chemistry teacher Samuel Howles-Banerji established that his class required a higher understanding of math and better math and science

reasoning than the regular chemistry class. Student showed in the class that he excelled at science. He understood matter at the atomic and molecular level, and could think about it at microscopic and sub-microscopic levels. He sometimes struggled with organization and time management, but the questions he asked in class were "extension" questions -- questions that went beyond the scope of the topic and sought to relate it to another topic.

16. Student's English teacher George Vuong established that Student's comments, insights and knowledge in class discussions were beyond those of most other students and were sometimes profound. He confidently gave a good presentation in front of the whole class, had no difficulty with public speaking and did not display shyness.

17. Student's History and Government teacher Caitlin Evans described Student as "incredibly bright" and well read. He participated regularly in class discussions. He got an enormous amount from his classmates, pushed them to go farther in their thinking, and was having "a great time." The F he was receiving at the end of the first quarter in fall 2017 went up to a B in November, when he turned in missing assignments. By the time of hearing, Student had earned an A on his most recent progress report.

18. Student's Spanish 3 teacher Joseph Vericat established that Student is not yet fluent in the language but is ahead of the other students in his class. He was respectful to the teacher and his peers, worked well in groups, and never acted inappropriately in class. He had problems with homework completion but overall did well in the class.

19. Student's physical education teacher Jason Fung described him as a "great addition" to the school community. He was successful in the class, was a leader in warmups, and was always out in front on drills. He was a very strong runner and, with his good grades and effort, earned a "prep," which was permission not to attend the class

from February to May so he could run on the track team. In spring 2017, his grade dipped because of incomplete work, but he brought it back up to an A. He fit into the class dynamic very well.

20. Student's math teacher Radu Toma established that he enjoyed the subject and knew more than his peers on particular topics. He was able to go to the blackboard individually and write solutions to problems in front of the other students without difficulty. He thought about the relationships of the lesson to other lessons more than other students did. Mr. Toma recalled that sometimes Student even tried to "catch me out," testing the teacher's knowledge as bright students sometimes do.

21. Student's theatre teacher Kathleen Woods described his performance in the class as "solid." In his freshman year, Student asked for and received promotion from Theatre 1 to the more advanced Theatre 2, because the work was more challenging and he had a close friend in Theatre 2. He was "fine" in performances; he recited a famous soliloquy from Shakespeare's *Macbeth* from memory. She gave him a D at the end of his freshman year solely because he failed to turn in his portfolio.

22. Student's ninth grade World History teacher Steven Sabbag described Student's class performance as "great." He had an unstoppable curiosity and a hunger for knowledge. He constantly asked high level questions, some of them provocative, and challenged assumptions. He benefited greatly from the class, loved sharing his ideas, and his classmates benefited from hearing them.

23. These opinions from Student's teachers showed that he participated in, enjoyed, and benefited greatly from his academic classes and, except for occasional failures to complete assignments and homework, was quite successful in them.

#### Extracurricular Activities

24. Student was as active in extracurricular activities as his time schedule permitted, and did well in them. In his freshman year, Student joined the debate club

and enjoyed it, but had to drop it due to his other time commitments. One of the courses he took in his first semester and part of the second was Stage Tech, an adjunct to his Theatre 2 course that involved the logistics of managing a dramatic production. It was not just a class; it required about 10 hours a week outside of class and outside the home, working on productions. Sometimes it kept Student out until late on weeknights, interfering with his homework.

25. In spring 2017, Student joined the track team. He dropped Stage Tech to give himself the time. The track season was from February to May. Mr. Fung, a physical education instructor who had earlier been the track coach, confirmed at hearing that Student had done an excellent job at track the previous spring and was in the process of repeating that performance this spring. Other records showed that Student also participated in swimming and tennis.

26. Student's strongest subject and greatest interest was science. In fall 2017, Student took competitive tests and succeeded in qualifying for the Science Olympiad, a series of competitions at the local, state and national levels sponsored by an organization dedicated to advancing education in the sciences. Mr. Howles-Banerji, Student's Honors Chemistry teacher, was also the school's supervisor of the Science Olympiad teams. He explained that Student's performance on the tryout tests showed a strong aptitude for science in general and for critical thinking, and earned him a place on the team. Student participated in the Olympiad and did well in it.

27. Throughout the complaint period, Student was deeply involved in Live Action Role Play, a role-playing game in which the participants physically acted out their assigned characters according to scripts. Student's group, both students and adults, met in a park on Saturdays, and sometimes Tuesdays, to enact their roles. Student was an organizer of the game and wrote scripts for other performers, which consumed a substantial amount of his time during the week.

28. As the evidence described above showed, Student received high grades in hard courses at a demanding high school (except when occasionally failing to turn in work); excelled in classes and was valued by his teachers and classmates for his contributions; and participated extensively in extracurricular activities. Both parties believed he will attend and prosper in a major four-year college or university, and the evidence supported that belief.

#### STUDENT'S ANXIETY AND EXECUTIVE FUNCTIONING DEFICITS

29. Student's success in school sometimes came at a heavy price. He was normally anxious about his performance in school, and at times so anxious about it that he became confused, overwhelmed, and unable to manage the logistics of paper, pens, binders, computers, assignments and homework. His anxiety had multiple causes, only some of which could be addressed in an IEP.

#### Student's School Environment

30. Palo Alto High served approximately 2,000 students. It was adjacent to the campus of Stanford University and was dominated by students and parents from the surrounding area who were accomplished, greatly valued education, and had high expectations. Its teachers were unusually well qualified and its academic instruction especially rigorous. It placed students on three levels depending upon their skills. One higher level was Honors classes. Another was Advanced Placement, which were courses equivalent to courses taught in the first year of colleges and universities.

31. Student was only one of many gifted students at the school. Most of the students aspired to attend major universities and were greatly concerned about their performances at school. Many had the same kind of performance anxiety that Student had. They frequently resented anything that took them out of their academic classes, and when they compared themselves, they compared grades. One teacher described the

campus culture as: "Straight As or bust."

32. Palo Alto High's teachers and administrators had taken many steps in recent years to ameliorate the effects of students' anxiety. They included operating a Wellness Center where any student could drop in and obtain counseling; training counselors to have a heightened awareness of anxiety problems among students; and a program offered to all incoming freshmen called YES, which was operated by the athletic department and taught stress reduction methods such as breathing exercises. Nonetheless, the atmosphere of the school was intensely competitive.

#### Student's Ambitions

33. Student had high expectations of himself, and drove himself hard notwithstanding his disabilities. He aspired to attend a major college or university and pursue a career in science. Students at Palo Alto High have many choices among classes, and Student deliberately took an especially challenging course load. Although many freshmen took five or six courses, and no more were required for graduation in four years, Student in his freshman year selected seven courses. Among them were Biology (a course most freshmen did not take), Honors Chemistry, Spanish 3 and Theatre 2. For his sophomore year, he chose a course load of equivalent difficulty. Student hoped to take two Social Studies classes simultaneously as a junior, which would put him on track to graduate in three and a half years rather than four. Palo Alto's staff suggested several times to Student and Mother that he manage his anxiety by lightening his caseload, but both repeatedly rejected the suggestion.

#### Student's Anxiety at Home

34. Mother is divorced and a single parent with two sons, the other younger than Student. She graduated from Stanford and worked for several years for a well-known high tech company, but in or around 2014 was injured in an automobile

accident, went on disability, and has not worked since. Instead, she turned to assisting Student in his education.

35. Mother established in her testimony<sup>5</sup> that during the complaint period, Student spent about 45 to 50 hours a week at home doing homework, and she helped him with it for several hours each day. She frequently accessed Schoology (the school's main database) to examine Student's grades and assignments. She then prepared him for his homework by taking away distractions, organizing and clearing the work area, checking his computer to ensure that his browser was only open to matter related to homework, helping him find needed information, and assisting him in interpreting his assignments. If he still had questions about assignments, she had him open an email to the teacher and start capturing his questions in it. Mother then ensured he focused on one assignment, and helped him complete it. Because of missing or late assignments, she testified, "there's usually a fire drill every day" concerning Student's homework.

36. Mother helped Student establish routines and good study habits. She directed him step-by-step in writing an email to a teacher because in her view he did not know what to write, and was incapable of writing most emails on his own.<sup>6</sup> She helped him find sources for the assignments and manage his paper. She put a large piece of butcher paper up on the refrigerator, divided it into weekdays, put a post-it on the butcher paper for each assignment, and moved it across the butcher paper as the assignment progressed. Since Student did not know how much time each assignment would take, she allocated his time for each assignment.

37. This process caused frequent conflict between Mother and Student. Mother testified that since she was the taskmaster and disciplinarian, Student did not

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<sup>5</sup> Mother was a credible witness, with occasional reservations noted herein.

<sup>6</sup> The record contains references to several emails Student wrote on his own.

want to talk to her when he came home from school. He covered his ears, and frequently hid under the bed or in a space between the bed and the wall. He sometimes locked himself in the bathroom for lengthy periods. When he attempted to work, he frequently became overwhelmed. He cried almost every day out of hopelessness, and sometimes got angry, went off into a corner, paced, muttered complaints to himself, knocked all the books off the table, kicked the furniture and stormed out of the room. He had eczema and scratched his arms until they bled.

38. To provide time for Student to do his homework, Mother regulated and frequently canceled competing activities in which Student wanted to participate: “[W]e cancelled all sorts of events . . . many days, in order to get homework done.” Student greatly resented those cancellations.

39. During Student’s ninth grade year, in March or April 2017,<sup>7</sup> Student’s case manager Cristina Dias, a credentialed educational specialist in both mild/moderate and moderate/severe classes with an emphasis in autism, suggested to Mother that her support of Student’s school work might be excessive. Ms. Dias said that Mother was “doing so much” at home that her efforts were not sustainable, and that her life and her younger son’s life were what Mother described as “down the tank because everything’s around the daily fire drill.” Ms. Dias told her: “I want you to be just a mom.” Mother took that advice and began to let Student come home and work on his homework without her intervention.

40. However, within three or four weeks Mother checked on Student’s grades and assignments on Schoology and was alarmed to discover that “he had gone from As

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<sup>7</sup> Ms. Dias was on maternity leave for part of that spring and remembered the conversation as occurring much earlier in the school year. The difference does not matter here.

and Bs to all Fs and one D.”<sup>8</sup> These were references to interim grades on assignments and tests as of the day she saw them. Mother told Ms. Dias that the school’s supports were not working, and redoubled her previous interventions in order to rescue Student’s grades by the end of the semester. During that period, she stated, “every hour at our home was homework and sleep.” She cancelled nearly all of Student’s other activities, making him “very, very, very disappointed and unhappy.” He no longer had anything to look forward to on weekends, which were dedicated to homework, and became increasingly depressed as a result. However, with the exception of the D in Theatre 2 caused by his failure to turn in a portfolio, Student’s grades returned to A’s and B’s by the end of the semester. Mother believed her redoubled intervention brought this about, and continued her active management of Student’s homework during his sophomore year.

41. Mother’s involvement with school staff was equally pervasive. During the complaint period she maintained frequent and sometimes daily contact with all of Student’s teachers, his case manager and some administrators, by email, telephone calls and personal visits. She monitored every detail of Student’s program, sought clarifications of his assignments, and made many requests for further action by staff. The testimony at hearing and the documentary record, including several hundred pages of

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<sup>8</sup> Palo Alto High’s grading system was complex. Each academic year consisted of two semesters, and each semester consisted of two quarters. Students were given a progress report half-way through each quarter, quarterly grades for the first and third quarters (half-way through the semesters), and end-of-semester grades, which also served as grades for the ends of the second and fourth quarters. The status and grading of each assignment was available on line, so that students and parents could monitor progress on a daily basis.

printouts of emails, showed that during the 15-month period examined here, Mother made thousands of requests, suggestions and demands for improvements in Student's program; asked staff questions almost every day; and diligently followed up on anything Student told her that troubled her. These contacts, always well-meant and polite, ranged from serious matters, such as suggestions for teacher training, reflections on autism, and hopes for improvement in the Palo Alto's computer systems, to minor matters, such as whether on the next math quiz Student should be given an additional sheet of paper, and whether his case manager would help him obtain two new track suits from the athletic department.

42. Mother also made herself available to Student throughout the school day and had frequent contact with him by text messages, emails, instant messaging and an occasional visit. (The family home was three blocks from the school.) She was in contact with Student, usually by text message, as many as five to ten times in a single school day, both while Student was in class and out of class. Palo Alto introduced some of these exchanges of texts, messages and emails into evidence. Some of them were simply for reassurance, or for advice such as obtaining a snack when Student was hungry or tired. In some, Mother would refer Student to particular staff members for help. In others, Student sought her help with the most minor matters. For example, when the physical education department was being renovated he could not find a drinking fountain, so he texted Mother for advice. She responded by informing him that he could not be denied water, and by guiding him to a different building. Once he could not find lined paper; she suggested the library might have it, but offered to deliver some to school in 10 minutes. At another time, he asked her to bring a plastic grocery bag to him at school; she did.

43. Some of the text and other messages exchanged by Student and Mother during the school day revealed that Student was sometimes caught up in the ongoing

negotiations between Mother and Palo Alto staff about his program. For example, there was a period in which Mother and a Palo Alto technology specialist were disputing what kind of computer Student should have. Student texted her: "They want me to use a chromebook." She responded: "No chrome book . . . Please say no to a Chromebook please don't let them talk you into it they're bullying you."

44. The evidence showed that Mother's ongoing electronic presence in Student's school day meant he did not fully have a respite during the day from the tensions at home. For example, Andrew Dakopolos, Student's 10th grade case manager, noticed that one day Student left his classroom to talk to Mother, and when he returned to class he kicked over a chair in anger and cried. This was apparently the only violent act at school by Student during the complaint period, and was the only time Mr. Dakopolos ever saw him cry.

45. Mother testified that she did not have a strained relationship with Student. Late in the hearing, Mother surreptitiously made an audio recording on a Sunday evening of a few minutes of Student's voice, later obtained his permission to disclose it, and introduced it in evidence. She testified that the recording was representative of their Sunday evenings, and that similar incidents happened about five times a week in fall 2017, sometimes multiple times in a single day. For almost two minutes on the audio recording, Student can be heard screaming (sometimes unintelligibly) in obvious misery, crying, and pounding something. Mother testified that she wanted the recording in evidence to show "how school affects [Student]." However, it is more accurately characterized as showing how anxious Student is at home, and as illustrating the stark contrast in his mental health between home and school.

#### Student's Anxiety at School

46. There was no evidence that the degree of anxiety Student displayed at home ever appeared at school. The difference in his condition between home and

school was recognized in his eighth grade year. A Summit IEP reported Mother's perceptions but added: "School team does not see the anxiety at school and shared that he appears happy, doing his work and participating." Ms. Herreshoff saw him cry in seventh grade only once.

47. In the ninth grade, Laura Bricca, Dr. Sheridan's predecessor as Director of Special Education (Secondary), did not see Student display discernable signs of anxiety. Mr. Vuong noticed a few times that Student displayed stress coming into class, but not when class got under way. Mr. Vericat never saw him stressed, frustrated or very anxious in Spanish class. Mr. Fung saw no signs of anxiety, stress, or crying in physical education. Mr. Toma sometimes noticed in math class that Student was anxious when arriving for a test unprepared, "emotional" a couple of times during or at the beginning of tests, and sometimes anxious when called upon, but no more than other students. He never saw him cry.

48. Teacher testimony about Student's anxiety in the 10th grade was the same. Tenth grade case manager and teacher Andrew Dakopolos saw him upset "very infrequently." He could not reconcile the reports from home with the reports he received from Student's 10th grade teachers. Mr. Howles-Banerji thought that Student did not manifest stress in Honors Chemistry; he seemed "fairly calm." Mr. Vuong thought that "he didn't seem stressed at all" in English in fall 2017. Ms. Evans sometimes saw him "a little bit flustered" in U.S. Government class, but he never exhibited a lot of anxiety. Nor did Student cry; she had "never seen that side of him."

#### PALO ALTO'S PROVISIONS FOR STUDENT'S ANXIETY

49. Palo Alto was aware of Student's anxiety well before he entered the ninth grade; his sixth and seventh grade IEP's discussed and addressed it. A fall 2015 assessment by the Children's Health Council diagnosed Student as having high functioning autism, but concluded that his anxiety caused him more difficulties than

autism and should be his primary diagnosis and the focus of treatment. Among other recommendations, it suggested including a parent component in his therapy “to help understand [his] areas of difficulty and adjust expectations accordingly.”

50. Near the end of Student’s eighth grade year at Summit, the charter school proposed to Mother an IEP for the following year which assumed Student would return to Summit. (She had not yet decided to move him back to the Palo Alto.) That IEP also addressed Student’s anxiety and proposed an ERMHS assessment. So when Student entered the ninth grade, Palo Alto knew it had to address his anxiety.

#### IEP Team Meeting of September 29, 2016

51. Palo Alto held a 30-day IEP team meeting for Student on September 29, 2016. His new case manager Ms. Dias reported that Student was smart, had a good sense of humor and was engaging appropriately with peers in groups. She noted that his comments were sometimes harsh and critical, and that he doodled a lot and did not always pay attention unless he was interested in the subject matter. Student had learned to complete his weekly planning and Flex forms,<sup>9</sup> though he needed prompting and encouragement.

52. The IEP written at the September 2016 meeting, which Mother approved, continued Student’s eligibility in the principal category of Other Health Impaired and the secondary category of Speech and Language Impairment. It placed him in Ms. Dias’s Academic Communications class for 230 minutes a week, and gave him consulting (rather than direct) speech and language support. The IEP set forth four annual goals in

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<sup>9</sup> Flex was a period at the school in which students could visit teachers to ask questions they were unable to get answered in class. In ninth grade the form was required to engage in that process, and was used to track each student’s use of the process.

the areas of social and emotional support, vocational and transition support, and academic study skills for his executive functioning needs. It also provided a variety of accommodations specified below.

53. The September 2016 IEP also referred Student to an assistive technology specialist to determine his technology needs, and referred him to the school's Adolescent Counseling Services for emotional support. Student attended twice and then left the program. At or near this time, Student also participated in the stress-reduction lessons of the YES program at the athletic department, described above. When the IEP team made its decisions in September 2016, Student was doing very well in his classes: he was receiving a B in Academic Communications; A's in Geometry, World History, Physical Education, Biology, and Theatre; and an A+ in Stage Tech. The IEP team had no reason to believe that his anxiety and executive functioning deficits were significantly interfering with his education.

#### IEP Team Meeting of October 11, 2016

54. At another meeting two weeks later, the IEP team converted the 30-day IEP developed on September 29, 2016, into an annual IEP without significant changes.<sup>10</sup> Student's grades and reports from his teachers were still encouraging. Mother described Student's emotional and organizational difficulties, but stated that, in general, he was doing better with organization. Mr. Fung reported that Student was participating in the YES stress-reduction program and was enjoying it. Assistive Technology specialist Brian Gadus attended the meeting to answer Mother's questions about technological assistance with Student's organizational needs. Math teacher Mr. Toma reported that Student was achieving 92 percent in his homework, and biology teacher Randy Scilingo

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<sup>10</sup> For convenience, the September-October 2016 IEP is referred to here as the September 2016 IEP. The term is meant to include both documents.

reported that Student was “doing pretty well and keeping track of his assignments.” None of this information suggested that Student’s emotional and resulting organizational deficits were significantly interfering with his education.

55. At the October 11, 2016 annual meeting, Mother spoke at length about Student’s emotional difficulties. Ms. Dias, who had noticed Student’s stress in class, had prepared an assessment plan for a new ERMHS assessment, and Mother signed it that day.

#### ERMHS Assessment and Therapy

56. In November 2016, ERMHS therapist Sirina Warfel reviewed Student’s records, obtained information from his teachers, interviewed Student and Mother, observed Student in his Biology and Academic Communications classes, and administered two standardized assessment instruments to measure his levels of depression and anxiety. During Ms. Warfel’s interviews of Student, he continually worried about missing class and frequently checked his watch.

57. In her assessment, Ms. Warfel also learned of Student’s tensions with Mother. Mother described to Ms. Warfel a lot of the difficulties between her and Student, and a lot of her own difficulties in managing her own stress. She was concerned about possibly losing her home and being homeless, and about the physical and mental repercussions of her accident. She was tearful at times and “really stressed out” by circumstances unrelated to Student. Ms. Warfel recommended to the IEP team that the therapeutic component of Student’s IEP include therapy for Mother.

58. In her report dated November 30, 2016, Ms. Warfel noted that, in her classroom observations, Student perseverated about questions he had, argued with teachers and an aide, ripped up an assignment, and demonstrated significant rigidity in his thinking and actions. Ms. Warfel noted a 2015 recommendation of the Children’s Health Council that Student participate in therapy, and agreed with it, although Student

was skeptical that it would help him. Ms. Warfel found that he had “a mental health condition that affects his ability to benefit from his education” and decided he was eligible for ERMHS assistance.

59. At an IEP team meeting on November 30, 2016, called to consider Ms. Warfel’s report, Mother agreed to an IEP amendment adding therapy to Student’s program and adding a new social and emotional goal. Ms. Warfel suggested that Mother become involved in the Parent Project, an 8-to-10-week group class facilitated by a therapist to teach parenting strategies concerning adolescents to people involved with Palo Alto schools and the Palo Alto police. Ms. Warfel believed that Mother was having difficulties knowing how to respond to Student, and thought the Project would be helpful to her. Mother never attended the class.

60. On November 30, 2016, Student began seeing ERMHS therapist Fabiana Coleman once a week. Ms. Coleman did not testify, but her progress notes show that Student attended a few sessions and then stopped attending. One of the few useful things Ms. Coleman learned of was Student’s complaint about “[M]other’s unreasonable expectations for perfect grades.”<sup>11</sup> Student developed a resistance to therapy within a month of beginning it. He resented being pulled out of class to attend it. When he did appear, he was distracted by worries about missing class. Student complained to Mother that he did not like talking to the therapist and did not want to go.<sup>12</sup> There was no

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<sup>11</sup> Mother complained at hearing that in a discussion of grades, Ms. Coleman stated that she had gotten some F’s and still got a job. This may have been an excess of rhetoric, but it does not show that Ms. Coleman’s therapy was legally deficient.

<sup>12</sup> Student missed all four of his scheduled sessions with Ms. Coleman in February 2017. He may have had excused absences for three of those sessions, but there was no evidence that either he or Mother informed Ms. Coleman of the reasons for his

evidence that Mother encouraged or attempted to enforce his attendance.

61. Wendy Goodridge, a licensed marriage and family therapist with many years of experience, was Palo Alto's supervisor of mental health therapists during the complaint period and was its director of ERMHS therapy. She testified knowledgeably about Student's mental health status and therapy history. Her testimony was uncontradicted, undamaged on cross-examination, and credible in all respects. It is given substantial weight here.

62. Ms. Goodridge established that Fabiana Coleman was an intern Palo Alto hired to support students during Student's ninth grade year. She was in her graduate studies at Santa Clara University, and was completing a practicum for graduation. She was qualified to provide ERMHS therapy for Palo Alto.

63. The ERMHS therapy added to Student's IEP included a component for "collateral" therapy that contemplated family therapy which would include Mother. Mother was no more cooperative with the therapy than Student; she went only once. She testified: "I felt that she was judging me for how I was parenting . . . she seemed very critical . . ."

64. In late February or early March 2017, Ms. Coleman left Palo Alto due to a personal emergency, and her responsibility for Student's ERMHS therapy was taken over by Susan Cook, a contract ERMHS therapist. At hearing, Ms. Cook was initially unable to state a precise date for the beginning of her services to Student and wanted to defer to her written log. She then agreed that May 2017 sounded "familiar" as a start date, and from that exchange Student now concludes that there was a two-month gap in Student's ERMHS services. However, Ms. Cook's later testimony and her log show that she actually started seeing Student in March 2017. She testified that while she was on

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nonappearance or attempted to reschedule the sessions.

spring break in March or April 2017 she spoke to Student's previous therapist about him, and she authenticated her written log of services, which showed that she first spoke to Mother on March 9, 2017, and began therapy with Student on March 16, 2017. The preponderance of evidence showed that Student's ERMHS services resumed without significant delay in mid-March 2017. Ms. Cook continued seeing Student until the end of the school year.

#### Student's Triennial Review in May 2017

##### LARA ZAWACKI'S PSYCHOEDUCATIONAL ASSESSMENT

65. School psychologist Lara Zawacki was the best informed of Palo Alto's witnesses about Student's mental health needs.<sup>13</sup> She became familiar with Student and Mother well before she was assigned in spring 2017 to lead his triennial assessment team. Ms. Zawacki met frequently with Mother and school staff during fall 2016, and observed Student in class several times throughout the school year. At hearing, she was familiar with Student's history and records, sympathetic to his and Mother's difficulties, and precise and careful in her testimony, which was undisturbed on cross-examination. She was a credible witness, and her testimony is given significant weight here.

66. Ms. Zawacki produced for the triennial review an "integrated" assessment by a multidisciplinary team that included portions authored by Ms. Dias, who conducted

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<sup>13</sup> Ms. Zawacki has a bachelor's degree in psychology and a master's degree and certificate of advanced graduate study in school psychology. She has a Pupil Services Credential and is state-licensed as a psychologist. She began working as a school psychologist in 2006 at the Center for Developing Minds in Los Gatos, where she primarily assessed children for autism and other developmental disorders. She became a school psychologist for Palo Alto in 2015.

an academic assessment, and Peggy Syvertson, a speech and language pathologist who conducted a speech and language assessment.

67. For her triennial assessment, Ms. Zawacki reviewed Student's records, received reports from his teachers, observed him in class, interviewed him, and administered a wide variety of standardized and other assessment measures to determine his overall psychoeducational status. On these instruments Student repeatedly scored various aspects of his life at home as lower than his life at school or elsewhere. On one scale of one to five, for example, he rated his school life and peer life with fours and his home life with a two. Student reported a strained relationship with his parents, including limited trust and feeling incidental to decision-making.

68. Ms. Zawacki already knew that Student had difficulties at home. In early fall 2016, Ms. Zawacki attended a meeting with Mother and Fabiana Coleman in which Mother was so upset that Ms. Zawacki was concerned for her well-being; her thoughts were scattered and not coming together. So as part of her triennial assessment of Student, Ms. Zawacki asked him whether anything at home contributed to his school difficulties. He responded that Mother was sometimes illogical and irrational. It was obvious to Ms. Zawacki from her discussions with Student that his strained relationship with Mother was a major source of his anxiety. At hearing, Ms. Zawacki described it as a tense and difficult dynamic when Mother and Student struggled over his homework. Ms. Zawacki observed the interactions between Mother and Student at meetings and noticed "he was a very different child with Mom present than without her . . ."

69. In her assessment report, Ms. Zawacki recommended "incorporating a family component into therapy . . . if possible." She explained at hearing that "working on or repairing the parent-child dynamic was a very important component to his overall emotional well-being and ultimately success, and could reduce his level of anxiety" if that dynamic could be improved. She testified that family therapy was "absolutely" an

important part of his services.

#### THE MEETINGS OF MAY 9, 23 AND 30, 2017

70. In preparation for the triennial review, Palo Alto's assessors made various recommendations. Palo Alto prepared a draft IEP.

71. The triennial review occurred in three IEP team meetings, each approximately two hours long, on May 9, 23 and 30, 2017. The notes of these meetings show that the discussion was lengthy and wide-ranging, and that Mother and her advocate participated vigorously and at length.

72. The IEP team accepted Ms. Zawacki's mental health recommendation and added "family counseling support" with the ERMHS therapist once a month for 60 minutes to Student's IEP. Mother signed the IEP on the second-to-last day of the school year, but requested another IEP team meeting within 30 days of the beginning of the new school year to discuss annual goals.<sup>14</sup>

#### ERMHS Therapy in 10th Grade

73. Ms. Cook resumed providing therapy to Student in August 2017. The parties agreed to an IEP amendment on August 24, 2017, concerning a change in a class; the amendment also made the therapy services to Mother more explicit, referring to them as "[p]arent counseling." Mother referred to them in an August 29, 2017 letter as "Family Therapeutic Services." Ms. Cook's services to Student and Mother continued past October 31, 2017.

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<sup>14</sup> Mother testified that at some point Ms. Bricca told her if she did not sign the IEP, Student would no longer be eligible for special education. Ms. Bricca did not recall making such a statement. Since Mother does not claim she was coerced into signing the IEP, the conflict in testimony need not be resolved here.

74. Ms. Cook described her services to Mother as “collateral therapy,” meaning that Mother could reach out to her and they could work collaboratively; the purpose was to provide support to Mother.<sup>15</sup> Mother did telephone her several times, usually between one and four times a month, primarily to ask about specific strategies to address Student’s anxiety. Mother did not, however, participate along with Student in therapy herself. She was aware she was entitled to it under Student’s IEP’s, but stated at hearing that she had not taken advantage of it because Ms. Cook had not asked her to schedule anything. The evidence showed that Ms. Cook made parent counseling available to Mother but did not affirmatively attempt to schedule therapy sessions with her. Given Mother’s proactive intervention in every other detail of Student’s education, it is more likely than not that her passivity indicated a lack of interest or willingness in participating in therapy herself.

75. During the complaint period, the therapy Palo Alto provided for Student and Mother did not succeed in substantially decreasing Student’s anxiety. Student dismissed it in his testimony as “not helpful.” In a progress report in September 2017, Ms. Cook mentioned that he attended therapy, but frequently tried to shorten his sessions so he could work on an assignment. Sometimes he just left after 15 minutes. She agreed at hearing that, by the end of October 2017, his anxiety level was not significantly reduced.

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<sup>15</sup> Ms. Goodridge established that “collateral services” in the ERMHS world means therapy in which a parent participates to become educated on the student’s needs and learn to help in supporting the student.

## PALO ALTO'S PROVISIONS FOR EXECUTIVE FUNCTIONING

### Ninth Grade Executive Functioning Supports

76. Student was given an interim placement upon arrival at Palo Alto High that included 140 minutes a week of small group specialized academic instruction in an Academic Communications class taught by Ms. Dias, who testified at length. She was obviously sympathetic to both Student and Mother and remembered their interactions in detail, and her testimony was confirmed by numerous contemporaneous documents. It was not undermined on cross-examination. She was a credible witness, and her testimony is given significant weight here.

77. Student's first full IEP at Palo Alto High was completed on September 29, 2016. The team knew that transition from middle school to ninth grade on a large high school campus was frequently difficult for students with disabilities, and especially difficult for Student because he did not go to school in the District the previous year and was not joining friends from the eighth grade as he began high school. Nonetheless, Student was generally doing well. He had mastered both of his executive functioning goals in the eighth grade at Summit, and had been getting excellent grades, including three A's and two B's, in his first few weeks of high school.

78. The September 2016 IEP team agreed on three goals that addressed executive functioning. The first addressed learning coping strategies in therapy. Another involved improving his use of Flex time. A third attempted to teach him to use a planner and weekly planning sheet to record his assignments. The team also adopted numerous accommodations, discussed below, that were designed to ease Student's difficulties with organization. The team also referred Student to Brian Gadus, an assistive technology expert, who began a sustained effort, also described below, to reduce the paperwork in Student's school life with technology.

## ACADEMIC COMMUNICATIONS CLASS

79. Ms. Dias's Academic Communications class met three times a week for 60 minutes and twice a week for 90 minutes. Ms. Dias generally devoted 30 minutes to an hour of each class to social skills and the rest to executive functioning. There were only five students in the class, including Student. Ms. Dias had an aide, and speech and language pathologist Allison Alberda also assisted in the class on Fridays through March 2017. With that assistance, Ms. Dias had the ability to organize Student's time as needed, and as the year progressed she reduced his exposure to social skills training as unnecessary and increased her support of his executive functioning skills. She estimated at hearing that, in September 2016, she met with Student individually and provided him 30 minutes to an hour a week of executive functioning support. The aide and Ms. Alberda provided additional support.

80. Ms. Dias established that, in her Academic Communications class, she and her aides worked with Student on planning and organization and with his binder and notebook. They helped Student fill out a weekly planning sheet and a week-at-a-glance sheet to organize his homework and assignments, and helped him complete Flex forms for his visits to teachers to ask questions. Mother asked to have Student excused from filling out any papers, but Ms. Dias declined because one of his goals required working with the Flex form. Using the form facilitated Student's contacts with teachers during Flex. As she also noted, paperwork cannot be entirely eliminated from Student's school life, and the Flex forms help Student establish accountability and responsibility. Ms. Dias reported to the September 2016 IEP team that Student was improving in his ability to fill out those forms. Mother reported to the October 2016 IEP team that Student was improving in his organization. Ms. Dias established in her testimony that Student derived substantial benefit from her class.

81. Ms. Dias also gave Student substantial support in learning to work with his

general education teachers and obtain answers to his many questions. She even accompanied him twice to see a particular teacher until he was able to do it himself.

82. In seventh grade at Jordan Middle School, Student had taken another class also named Academic Communications. Student argues that the ninth grade class was “the same” as the seventh grade class and that the earlier class failed in advancing his executive functioning skills, and therefore should not have been offered again in the ninth grade, so the two classes must be compared.

83. Linda Herreshoff taught Student’s seventh grade Academic Communications class at Jordan, and in her testimony demonstrated she remembered him and his performance well. Her testimony was clear and consistent with contemporary records, and undisturbed on cross-examination. She was a credible witness and her testimony is relied upon here.

84. Ms. Herreshoff described her seventh grade Academic Communications class as follows: Two days a week she and her co-teacher, a speech and language specialist, taught social skills from the works of Michelle Garcia Winner. The other two days a week they focused on executive functioning. Student was usually very disorganized. He usually cooperated with the instruction, although sometimes he put his head down on the desk or said he already knew what was being taught. He cooperated much better with the teacher than with the aide, who had to withdraw because she raised his anxiety level.

85. Ms. Herreshoff noticed that Student appeared to absorb lessons on executive functioning, but did not apply them over time. For example, his seventh grade academic classes were organized around a binder system. Student appeared to Ms. Herreshoff to understand instruction on using his binder index and putting materials in a pocket in the binder, but the next day the binder was again disorganized. A staff person once reorganized his locker, but four weeks later it was in complete disarray again.

86. Mother testified that Student made no progress in the seventh grade Academic Communications class, but Ms. Herreshoff interacted with Student every school day there, whereas Mother visited the class only a few times, so Ms. Herreshoff was in a better position to know. She established that Student did make some progress in the class. She and her co-teacher tried a wide variety of strategies for getting him organized, including a pocket notebook, a calendar, an accordion folder, and others. Some of these failed, but some worked. They did not know which eventually worked, but after a while they were finding everything Student needed, and he was proud of being able to produce all the items on his checklist. They successfully taught him how to access assignments on Schoology, which allowed him to manage his work much better. He learned to write a paper directly on Schoology. They also succeeded in teaching him how to take pictures of assignments to reduce paperwork and to have the assignments even if he lost the hard copy.

87. Overall, Ms. Herreshoff established that Student made "a lot of gains" in executive functioning by the end of the year; he was doing "much better" than at the beginning of the year. She said in summary: "We chipped away at a lot of the issues for [Student], but we certainly didn't solve them all." As Ms. Herreshoff observed, Student did very well academically in seventh grade. She also opined that Ms. Dias's ninth grade Academic Communications class would be "very appropriate" for Student.

88. Student's seventh and ninth grade classes in Academic Communications were not the same, but they were similar, which is how Student characterized them at hearing. Each was taught in a small group by a credentialed teacher assisted by one or more aides, and combined a social skills component with individualized executive functioning training of the sort described above.

## OTHER SERVICES AND SUPPORTS

89. Student's executive functioning difficulties in ninth grade were not continual; they were episodic and intermittent. It was only when his anxiety was elevated that he lost his organizational skills. The record contains many examples of his organizing his assignments and materials competently. He always did well, for example, at the beginning of school years, until he fell behind and became increasingly anxious. Paper often troubled him, but not always. There were times, such as in Chemistry and Spanish, when he preferred doing assignments on paper rather than digitally. And when he cared about something and was interested in it, his organization was frequently effective. Mr. Toma, Student's math teacher, established that he "can be organized when he takes the time to be organized" and "I saw him do very organized work . . . at times." Other Palo Alto witnesses made similar observations.

90. Student did not have one-to-one aide support in his IEP, but several aides were present in his academic classes who were assigned to other students or to the class. Ms. Dias contacted aides in Student's Biology, English and math classes and asked them to help Student when they could. As a result, those aides gave Student executive functioning support in his academic classes when he was willing to accept it, but he usually was not willing.

91. Student's teachers also provided him extensive executive functioning support, both generally and personally. All of his teachers put almost all of their assignments up on Schoology as a daily practice, though some did so more quickly than others. Most of them used slides in class, and put the slides on Schoology as well so students did not have to take notes on the slides in class.

92. All of Student's teachers answered his questions about his assignments, although not always immediately. His teachers in Chemistry, English and Government all testified that Student readily approached them during or right after class with questions

and observations about the materials. He also approached several of them during Flex period, although sometimes he found so many other students trying to see a teacher that he lost patience and left. But the teachers uniformly made themselves available to their students, including Student, to answer their questions, sometimes during their own lunches or breaks.

93. Most of Student's teachers took special steps to help him remember, complete, and turn in his assignments. All repeatedly reminded him of, and inquired into, overdue assignments. Some of them opened his backpack, with his permission, and searched for completed work he could not find. Mr. Toma worked out a system to text Student his math assignments.

94. Student's teachers almost always excused his tardiness in turning in assignments even if he took far more time than his accommodations allowed, and did not lower his grades for that reason. Only when his tardiness turned into complete failure to produce important assignments did it affect his grades. For example, at the end of each semester of Theatre 2 each student was required to turn in a portfolio, which was the most important written project of the semester. It included a self-assessment, feedback sheets from observers of their performances, and programs from shows that they had seen or participated in. During the fall semester, Student did not submit the portfolio on time. However, on December 27, 2016, while on winter break, he emailed it to Ms. Woods, the teacher, who accepted it and graded it without marking him down for lateness. But at the end of the spring semester, he failed entirely to turn in the portfolio, whereupon Ms. Woods gave him a D in the class, in which he had otherwise performed well. It was the only final grade lower than a B he received all year. He never did turn in the portfolio, though Ms. Woods stated at hearing that she was still willing to accept it and change his grade. Student did not explain why he failed to turn in the portfolio, or prove that the failure was related to his executive functioning deficits.

It is unlikely that intermittent executive functioning difficulties would prevent him from turning in an assignment continually over a period of several months.

95. As shown above, Student thrived academically in ninth grade notwithstanding his serious executive functioning deficits. The only final grade he got less than a B resulted from a months-long failure to turn in a major Theatre assignment which was not clearly related to his intermittent executive functioning struggles.

### Tenth Grade Executive Functioning Supports

#### OFFER OF COGNITIVE PLANNING CLASS

96. At the May 2017 IEP team meetings, Palo Alto primarily addressed Student's executive functioning difficulties by replacing his ninth grade Academic Communications class with another small support class called Cognitive Planning. Mother at first agreed to the class but, in the summer, withdrew that agreement. The parties dispute whether the Cognitive Planning class would have been part of an appropriate placement for Student.

97. The Cognitive Planning class supported students with executive functioning needs and included other autistic students. It was similar to, but not the same as, Student's ninth grade Academics Communications class. The biggest difference was that Cognitive Planning did not include a social skills component. There were six or seven different Cognitive Planning courses available to Student during the 10th grade, depending upon the period in which he took the course, so the May 2017 IEP did not identify a particular class or teacher.

98. Dr. Stephanie Sheridan, Palo Alto's Director of Special Education for secondary schools,<sup>16</sup> had observed Palo Alto High's cognitive planning classes and was

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<sup>16</sup> Dr. Sheridan has a bachelor's degree in psychology and master's and doctoral degrees in education. She is a credentialed school psychologist and is eligible for an

knowledgeable about the class's program. She testified carefully and in detail, and was extraordinarily familiar with Student's situation, his records, and his history at Palo Alto High. Cross-examination did not undermine her testimony. She was a credible witness, and her testimony is given significant weight here.

99. The Cognitive Planning course offered to Student in May 2017 was accurately described in a written course guide and by Dr. Sheridan. The class included support with a weekly planning guide, prominently using Schoology; time management plans; completion of long-term assignments; organization, goal-setting; future planning; note-taking; transition assessments; strategies for studying and test-taking; and the proper mindset for growth. Students were taught to maintain a portfolio for retaining completed in-class assignments. Students also had time for work completion and were allowed to use class time to visit other teachers with questions.

100. Several Palo Alto witnesses credibly testified that the Cognitive Planning class would have been appropriate to address Student's executive functioning deficits in the 10th grade. Among them were Ms. Bricca and Mr. Dakopolos; the latter described Student's needs as "exactly" what the class was designed to address. Dr. Sheridan and Ms. Zawacki expressed the same opinion. Dr. Sheridan added that Student would benefit from knowing that his schedule included a time to decompress, organize himself, go over his assignments, check Schoology, email or visit his teachers, and relax and regroup.

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administrative services credential. She was a school psychologist for the San Mateo-Foster City School District from 1997 to 2004, when she began in the same role for Palo Alto. She became the Palo Alto's lead school psychologist in 2013 and its Director of Special Education (Secondary) in March 2017. She has lectured in school psychology at San Francisco State University since 2013.

101. Three witnesses for Student were critical of the Cognitive Planning class. Mother testified that she believed the class was the same as the two previous Academic Communications classes, absent the social component, and since those classes were failures, another class like them should not have been offered. The evidence showed, however, that while Student's executive functioning deficits were not cured by the earlier classes, he received significant executive functioning support and made substantial progress in both of them.

102. Susan Garber directed the social skills program at the private Morrissey-Compton Educational Center, where she also directed its parent education program.<sup>17</sup> She taught Student in a Morrissey-Compton social skills program when he was in the fifth and early sixth grades, but had not seen him in a classroom since. She then became Student's advocate and attended nearly all his IEP team meetings in that role. She had never observed Palo Alto High's Cognitive Planning class. However, based on the class's course guide and descriptions of the course she heard at Student's IEP team meetings, she opined at hearing that the class would not be adequate to meet Student's needs. She based her opinion on the same claim as Mother's; that the class was similar to Student's seventh grade Academic Communications class, which was "ineffective" because Student still has "the same issues."

103. Ms. Garber also testified that the written description of the Cognitive Planning class showed that it required some skills she did not believe Student had or

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<sup>17</sup> Ms. Garber has a master's degree in special education with a focus on emotional disturbance and learning disabilities. She has been trained in Michelle Garcia Winner's social thinking techniques, which focus on social cognition and pragmatic language. She has substantial experience in teaching and evaluating special education students.

could develop. She did not believe he had the skills to take in the curriculum in the class; she predicted it probably would have just increased his anxiety.

104. A similar opinion was offered at hearing by Dr. Brendon Pratt, a clinical psychologist.<sup>18</sup> In fall 2017, Mother requested an independent educational evaluation, and Palo Alto paid Dr. Pratt to conduct it. Dr. Pratt began clinical testing of Student in his office in October 2017, but did not complete it until November 2017, after the complaint period, and did not write a report on his findings until December 12, 2017. On the next day, he presented his report to Student's IEP team, and opined that Student could not successfully be educated on a comprehensive high school campus such as Palo Alto High. He proposed that Palo Alto provide Student a split program, sending him to the Lydian Academy, a local private school, where he would receive one-to-one instruction in all academic subjects, and to Palo Alto High for electives and athletics. Dr. Pratt's recommendation was a surprise to the team; no one associated with Student, including Mother, her attorneys or her advocate, had sought such a placement before.

105. Dr. Pratt's report and findings were not before Student's IEP team until after the complaint period examined here, so the IEP team's judgments at any relevant time cannot be undermined because it did not act on his recommendations earlier. The IEP team would have been justified in declining to agree with Dr. Pratt even if it had

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<sup>18</sup> Dr. Pratt received his Ph.D. in clinical psychology in 1999 from the California School of Professional Psychology in Alameda, and then completed a two-year post-doctoral fellowship in pediatric neuropsychology at a hospital in Maryland. He now heads the Pratt Center, a professional psychology corporation, where he has had substantial experience in assessing disabled youth and advising public and private schools and parents on their programs. He has no educational training or credentials and has never taught in a school.

received his report earlier because that report had numerous flaws. Among the most significant were that Dr. Pratt unquestioningly accepted Mother's representations that Student was failing in school and wrote his report to create that impression; that he ignored and at one point obscured Mother's role in Student's anxiety; and that he did not address or seem aware of Student's frequent refusal to cooperate with the kind of supports he recommended.

106. In February 2018, after Dr. Pratt had formed his opinions and delivered his report, he went to the Palo Alto High Campus at Mother's request to observe two Cognitive Planning classes. He also examined the course guide and talked to the teachers of the classes. He testified at hearing that the Cognitive Planning classes were inappropriate for Student for the reasons that follow.

107. Dr. Pratt opined that the class was not an "appropriate placement" because most of the students there are behind in academics, and there is no one in the class with Student's academic abilities. He also found it inappropriate because there was no one in the class who could answer Student's questions regarding assignments in academic classes that he did not understand. He added that the Cognitive Planning class was similar to Student's previous executive function training in his previous classes. He opined about the similarity between the Cognitive Planning class and Student's seventh grade Academic Communications class at Jordan, though he knew nothing about the latter class except what Mother told him. He inaccurately dismissed the proposed 10th grade Cognitive Planning class as "primarily a studies skills class with an executive functioning component."

108. Dr. Pratt's opinion of the Cognitive Planning class was based on little knowledge of its functioning. He observed both classes for a total of one hour. He talked briefly to the teachers of the two classes, one of whom knew who Student was. The teachers told Dr. Pratt that they did not know whether Student's needs could be

addressed in their classes, and that they would be unable to answer his questions about homework in Honors classes.

109. Dr. Pratt's opinion that none of the other students in the Cognitive Planning classes was Student's intellectual equal was inaccurate. Dr. Sheridan established that numerous students in the Cognitive Planning classes were also highly intelligent and on Honors or advanced placement tracks. She checked the records of the Cognitive Planning classes, which confirmed that fact. Her research-based finding was more persuasive than Dr. Pratt's fleeting impression.

110. The Cognitive Planning classes Dr. Pratt observed were not necessarily the same classes to which Student would have been assigned in 10th grade, nor would either of the teachers of the classes he observed necessarily have been his teacher. One of the teachers knew who Student was, but neither teacher knew anything about his needs. Neither had access to his special education file because they had never taught him.

#### MATH LAB

111. In response to Mother's request, Palo Alto provided Student a male case manager for his 10th grade year. Andrew Dakopolos, a special education teacher, had just started at Palo Alto and was, among other things, teaching a small remedial math class called Math Lab.<sup>19</sup> Student did not need remedial math; he was doing well in Mr. Toma's general education math class. But Mr. Dakopolos, concerned by Mother's

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<sup>19</sup> Mr. Dakopolos has master's degrees in teaching and applied statistics and is expected to receive a doctoral degree from Columbia University in May 2018 in intellectual disabilities and autism. He was a special education teacher at Glendale High School from 2012 to 2014, and came to Palo Alto in that role in 2017. He teaches a master's level course in special education at the Teacher's College in New York.

rejection of the Cognitive Planning class, was seeking other ways to provide some one-to-one assistance to Student for his executive functioning problems. He proposed that Student's IEP be amended to include the Math Lab, not to give him remedial math but to give Student significant one-to-one assistance, and to give him the opportunity to develop a relationship with his new case manager. On August 24, 2017, Mother agreed to the amendment, and Student began attending the Math Lab.

112. Mr. Dakopolos quickly become familiar with Student's needs, and between the end of August and the end of October 2017, worked hard to serve him. If Student had a low grade on an interim test or project, Mr. Dakopolos went to the teacher to inquire about improving it. If Student did not complete or turn in an assignment, Mr. Dakopolos reminded him of the assignment, tried to find out why it was delayed, and arranged opportunities for him to complete it. Mr. Dakopolos exchanged hundreds of emails and had many conversations with Mother, keeping her advised of Student's activities and trying to adopt Student's program to her requests when he could.

113. Like Student's other teachers and case manager, Mr. Dakopolos was a persuasive and credible witness. He was familiar with all aspects of Student's difficulties, and displayed an obvious concern for his predicaments. Mr. Dakopolos testified clearly and with restraint, crediting both Student and Mother when appropriate. Cross-examination did not weaken his testimony, which is given significant weight here.

114. Student did not actually receive remedial math instruction in the Math Lab. Instead, pursuant to his understanding with Mother, Mr. Dakopolos turned his Math Lab (for Student only) into an adjunct to Palo Alto's other methods of addressing Student's executive functioning difficulties. Mr. Dakopolos worked one-on-one with Student on his executive functioning all three days a week that the class met, and sometimes during Flex time as well. He proposed methods of organization, examined assignments and due dates, and attempted to prioritize Student's work. He checked Student's coursework and

assignments with Student and on Schoology, and answered such questions as he could. Since many of Student's questions related to academic coursework with which Mr. Dakopolos was unfamiliar, such as questions about his Spanish assignments, he could not answer them all, and this frustrated Student.

115. Student did not cooperate well in the Math Lab. Between 90 and 95 percent of the time, Student was dismissive of Mr. Dakopolos's efforts to help him with executive functioning and did not want to work with him or talk to him. When Mr. Dakopolos was not working individually with Student, Student worked diligently on his homework. He also used the class to decompress, check his telephone, and take a brief break from his work. He interacted very little with the four other students, who were not his academic equals.

116. Witnesses for the parties agreed that Student did not belong in the Math Lab academically because he did not need remedial math instruction. Some of those witnesses characterized it as an inadequate "placement." Student's witnesses added that the other students in that class were not his cognitive equals and it was predictable he would not interact with them.

117. Asked whether the math lab adequately met Student's executive functioning needs, Mr. Dakopolos replied: "It can." He believed, however, that the best solution to Student's executive functioning needs was the Cognitive Planning class, and he urged Mother to agree to it so often she became annoyed and told the IEP team she did not want to talk about it further.

118. Student derived some benefit from the Math Lab. He received executive functioning assistance when he was willing to receive it, had some relief from his rigorous academic routine, and had extensive time to work on his homework, which was badly needed in the view of both parties. His executive functioning skills did not materially improve in the class.

## OTHER EXECUTIVE FUNCTIONING SUPPORTS

119. Testimony from Student's teachers and case manager established that he enjoyed the same kind of executive functioning support from them in the 10th grade as he had received in the ninth grade. His Government teacher, Caitlin Evans, once was so frustrated by Student's failure to turn in an assignment that she pulled him out of another class, searched his telephone for the assignment, and graded it on the spot. At an IEP meeting in September 2017, Student claimed he could not find three assignments he had completed. Ms. Evans reached into his backpack and promptly found two of them; the third turned up within days.

120. Student also received whatever benefit he was willing to derive from his ongoing ERMHS therapy from Ms. Cook.

### Mother's Proposal for One-to-one Assistance by a Credentialed Teacher or Similarly Trained Adult

121. During his ninth grade year, as noted above, Student received significant support from various classroom aides, but was frequently dismissive of it. He would accept it and even seek it out when he wanted it, but he usually rejected it and sometimes showed disdain for the intelligence of the aides. He did not want them hovering over him or sitting near him and would not work with them if they did.

122. At Student's May 2017 IEP team meetings, the parties extensively discussed possible aide support for Student. Both Mother and Student rejected aide support of the ordinary kind. Student stated that when he wanted help with his organization he would ask for it. Mother requested that the aides be informed not to help him unless he asked for help. The team agreed to inform the aides to refrain from helping Student unless Student requested it.

123. At the May 2017 IEP team meetings, Mother proposed that Student receive one-on-one executive functioning support from a properly trained adult, such as

an expert in Asperger's disorder. Later, in three IEP team meetings on September 11, 14 and 26, 2017, Mother pursued her proposal for one-to-one assistance from such an adult, sometimes altering its details. The audio recordings and notes of the September meetings showed that Mother wanted a credentialed special education teacher trained in dealing with high-functioning autism, or some adult professional with equivalent credentials, to spend an hour a day, one on one, with Student to address his organizational needs, go over his homework, answer his questions about his assignments, make sure he had the necessary materials, and generally "fix" things for him. The parties negotiated extensively over the details of this request but did not reach agreement during the complaint period. Mother and Student declined to have such support during his time for academic classes, and Student firmly refused a proposal to receive it after school.

124. Student now argues that such an arrangement – an hour a day of one-on-one executive functioning assistance from a credentialed special education teacher or equivalent who is trained in high functioning autism – was the only reasonable way to address Student's executive functioning needs, and that Palo Alto denied him a FAPE by failing to agree to it. However, no witness except Mother and her advocate supported the proposal at hearing. No professional testified it was required to assist him, or even that it would accomplish the desired purpose. In its absence Student received excellent grades in fall 2017.

#### STUDENT'S GOALS

125. Student's September 2016 IEP contained four annual goals. The first addressed his anxiety and as a result also addressed his executive functioning limitations:

By May 1, 2017, when given coaching and self-calming

strategies, Student will be able to identify a coping strategy that he can use or a specific request he can make to his teachers to alleviate the source of frustration with one or less prompts in 4 out of 5 discussions as measured by teacher observations.

126. The second goal was labeled vocational, but Ms. Dias established in her testimony that it was directed to executive functioning and study skills:

By May 1, 2017, when assigned to Flex each week Student will complete his Flex Form 80% of the time per data collected by Case Manager.

The second goal reflected Ms. Dias's experience with Student in the first few weeks of ninth grade, in which he improved but had difficulty in completing and using the Flex form. She reported to the September 2016 IEP team meeting that Student had struggled with the form but was making some progress.

127. The third goal related to transition and employment, and was not addressed by the parties.

128. The fourth goal addressed academic, study, and executive planning skills:

By 9/29/17, given a reminder by staff, Student will record assignments in a planner and weekly planning sheet within 3 prompts in 4 out of 5 opportunities as measured by teacher recorded data.

This goal was directed to Student's long-standing difficulties in tracking his assignments and due dates and completing and turning them in.

129. After the ERMHS assessment in fall 2016, the parties added a fifth goal

addressed to the therapy Student was beginning:

By 10/11/2017, Student will learn and practice coping strategies in therapy in order to be able to identify at least 3 he can use to reduce his stress level as measured by his therapist and self-report.

130. Ms. Dias credibly opined that these goals were appropriate and measurable, and met his executive functioning and organizational needs.

131. Although Student made some progress in executive functioning during his ninth grade year, as established by Ms. Dias and Mr. Gadus, he did not participate well in therapy and his anxiety did not substantially abate. Because of his continuing periodic episodes of disabling anxiety, he did not meet or make significant progress toward the goals in the September 2016 IEP. Ms. Dias's progress reports on the goals show that his lack of progress was caused either by his refusals to cooperate or because his executive functioning difficulties got in the way of everything else. In December 2016, she noted that "Student [is] resistant to therapy, needs time to connect to therapist before goal can be worked on." By February 2017, she noted: "Student resistant to therapy – does not comply with therapy." She noted "steady progress" on his Flex form goal but still noted: "Behavior interferes with learning." And she noted "steady progress" on his study skills goal, but also that "behavior interferes with learning."

132. In May 2017, the IEP team carried over these goals into Student's annual IEP with one minor change. Ms. Dias established that this was appropriate because, while he had not met the goals, he had made some progress toward some of them.

133. Mother signed the May IEP with the proviso that an IEP team meeting be convened within the first 30 days of the upcoming school year to discuss Student's goals. Palo Alto members of the IEP team expected to have that discussion during the

three September 2017 IEP team meetings, but as described below, Mother and her representatives directed the conversation to other matters first, such as one-to-one executive functioning support and accommodations. This prevented Palo Alto from revising Student's goals during the complaint period. Among other things it prevented the team from revising Student's second goal concerning filling out a Flex form. The goal had become obsolete in the 10th grade because Flex had become mandatory.

134. At hearing, Ms. Garber and Dr. Pratt opined that there should have been many more annual goals in Student's September 2016 and May 2017 IEP's. They both argued that Palo Alto was remiss in not realizing from Student's earlier records, such as the sixth grade psychoeducational report, the Children's Health Council assessment, and the May 2015 IEP at the end of Student's seventh grade, that numerous additional goals were required to provide Student a FAPE.

135. Dr. Pratt testified that in Student's records, by August 2017, there was evidence that he had needs in the areas of anxiety, pragmatic language, perspective-taking, social skills, bullying prevention, perfectionism, attention, organization, time management, working memory, ability to accept help, insight, and polite self-advocacy. He testified that Student's IEP's should have included annual goals addressing his non-verbal behaviors, his participation in group work, and self-advocacy.

136. Ms. Garber also found, in Student's files that were available to the IEP teams during the complaint period, evidence of a wide variety of needs such as anxiety, mental health, coping skills, calming skills, regulating emotion, executive functioning, organizing and initiating work, being able to break down and sequence tasks, being able to think ahead, perseverating on part of an assignment, identifying and expressing his feelings, seeking help in an appropriate way, peer relationships and rigidity of thinking. She testified that Student's IEP's should have contained goals for executive functioning, organizational skills, assistive technology, self-regulation, social skills,

learning how to compromise, behaving appropriately with peers and self-esteem.

137. There was no evidence that the absence of any of the additional goals suggested by Dr. Pratt and Ms. Garber had any effect on Student's education. The goals he had addressed his unique needs, and he succeeded academically and socially during the complaint period, as described above.

138. Student's goals in the IEP dated May 9, 2017, had expiration dates of October 11, 2017, three weeks before the end of the complaint period. Ms. Dias explained that she failed to archive the goals properly in Palo Alto's computer system; she erroneously thought that Student would have an annual IEP in October. There was no evidence that Palo Alto stopped working on Student's goals, or that anyone even noticed the error at the time. A January 31, 2018 progress report showed that Mr. Dakopolos continued to track and report Student's progress on his goals.

## SPEECH AND LANGUAGE SUPPORT AND SOCIAL SKILLS

### Assessments for Speech and Language

139. Student's records from sixth through eighth grades provided no reason for Palo Alto to assess him for speech and language before his triennial review. Palo Alto had formally evaluated Student for speech and language needs when he was in the sixth grade. The assessor found no concerns about his expressive and receptive language, and concluded that formal evaluation of those subjects was not warranted. Student's perspective-taking was average and he was "generally able to generate socially appropriate responses" in social situations. He had adequate knowledge of expected behaviors and polite social mores, though he admitted he did not always follow them when he was not getting his way. Although he was sometimes rude and insensitive, he was showing improvement in small group work. The assessor recommended speech and language eligibility and support, which Student received in seventh grade in the form of

social skills training in Ms. Herreshoff's class.

140. In Student's eighth grade year, Summit held an IEP team meeting in October 2015, identified study skills as his only area of need, and wrote goals for that area. In spring 2016, teacher and parent concerns about Student's social communications led Summit to refer him to Rachel Tempesta, a speech and language pathologist, for an informal consultation. Ms. Tempesta talked to Student's teachers, held two therapy sessions with Student, and found that he demonstrated age-appropriate social skills individually and in groups, though his skills varied across settings. She administered a standardized test that showed some social deficits. She concluded that "[s]ocio/emotional issues appear to be impacting [Student's] ability to use appropriate social skills consistently." She recommended only 30 minutes monthly of speech and language consultation, not direct services, but also recommended assessments in the fall for speech and language, and for counseling needs. Ms. Tempesta's report was not among the documents Summit later sent to Palo Alto in response to a routine records request.

141. At its May 2016 IEP team meeting, the Summit team agreed on an accommodation providing for "[s]peech-language consultation with the student and team to support any social-pragmatic issues that may arise including social behavior needs." It did not provide for direct speech and language services. Over the summer, Mother told Palo Alto staff she disagreed with everything in the Summit IEP. Neither then nor at the September 2016 IEP team meeting did Mother or anyone else suggest that a speech and language assessment should be conducted.

142. Sometime in fall 2016, Mother sent Ms. Bricca the Tempesta report, including the recommendation for a speech and language assessment, but Ms. Bricca did not pursue it because of Mother's statement that she disagreed with the entire Summit IEP, and because the school psychologist would normally decide whether the

assessment was warranted.

143. As Student's freshman year progressed, Ms. Dias learned that Student knew social skills and did not need much instruction in them. Speech and language pathologist Allison Alberda, who provided speech services in the class on Fridays, found that Student had age-appropriate social skills, except when he was particularly frustrated or anxious.

144. Lara Zawacki, the school psychologist, noticed while assessing Student for his triennial review that his social skills had significantly improved since the Children's Health Council report in 2015. She was impressed by the way he had matured and developed socially. He told her he had figured out how to make friendships, and the way he could articulate that convinced her that he knew how to navigate the social scene at Palo Alto High.

145. Palo Alto conducted its own speech and language assessment of Student in preparation for his triennial review in spring 2017. Peggy Syvertson, a well-qualified speech and language pathologist who had worked for the Palo Alto for 13 years and was an expert in autism, conducted the assessment, which became part of the integrated assessment presented to the IEP team.<sup>20</sup> Someone in Palo Alto gave her Student's file and she read it, though the Tempesta report and the Summit IEP were not in it. She interviewed Student and informally assessed his reactions. She administered

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<sup>20</sup> Ms. Syvertson is a state-licensed speech pathologist who has master's degrees in communication disorders and counseling and psychology, a state clinical rehabilitative services credential, and a certificate of clinical competence from the American Speech and Hearing Association. She has been a speech and language pathologist for the Palo Alto since 2003, has authored numerous technical publications, and has received several professional awards.

the Test of Problem Solving-2: Adolescent (TOPS-2) to test for pragmatic language and problem-solving.

146. About two-thirds of the way through the TOPS-2, Student informed Ms. Syvertson that he had taken many such tests and knew how to give the correct answers; her conversation with him showed that he did. He demonstrated to her he knew all the correct answers, so she put more emphasis on the problem-solving aspects of the measure. She concluded from the TOPS-2 results that Student had knowledge of pragmatic skills and when to use them. She also concluded that Student did not require further speech and language services. At hearing she observed: "I can't make a kid be engaged . . . it's very hard to teach new skills to somebody who thinks he already knows them all." The May 2017 IEP team accepted her recommendation to end speech and language services, without objection from Mother or her advocate.

#### Direct Speech and Language Services / Social Skills Training

147. The September 2016 IEP team knew that Student had received direct social skills training in the fifth and sixth grades from Ms. Garber at Morrissey-Compton. During the seventh grade he became somewhat uncooperative with the social skills component of Ms. Herreshoff's class; he thought he knew the curriculum and it wasted his time. Student sometimes became resistant when paired with his peers and would frequently move away, not because of difficulty communicating with them but because he felt that he already knew the lessons of the exercise. Near the end of his seventh grade year, his IEP team proposed to move him to resource support for the eighth, believing that would be adequate for his social needs. Instead he went to Summit, where he interacted well with others and had friends.

148. A month into the ninth grade, Student was doing well academically. The September 2016 IEP team learned from teacher reports of possible social limitations, but no one suggested they significantly interfered with Student's education. Summit had

been providing consultative speech and language services only, and nothing in their documents established a need for direct services. The IEP team thus chose to offer 200 minutes of consultative speech and language services over the year, but not direct services. The team kept Student in Ms. Dias's Academic Communications class, which had a social skills component.

149. During Student's freshman year in Ms. Dias's class, it became apparent that Student did not need further social skills training. At first, Student was responsive to social communications instruction, but he became more resistant as the semester went on because he did not think he needed it, and for the most part Ms. Dias agreed. She found his perspective-taking "quite good." Ms. Dias reduced the time she allocated to Student's social skills training on the ground that it was unnecessary; she used the time for executive functioning support instead.

150. Student's triennial assessments confirmed that he needed no more social skills training. The May 2017 IEP team also considered the views and experiences of Ms. Dias, Ms. Alberda, Ms. Syvertson, and Ms. Zawacki. As noted above, the team terminated Student's consultative speech and language services on Ms. Syvertson's recommendation and with Mother's consent.

151. The only professional who recommended to the IEP team and testified at hearing that Student needed direct speech and language services for pragmatic language and social skills was Student's advocate Ms. Garber, who had no formal speech and language training. Speech and language pathologists Ms. Alberda and Ms. Syvertson, and Ms. Dias, more persuasively testified that Student did not require direct speech and language services. Each believed and credibly testified that Student knew social skills, could use them sometimes, but could not use them when especially frustrated and anxious.

152. The parties disputed whether Student was able to develop friendships at

Palo Alto High. His earlier records gave the IEP team ample reason to believe that he could make friends, at least in the sixth through eighth grades. A sixth grade language arts teacher mentioned to Mr. Daley that student had "close friendships" with peers. Ms. Herreshoff established he interacted appropriately with friends in seventh grade. Ms. Tempesta reported age-appropriate peer interactions in eighth grade.

153. Mother testified that Student was essentially friendless. He did not make a single friend since he started at Palo Alto High, and never got invited to the houses of peers. Student contradicted her, testifying that he had some friends at school and two friends whose houses he visited.

154. Testimony from school staff established that Student was not gregarious. He was sometimes quiet and occasionally withdrawn, and it was not easy for him to engage with a wide range of students. He preferred to limit his friendships to other highly intelligent students, and sometimes disdained those of lesser intellect. Some of his friendships were not deep. His blunt and abrupt manner sometimes struck others as rude. And Palo Alto witnesses agreed that he sometimes disengaged from group exercises because he thought he could do a better job alone, or because he thought he already knew the lesson. This was consistent with Student's testimony that he sometimes thought he could complete the projects better on his own than in a group.

155. However, almost all Student's teachers, and the professionals and administrators who have observed him, believed that he had a substantial number of friends at school. Ms. Dias saw that over his freshman year, Student was "always with friends" and functioned very well socially in his general education classes. He talked to her a lot about his outside role-playing activities, and she learned that the activity required a lot of collaboration. She thought it well demonstrated his ability to interact socially with his peers.

156. In Student's ninth grade year, Ms. Zawacki also saw Student appropriately

interacting with peers. Mr. Vuong established he had “quite a few friends” in English class. Ms. Woods established that Student chose to move from Theatre 1 to Theatre 2, in part, to join a “really good friend” in the latter class. Mr. Sabbag saw him connecting with peers on field trips to Yosemite and Monterey. Mr. Fung established that Student had no difficulties relating to the other students in physical education, and had a couple of friends with whom he socialized. The only exception among Student’s teachers was Mr. Toma, the math teacher, who testified that he had not seen Student engaging with peers.

157. Mr. Dakopolos noticed that Student also had friends during the 10th grade. U.S. Government teacher Ms. Evans saw he had “strong friendships” with a certain girl in her class, and with a male peer. Dr. Sheridan thought he was doing “extremely well” socially; she has seen him near the theatre laughing and having fun with four or five other boys.

158. The preponderance of evidence showed that Student was reasonably successful in making friends at school, and that further social skills training was not necessary to allow him to make friends.

#### ASSISTIVE TECHNOLOGY

159. At the September 29, 2016 IEP team meeting, Mother inquired about available technology. She did not ask for an assistive technology assessment. The team made an “AT referral,” a process developed by Palo Alto to investigate any student’s need for technological support. It was not the same as a formal assessment. In writing the IEP, the team checked “yes” next to the question: “Does student require assistive/augmentative devices or tools to meet educational goals?” In a space for justifying that choice, the IEP stated: “Submitting AT referral.” Assistive technology services were not otherwise listed as a need to be addressed or as part of the offer of FAPE, nor were they mentioned on the services page of the IEP, or as an accommodation.

160. Palo Alto's technology expert Brian Gadus, who was also a special education teacher, responded to the referral. He attended Student's October 11, 2016 IEP team meeting to hear Mother's concerns. Ms. Dias informed him that Student was "fully independent" with using technology, but the IEP team was concerned with study, organizational skills, and notetaking.

161. Palo Alto High kept student-related data in the cloud (i.e., on remote servers), where any student or parent could access assignments and grades from anywhere, at any time, with any device. During Student's ninth grade year, Palo Alto relieved students of carrying devices from class to class by maintaining carts of computing devices in classrooms such as laptops, desktops and tablets, all programmed to access the school's cloud-based data (principally in the database Schoology and by using Google Docs). At the October 2016 meeting, Mr. Gadus recommended this "embedded" technology as a better starting place than specific new technology, which could be harder to use and more restrictive.

162. Mr. Gadus then met Student and watched him do everyday tasks like accessing Schoology and Google Drive on a desktop computer. He offered several suggestions to assist Student in executive functioning. He found that Student was "extremely tech-savvy; he picked up everything and was able to navigate everything on the computer with ease and very quickly." Mr. Gadus established that during his ninth grade year, Student learned to upload documents with his telephone or a desktop or laptop computer, and learned to use Schoology's monthly planner. He became quite proficient with Google Drive; he was sometimes faster than the technology.

163. In obtaining information from Ms. Dias, Mother, Student, and other members of the IEP team, Mr. Gadus gathered all the information a formal assessment would have gathered. He credibly testified that "if we were to do a formal assessment,

the outcome of that assessment would be very similar if not identical to what occurred with the referral consult model that we did follow.” There was no evidence to the contrary.

164. At the triennial review in May 2017, the IEP team was aware that Student’s use of technology during the ninth grade was successful. Though the notes of the three meetings do not mention it, the IEP team apparently decided that Student did not need assistive technology as a related service. On the resulting IEP, it checked “No” next to the box asking: “Does student require assistive/augmentative devices or tools to meet educational goals?” No one disagreed with that statement, including Mother, her advocate, or Student.

165. During Student’s ninth grade year, Palo Alto had decided, as a new policy for the following year, that some students would be encouraged to use “one-to-one” computing (carrying a single dedicated device) rather than using embedded technology. At the triennial review, and pursuant to that new policy, Mr. Gadus proposed that Student use a Chromebook Plus. Mother and Student insisted instead on obtaining a Windows Surface Tablet, which was based on the Windows operating system. Mr. Gadus provided a Windows Surface machine to Student at the beginning of the next school year, set it up, programmed it extensively for Student, equipped it with digital versions of texts, connected Student to digital libraries, and worked with him and with Mother to show them how to use those features.

166. Student had some difficulties using the Surface machine, including internet connectivity, battery life, and the availability of some programs and applications. The machine’s connectivity was better in some school buildings than others. On one occasion the school’s network went down. Schoology did not always work perfectly. Because of different font sizes, the online page numbers in one of Student’s assigned books – Harper Lee’s *To Kill a Mockingbird* – did not match the page numbers in the

hard copy being used in class.<sup>21</sup> At hearing, Mother described numerous other minor technological problems that she and Student encountered in that period.

167. More importantly, the Windows Surface machine was not entirely compatible with the school's systems, which were Apple- and Google-based; Palo Alto had only a handful of Windows machines. Throughout the fall, Mr. Gadus struggled to improve the machine's compatibility with school systems. He established that most of Student's functionality problems occurred because of this incompatibility.

168. Notwithstanding those problems, Student was generally successful in fall 2017 in using the Surface machine to retrieve assignments on Schoology and submit them on Google Drive. Mother wrote in mid-September:

[Student] has had success using the Surface to retrieve his assignments on Schoology and also submit them using the new Google Drive integration with Schoology . . . . He was able to show me where to find [his assignments] all within a few seconds. He is able to navigate the computer, Schoology, and Google Docs very quickly.

In October, Mother also wrote that Student told her the Surface machine "has cut down on losing assignments and is helping him stay organized." Mr. Gadus credibly testified that the equipment and consultation he provided Student were sufficient to address his technology needs, including his executive functioning needs, during the complaint period.

169. In December 2017, after the complaint period, Mr. Gadus persuaded

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<sup>21</sup> Student nonetheless received an A or A- on the essay assignment related to the book.

Mother to change to his original choice, a Chromebook Plus. It arrived in January, and by February, using the features of the new machine, Mr. Gadus had created a system for Student of filing and keeping his documents and turning in his papers on line. The new system has worked well; Student testified he was "content" with it.

## ACCOMMODATIONS

### Adequacy of Accommodations

170. At the urging of Mother or Ms. Garber, Palo Alto provided for numerous accommodations in Student's seventh grade IEP, including time parameters on written language assignments, reduced workload when content mastery was demonstrated, and the use of "individual/teacher directed" organizational systems for papers, binders and homework. Several of them were repeated in Student's September 2016 IEP.

171. At Mother's urging, Summit included several accommodations in Student's May 2016 IEP. Some of these were repeated in Student's September 2016 IEP at Palo Alto High. Others were not, including optional bullet point responses, and "speech-language consultation with the student and team to support any social-pragmatic issues that may arise . . .," although the latter was provided for elsewhere in the September 2016 IEP. One Summit accommodation, access to teacher notes when available, was adopted in September 2016, but changed to access to peer notes when available.

172. Student's September 2016 IEP provided him the following accommodations: Seat at front of room; seat away from distractions/noise; provide breaks as necessary; use of testing center when needed for extended time for tests; teacher check in's for understanding/clarification; chunk information/lengthy assignments with explicit directions; when [Student] asks questions that require more time to answer than is available to answer/discuss teacher will give option of setting up time with him to meet/giving [Student] the option of a brief answer is helpful as well as

returning for a more in-depth conversation; access to peer notes as available; extra time for tests/quizzes when needed up to 50 percent; and extra time for assignments up to 50 percent when coordinated with teachers in advance.

173. As Student's triennial review approached in spring 2017, Mother emailed to Palo Alto a list of more than 50 additional accommodations she wanted included in the triennial IEP.<sup>22</sup> Some of these overlapped with or reworded existing accommodations, but most were new. Ms. Bricca and Ms. Zawacki met with Mother in Ms. Zawacki's office before the May 30, 2017 meeting to respond to that email, and Ms. Zawacki put stars by the requests the team might grant. The discussion continued into the May 30, 2017 IEP team meeting. The written IEP included some but not all of the items Ms. Zawacki starred. The evidence did not show whether Ms. Zawacki starred the items in her office or at the IEP team meeting, and did not show why some items were included in the IEP and others were not. There was no evidence that the omission of any of the accommodations Ms. Zawacki had starred had any effect on Student's education.

174. The final version of Student's May 2017 IEP retained all the accommodations from the September 2016 IEP, some in slightly reworded form. It also added a variety of others, which were: provide structure with clearly defined expectations and consequences; give five-minutes warning to end of class to help [Student] prepare to leave; student permitted to turn in homework/classwork during class time to assist him with paperwork organization – arranged with teachers; student can turn in class assignments via electronic versus paper as arranged with teacher; shortened assignments when content mastery is demonstrated; for notebooks electronic version is permitted as arranged with teacher; oral response allowed for assignments as

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<sup>22</sup> The number is approximate because it depends on characterizing each request as a request for accommodation or as some other kind of request.

arranged w/teachers; student needs to be permitted to use copying strategy of doodling as he is able to process information better when permitted to doodle while listening; student permitted to take breaks when feeling overwhelmed and/or anxiety increases; and for group assignments/projects student can communicate to teachers which student he identifies that he can best engage with and be most productive. In addition, Student's extra time for tests and quizzes was increased from 50 percent to 100 percent, and his extra time for assignments was increased from 50 percent to two weeks when coordinated with teachers in advance.

175. Student introduced no evidence that any of the accommodations omitted from the seventh grade IEP, the Summit IEP, or Mother's May 2017 list was required to allow Student to advance appropriately toward attaining his annual goals, to be involved and make progress in the general education curriculum, or to participate in extracurricular activities and other nonacademic activities.

176. Mother wrote a letter to Palo Alto on August 29, 2017, requesting many changes in the triennial IEP. They included a change in eligibility category, addressing of several parent concerns, several additional areas of need, revision of three extant goals, 18 proposed new goals, eight proposed new services, and 27 proposed additional accommodations.

177. An IEP team meeting had been scheduled for September 11, 2017, in response to Mother's request at the triennial review for another meeting to discuss goals. Dr. Sheridan decided that Mother's August 29 letter should be discussed there. She did not send a prior written notice indicating agreement or disagreement with the contents of the letter then or later. Some of the contents of the letter were discussed at the IEP team meetings on September 11, 14, and 26, 2017. Some of the discussion in those meetings addressed Mother's requests for additional accommodations, but with one possible exception nothing was finally decided.

178. The possible exception occurred at the meeting on September 14, 2017. Dr. Sheridan announced that the group would be making changes to a “working document.” Mother requested that the words “as arranged with teachers” be removed from one accommodation. Dr. Sheridan stated that she did not wish to speak for the entire IEP team, but she agreed to removal of the words. Mr. Dakopolos also agreed, and the conversation turned to other matters. No written amendment to the IEP making that change was ever produced.

#### Implementation of Accommodations

179. The parties dispute whether 11 accommodations from Student’s September 2016 and May 2017 IEP’s were implemented. At hearing, Student was asked only about implementation of accommodations in his sophomore year, not in his freshman year.<sup>23</sup> The evidence with respect to each is set forth below.

“Seat at front of room; seat away from distractions/noise”

180. This accommodation was probably intended to be available at Student’s discretion. Mother asked in her May 2017 list of proposed accommodations for “preferential seating,” and in an August 2017 letter for “preferential seating . . . . [Student] should have some say on this.”

181. There was no evidence that any of Student’s teachers failed to allow him to choose his seating. He sat in the front in math class and, according to Ms. Evans, in history and government as well. In other classes Student chose to sit in the back, where

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<sup>23</sup> The only evidence about the implementation of accommodations in Student’s freshman year was that Ms. Woods may not have chunked information in Theatre 2. There was no explanation of how information could be chunked in the context of plays or other dramatic material.

he could escape noise and spread his materials out on a table. In English, the two halves of the class faced each other in a small room, and sitting in front would have been the noisiest place, so Student sat in the back.

182. Palo Alto substantially complied with this accommodation because it allowed Student his choice whether to sit at the front of the class.

“Permitted to take breaks when feeling overwhelmed”

183. Student testified it would increase his anxiety to ask for a break, but did not claim he was not permitted to take breaks. There was no evidence that he was ever denied a break he asked for, or simply took. Student did not prove that Palo Alto failed to implement this accommodation.

“TEACHER CHECK INS FOR UNDERSTANDING/CLARIFICATION”

184. Student testified that these check-ins did not usually happen. Mr. Toma testified that he engaged in such checks, but the evidence did not show whether the other teachers implemented this accommodation. Student proved that Palo Alto sometimes did not implement this accommodation.

“GIVE 5-MINUTES WARNING TO END OF CLASS TO HELP [STUDENT] PREP. TO LEAVE”

185. Student testified that such warnings did not usually occur. The only contrary testimony was from Mr. Vuong, who said he habitually gave that warning to all Students in his English class. Student proved that Palo Alto did not usually implement this accommodation.

“WHEN [STUDENT] ASKS QUESTIONS THAT REQUIRE MORE TIME THAN IS AVAILABLE TO ANSWER/DISCUSS TEACHER WILL GIVE OPTION OF SETTING UP TIME WITH HIM TO MEET. GIVING STUDENT THE OPTION OF A BRIEF ANSWER IS HELPFUL AS WELL AS RETURNING FOR A MORE IN-DEPTH CONVERSATION”.

186. Student was not accurately asked whether this accommodation was

provided. Instead he was asked: "Were you able to ask the teachers questions during the fall of 2017?" His answer was: "sometimes." The reasons for his inability to ask them questions at other times was not made clear. He did complain that the teachers were not always present during Flex time, though "they were likely to be." There was no evidence that any teacher ever declined to meet with Student to answer, or further answer, his questions. Student did not prove that Palo Alto failed to implement this accommodation.

"Student permitted to turn in homework/classwork during class time"

187. Student testified he could turn in homework or classwork during class time in some classes. In History, he testified, "they didn't say if I had to have the papers later, so I didn't know I needed to turn it in then." That may have shown confusion about due dates, but it did not prove Student was not permitted to turn in work during class time. Student did not prove that Palo Alto failed to implement this accommodation.

"CHUNK INFORMATION / LENGTHY ASSIGNMENTS WITH EXPLICIT DIRECTIONS"

188. Student testified that "there weren't that many lengthy assignments but some were broken down." Mr. Toma testified he chunked assignments; the other teachers did not address the question. Student's testimony established at most that Palo Alto deviated from this accommodation at some times.

"ACCESS TO PEER NOTES AS AVAILABLE"

189. Student testified only that he did not "receive" any peer notes. That did not demonstrate he lacked access to them. Student complained he once requested "class" notes and did not get them, but it was not clear these were peer notes. Palo Alto High had a system in which peer notes were posted on line and made readily available to all students. Student did not prove that Palo Alto failed to implement this accommodation.

"FOR NOTEBOOKS ELECTRONIC VERSION IS PERMITTED AS ARRANGED W/TEACHER"

190. Student testified he was allowed to provide an electronic notebook in English, but that in Chemistry he was "required to have a physical notebook . . ." The evidence showed that the most important assignments in Chemistry were known as "labs," not as notebooks. Those had to be submitted on paper. However, there was no evidence that Student or anyone on his behalf ever asked a teacher for permission to submit an electronic rather than a written notebook, or that he was ever denied such an arrangement. Student did not prove that Palo Alto failed to implement this accommodation.

"ORAL RESPONSE ALLOWED FOR ASSIGN[MENTS] AS ARRANGED W/ TEACHERS"

191. Student testified that he was not "allowed" to provide oral rather than handwritten assignments or answers in any of his classes, except once in English. However, there was no evidence that he or anyone on his behalf ever requested a different arrangement from the teacher, or that he was ever denied such an arrangement. Student did not prove that Palo Alto failed to implement this accommodation.

"SHORTENED ASSIGNMENTS WHEN CONTENT MASTERY IS DEMONSTRATED"

192. Asked whether he ever had assignments "shortened because you had already mastered the material," Student testified he did not think so. He did not claim that he or anyone on his behalf ever requested a shortened assignment because he could or did demonstrate content mastery, or that he was ever denied a shortened assignment in those circumstances. The evidence did show that Mother asked at least twice during the complaint period for shortened assignments, but those requests did

not mention content mastery. Mother in her testimony consistently failed to connect her requests for shortened assignments with the requirement of content mastery. Mr. Dakopolos testified he thought that Student's teachers did shorten some assignments, but he did not mention content mastery either. Student did not prove that Palo Alto failed to implement this accommodation.

193. There was no evidence that any shortcomings in Palo Alto's implementation of Student's accommodations had any negative effect on his education or anxiety.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>24</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>25</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 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 appropriate special education and related services that are

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<sup>24</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>25</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, 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 Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school Palo Alto 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, 950-951.) 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. 951, fn. 10.)

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_\_, 137 S.Ct. 988 [197 L.Ed.2d 335]. It explained in *Endrew F.* that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student like *Endrew F.*, who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001; see *E.F. v. Newport Mesa Unified Sch. Dist.* (9th Cir., Feb. 14, 2018, No. 15-56452) 2018 WL 847744, p. 1 [nonpub. opn.] [in Ninth Circuit *Endrew F.* clarified but did not change *Rowley* standard], citing *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1200.) The high court noted that “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Endrew F.*, *supra*, 137 S.Ct. at p. 999 [italics in original].)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (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.

6. Whether an IEP offers a student a FAPE is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP “is a snapshot, not a retrospective”; it must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Ibid.* [quoting *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (Mansmann, C.J., concurring); see also *L.J. v. Pittsburg Unified Sch. Dist.* (9th Cir. 2017) 850 F.3d 996, 1004 [“the ‘snapshot’ rule . . . instructs the court to judge the appropriateness of the determination on the basis of the information reasonably available to the parties at the time of the IEP meeting.”]; *JG v. Douglas County Sch. Dist.* (9th Cir. 2008) 552 F.3d 786, 801.)<sup>26</sup>

7. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1)

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<sup>26</sup> In *E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2009) 652 F.3d 999, 1004-1005, a divided Ninth Circuit panel declined to apply the *Adams* rule to a 2007 assessment that the majority thought 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 returned to the routine application of *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.)

impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

## MENTAL HEALTH ISSUES

Issues 1(e) and 2(e): Did Palo Alto Fail to Provide Student Adequate Mental Health Services?

8. Palo Alto took Student's anxiety seriously and addressed it in a variety of ways. It ensured that Student had available the YES program (which he attended), the Wellness Center, and Adolescent Counseling Services, which he attended only twice and then rejected. It promptly assessed him for ERMHS eligibility, found him eligible, began ERMHS therapy with Ms. Coleman in November 2016, and continued it with Ms. Cook throughout the complaint period. It made family therapy available to Mother as well.

9. In his closing brief, Student dismisses Ms. Coleman, his therapist through February 2017, as a "trainee" who was "not able to establish a rapport" with him, and speculates that they lacked rapport because Ms. Coleman was inadequately supervised. However, no mental health professional supported that claim. Ms. Goodridge established that Ms. Coleman was fully qualified to provide ERMHS therapy to Student, and the testimony of several witnesses, including Student himself and Mother, showed that their lack of rapport was primarily caused by Student's hostility to the therapy itself. He resented and resisted being there because it took him out of class, and believed it was not helpful to him. Student did not prove that his lack of rapport with Ms. Coleman was the consequence of any deficiency in Ms. Coleman's training or therapy.

10. Student also claims he missed two months of therapy in spring 2017 in the transition between Ms. Coleman and Ms. Cook, but the weight of evidence showed

there was no such gap. Ms. Coleman left at the end of February and Ms. Cook began seeing Student in mid-March.

11. Student claims that Palo Alto never offered or provided family therapy to him and Mother, arguing incorrectly that the therapy from Ms. Coleman and Ms. Cook consisted only of "consultation" or "collaboration." The evidence showed otherwise. At the November 30, 2016 IEP team meeting, Mother was referred to the Parent Project. Mother testified she began therapy with Ms. Coleman but stopped because she was offended by the implication that she was not a good parent. Ms. Cook testified that she delivered "collateral" therapy to Mother, which she and Ms. Goodridge defined as providing support to Mother and offering her an increased understanding of Student's mental health needs and how to support him. Student's triennial IEP refers to the support provided as "family counseling support," and the August 24, 2017 amendment to which Mother agreed offered "[p]arent counseling." In her August 29, 2017 letter, she referred to these agreed-upon services as "Family Therapeutic Services." The weight of evidence showed that Palo Alto did make family therapy available to Student and Mother. It also showed that Mother was resistant to it and did not take advantage of it.

12. Student's central attack on Palo Alto's provision of mental health services is simply that it did not work; his anxiety was still elevated at the end of the complaint period. But the evidence showed convincingly that Student's anxiety is rooted in the home, not school, and that it is vastly more elevated at home. The evidence also showed that Student's anxiety at home affected him at school through his many contacts with Mother during the school day. Student does not deny this, but does not explain what Palo Alto could have done in an IEP about his anxiety in the home other than propose family therapy, which it did.

13. Student does not persuasively explain what Palo Alto should have done at school to address his anxiety that it did not do. He asserts that Palo Alto should have

offered him Cognitive Behavior Therapy, but the only evidence in the record concerning this claim is a single sentence in Dr. Pratt's December 2017 report stating that Cognitive Behavior Therapy would be "appropriate" for Student. That statement was not otherwise explained, suffers from the shortcomings of Dr. Pratt's report described above, and was not before the IEP team at any time during the complaint period. There was no evidence that Cognitive Behavior Therapy was mentioned by anyone before Dr. Pratt's December 2017 report. Nothing in the record relating to the complaint period supports the notion that Cognitive Behavior Therapy would have made any difference to Student's anxiety. No such evidence was before any of Student's IEP teams when its decisions concerning his mental health services were made during the complaint period.

14. Student also faults Palo Alto because it "did not change [Student's] IEP to increase his support" upon learning from Ms. Cook in September 2017 that Student's therapy had not been notably successful. Student does not explain what that increased support might have been, unless it is just another reference to Cognitive Behavior Therapy. If Student means that Ms. Cook's therapy time should have been increased, there was no evidence that such an increase would have made a difference. Since Student, Mother and Ms. Cook did not believe the therapy was particularly helpful, Student did not show that increasing it would have alleviated his anxiety.

15. From November 2016, through Student's ninth grade year, and from the beginning of his 10th grade year to the end of the complaint period, Palo Alto made available to him and to Mother the support of qualified ERMHS therapists. The fact that he and Mother were resistant to the therapy does not undermine Palo Alto's reasonableness in making it available. Nor does the fact that Student's anxiety did not significantly decrease indicate a failure in Palo Alto's approach. It was Palo Alto's duty 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 [italics added].) It need not guarantee any particular outcome. (*Id.* at p. 192; see also *Andrew 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”]; *Nack v. Orange City Sch. Dist.* (6th Cir. 2006) 454 F.3d 604, 614.) Student has no plausible explanation of what mental health services Palo Alto should have provided that it did not. Student did not prove that Palo Alto failed to provide adequate mental health services to him during the complaint period, or that its provision of mental health services was not reasonably calculated to allow him to benefit from those services in light of all his circumstances.

Issue 1(g): Did Palo Alto fail to timely provide Mother an assessment plan in response to her request referrals for assessments including . . . educationally related mental health services?

16. Student does not mention this issue in his closing brief and may have abandoned it. He did not prove that Mother ever requested an ERMHS assessment from Palo Alto. If she signed an ERMHS assessment plan at Summit, and Palo Alto had any duties with respect to it, there was no need for an additional assessment plan. In any event, Palo Alto independently provided its own ERMHS assessment plan to Mother on October 10, 2016. Student did not prove that Palo Alto failed to timely provide Mother an ERMHS assessment plan.

#### EXECUTIVE FUNCTIONING ISSUES

Issues 1(d) and 2(d): Did Palo Alto fail to provide Student adequate services to address his executive functioning deficits?

17. Palo Alto provided Student several services and supports to address his executive functioning deficits. He received substantial support in the Academic Communications class, additional support when he would accept it from aides in his general education classes, personalized supports from his teachers, and additional

assistance from Mr. Gadus through technology.

18. Student now argues that the ninth grade Academic Communications class was an inadequate “placement.” This misunderstands the meaning of placement, which is not a single class; instead it is “that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs . . .” (5 C.C.R. § 3042, subd.. (a).) Student’s misunderstanding leads him to attack the Academic Communications class as not addressing all his executive functioning needs, when the proper question is whether the entire array of services and supports for executive functioning that Palo Alto provided adequately addressed those needs. No single part of that array can separately be found legally inadequate for failure to provide everything Student needed. An IEP must be considered as a whole; its individual parts cannot be judged in isolation. (*J.M. v. New York City Dept. of Educ.* (S.D.N.Y. 2016) 171 F.Supp.3d 236, 247-248.)

19. The ninth grade Academic Communications class did serve most of Student’s executive functioning needs. Student faults the class for “increas[ing] his administrative load,” by which Student means he still had to deal with some paperwork. But as Ms. Dias established, Student had demonstrated ability to handle paperwork when not overly anxious, and an important educational need to know how to do that.

20. Student also asserts that the ninth grade Academic Communications class “did not address his underlying skill deficits, including a method for keeping track of work, breaking down assignments, or obtaining the information he needed to do the assignments.” This characterization is incorrect. Ms. Dias’s testimony describing Student’s work in her class, summarized in the Factual Findings, showed that the class assisted him in all of these matters except breaking down assignments, which was primarily the responsibility of the teachers of Student’s substantive classes. That evidence also showed that Student derived substantial benefit from the support he

received in the Academic Communications class.

21. Student's argument that the ninth grade Academic Communications class too closely resembled the seventh grade class is unpersuasive. Student did not fail, as he now claims, in the seventh grade class. Ms. Herreshoff established that, although he did not progress in some ways, he progressed substantially in others. He was also academically successful in seventh grade.

22. The fact that the seventh and ninth grade classes were similar did not mean that the latter class was redundant and should not have been offered. Student's needs were almost the same in both grades. Student's representatives conceive of teaching him executive functioning "skills" as if there were a ladder of advancement on which, having learned one skill, student could climb to a more complex and difficult executive functioning skill, much as one learns short division and then by building on that skill learns long division. This misunderstands what Student needed and received from the seventh and ninth grade Academic Communication classes, which is more accurately described as executive functioning support. Student lost papers in the bottom of his backpack in both grades (as he did in 10th grade as well), and he needed support in organizing it in both grades. As Ms. Herreshoff observed, he could be taught something, but would lose the ability to apply it, whereupon the teaching had to be repeated. Similar supports in the seventh and ninth grades were appropriate to address Student's repetitive needs.

23. Student's witnesses were not persuasive in their attacks on the Cognitive Planning class offered for his 10th grade year. Mother's opinion that the Cognitive Planning class was too similar to Student's previous classes had the same flaw as discussed above. Student was not acquiring basic skills in those classes and then building on them to acquire more advanced skills. He needed the same kind of organizational support that he needed previously, so the similarity in the classes does

not mean that the later classes were inappropriate.

24. Ms. Garber's opinion that Student lacked the skills to be served by the Cognitive Planning class is not entitled to significant weight. For years she has been Student's advocate, and her opinions were formed as part of that advocacy. She had not seen Student in a classroom since the sixth grade. Ms. Zawacki's contrary opinion was more persuasive because it was based on a thorough assessment of Student just before the Cognitive Planning class was offered to him, and was informed by her extensive testing, her classroom observations, her information from Student's teachers, and her conversations with Student. Ms. Zawacki, Mr. Dakopolos, Dr. Sheridan and Ms. Bricca all opined persuasively that he could benefit from the class. And due to the episodic nature of Student's executive functioning problems, he had many times displayed the skills in question when he was not unduly anxious. The weight of evidence showed that Student had the skills to participate in the Cognitive Planning class.

25. Dr. Pratt's disapproval of the Cognitive Planning classes on the ground that they did not contain Student's intellectual equals was factually incorrect and legally irrelevant. Dr. Sheridan established that numerous highly intelligent students on Honors and advanced tracks were in those classes. And, in any event, Palo Alto High had an unusually high proportion of students at or above Student's intellectual level, and he had ample opportunity to mix with them in his academic classes and elsewhere. Special education law did not require Palo Alto to ensure that Student's intellectual equals were in every one of his classes.

26. The criticisms made by Mother, Ms. Garber and Dr. Pratt of the proposed 10th grade Cognitive Planning class were unpersuasive for the additional reason that all three of them regarded the class as a "placement" and analyzed it in isolation, rather than evaluating it in the context of the entire array of services and supports for executive functioning that Palo Alto offered and had been providing. Dr. Pratt, for

example, faulted the Cognitive Planning class because no one was there to answer Student's questions about his homework in his substantive academic courses. This is hardly surprising; it would be a rare teacher who could answer all of Student's many questions about his Honors Chemistry, math, Spanish and U.S. Government assignments. As Mr. Dakopolos's experience in his Math Lab showed, even a credentialed special education teacher is unlikely to be able to answer all those questions unless he or she has had a highly unusual set of academic experiences and training.

27. If Student had been in the Cognitive Planning class, he would have been allowed to use class time to visit his academic teachers to get answers to his questions, a fact of which Dr. Pratt seemed unaware. He could also get them answered during Flex time and sometimes during lunches and breaks. Palo Alto's teachers made reasonable and sometimes extraordinary efforts to answer Student's questions. There is no legal support for Student's assumption that he was entitled in a small support class to immediate answers to his questions about other classes.

28. Student did not prove that the Cognitive Planning class was inadequate to address his executive functioning deficits. On the contrary, Palo Alto proved that the class would have served him well. Mother's rejection of the class was beyond Palo Alto's control. As a stopgap measure, pending further efforts to persuade Mother to accept the Cognitive Planning class, Palo Alto put Student in the Math Lab. He did not receive inappropriate remedial instruction there.<sup>27</sup> Instead he received needed one-to-one executive functioning support when he was willing to cooperate with it, and time for breaks and homework. Student benefited to some degree from the Math Lab.

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<sup>27</sup> Whether Palo Alto's use of the Math Lab denied Student a FAPE is not an issue in this case.

29. Student did not prove that Palo Alto failed to give him adequate services for his executive functioning deficits.

Issues 1(k) and 2(j): Did Palo Alto fail to offer or provide Student with one-to-one support?

30. Student's claim that he only could receive a FAPE if given one-to-one support during non-academic portions of the school day by a credentialed special education teacher trained in high-functioning autism, or an adult with equivalent training, was not supported by any professional opinion or other evidence beyond Mother's stated desire. The proposal did not take into account the substantial evidence of Student's hostility to aides in general and resistance to assistance from highly trained adults. Mr. Dakopolos fit the description of the kind of specialist Mother wanted, and Student nonetheless rejected his organizational help 90 to 95 percent of the time it was offered.

31. Student has repeatedly demonstrated the skills required to seek out his academic teachers for answers to his questions, in and out of class and during Flex time, and his teachers have been reasonably and sometimes generously available for that purpose. Special education law did not require Palo Alto to designate a credentialed teacher or equivalent to do it for him.

32. It is doubtful that Student's frustration about getting all his questions about his classes and assignments answered is even an aspect of executive functioning. Ms. Warfel, the ERMHS assessor, saw it instead as an attempt to relieve his anxiety. In any event, the proposed one-to-one professional could not have answered most of his specific questions about assignments in academic classes, and would have had to resort to email or personal visits to help Student get the answers. And if a teacher could not immediately be found to answer, Student would have been frustrated anyway. Student himself told the September 26, 2017 IEP team that walking around the campus with

someone looking for teachers to answer questions did not have “a high chance” of succeeding. At no relevant time did the IEP team have reason to believe that the proposal would work for its announced purpose or that Student would cooperate with it.

33. Mother’s proposal was also antithetical to an important purpose of the IDEA: to prepare disabled students to be independent in later life. (20 U.S.C. § 1401(34)(A); see *J.L. v. Mercer Island School Dist.*, *supra*, 592 F.3d at p. 948.) Palo Alto staff were reasonably concerned that Student was already overly dependent on assistance from others, especially from Mother, and might not succeed in college if he did not learn skills such as keeping paper, finding assignments, and getting answers to questions from his teachers. In college, as Ms. Evans put it, “professors are not going to spend the time to dig around in Google Drive to find things.” Mother’s proposal would have increased that dependence.

34. Student’s success in his education, notwithstanding the absence of the one-to-one professional Mother proposed, showed that he did not need that arrangement to access his education. Palo Alto did not deny Student a FAPE by declining to offer him the one-to-one support Mother proposed.

35. Notwithstanding his executive functioning difficulties, Student thrived academically in both the ninth and 10th grades during the complaint period. Student did not prove that in either grade, Palo Alto provided him inadequate services and supports for his executive functioning deficits, or that its provision of executive functioning services was not reasonably calculated to allow him to benefit from those services in light of all his circumstances.

## GOALS ISSUES

Issues 1(a) and 2(a): Did Palo Alto fail to provide Student measurable goals in all areas of need?

### ADEQUACY OF GOALS

36. Student's first and fifth goals were designed to address his anxiety. The opinions of Ms. Garber and Dr. Pratt that he needed an additional undescribed goal for anxiety simply proposed redundancy.

37. Because Student's executive functioning difficulties were a result of his anxiety, the first and fifth goals were also designed to address executive functioning. So was the fourth goal, which was designed to increase Student's skill with and reliance on a planner and a weekly planning sheet. In addition, those three executive functioning goals were supplemented by a wide variety of accommodations also directed to supporting Student's executive planning needs. Even if a goal is wholly missing, FAPE is not denied when the subject matter is adequately addressed by other services in the IEP. (*P.C. v. Rye City Sch. Dist.* (S.D.N.Y., Feb. 7, 2017, No. 15-CV-6006 (CS)) 69 IDELR 122 [nonpub. opn].)

38. Student faults Palo Alto for repeating his September 2016 goals in the triennial IEP. But carrying over previous goals, by itself, "does not mean the identified goals .... failed to provide or deliver a meaningful educational benefit." (*MB v. City Sch. Dist. of New Rochelle* (S.D.N.Y., March 29, 2018, No. 17-cv-1273 (KBF), 2018 WL 1609266, p. 15 [nonpub. opn].) As Ms. Dias established, Palo Alto repeated Student's goals because he had not fully met them, though he had progressed toward some of them. She correctly attributed his lack of further progress to his anxiety and executive functioning deficits. Student admits in his closing brief that "unless [his] anxiety is brought under control, he will continue . . . to not meet his goals." Student did not prove that the partial nature of his progress toward his goals was due to some defect in the

goals or his educational program.

39. Ms. Dias erred in drafting the triennial goals so that they expired on October 11, 2017. However, Student makes no effort to argue that there was any consequence of this error in the remaining three weeks of the complaint period. The evidence showed that by January 2018, Mr. Dakopolos continued to monitor and report on Student's progress toward his goals.

40. Student's goal concerning filling out a Flex form became obsolete in 10th grade because Flex had become mandatory. Palo Alto would have attempted to revise the goal during the complaint period, but the three September 2017 IEP team meetings turned to other matters first, largely at Mother's behest. There was no evidence that the obsolete goal had any effect on Student's education in the 10th grade.

41. Ms. Dias credibly testified that the goals in Student's September 2016 and May 2017 IEPs were measurable and appropriately addressed his anxiety and his executive functioning and organizational needs. With the exception of a D in Theater unrelated to his goals, Student thrived academically and socially during the complaint period. Substantial evidence therefore supports the conclusion that Student failed to prove his goals were not measurable or designed to address his educational needs.

#### NEED FOR ADDITIONAL GOALS

42. Student in his closing brief collects every reference in his files to a need, a deficit, a challenge, or an area of struggle, and then asserts that the Palo Alto was required by law to write a separate annual goal for each. Ms. Garber and Dr. Pratt made the identical assumption in their testimony. However, that is not the law. An annual IEP must contain annual goals that are measurable, and are designed to "meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs that result from the child's disability . . ." (20 U.S.C. §

1414(d)(1)(i)(A)(II)(aa), (bb); 34 C.F.R. § 300.320(a)(2)(i)(A), (B); Ed. Code, § 56345, subds. (a)(2)(A), (B).) This language does not require that each identifiable need, deficit, or area of struggle or challenge be addressed in a separate goal. Nor does it require subdividing a student's needs into smaller components of need and addressing each component in a separate goal.

43. In *Coleman v. Pottstown Sch. Dist.* (E.D.Pa. 2013) 983 F.Supp.2d 543, parents made the same contention as Student does here, but the District Court disagreed:

Plaintiffs interpret [§ 1414(d)(1)(A)(i)(II)] as requiring a school district to create measurable goals for every recognized educational and functional need of a student with disabilities. . . . [I]t would again be inconsistent with the longstanding interpretation of the IDEA to find that providing a FAPE requires designing specific monitoring goals for every single recognized need of a disabled student. As noted above, a FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education.

(*Id.* at pp. 572-573.) The Court of Appeal affirmed that part of the District Court's decision. (*Coleman v. Pottstown Sch. Dist.* (3d Cir. 2014) 581 Fed.Appx. 141, 147-148; see also *N.M. v. The School Dist. of Philadelphia* (3d Cir. 2010) 394 Fed.Appx. 920, 923 [nonpub. opn.]; *L.M. v. Downingtown Area Sch. Dist.* (E.D. Pa., April 15, 2015, No. 12-CV-5547) 2015 WL 1725091, p. 16; *Benjamin A. v. Unionville-Chadds Ford Sch. Dist.* (E.D. Pa., Aug. 14, 2017, Civ. No. 16-2545) 2017 WL 3482089, pp. 12-13.)

44. Ms. Garber and Dr. Pratt opined that Palo Alto should have provided

annual goals that would have subdivided Student's need for executive planning support into far smaller categories, and should have provided separate goals for time management, coping skills, organization, initiating, and a wide variety of other matters described in the Factual Findings. Neither of them articulated any reason why these matters could not be adequately addressed under the three executive functioning goals, two social-emotional goals, and numerous accommodations in the IEP, or why it was essential to Student's receipt of a FAPE that his goals measure his progress in each of those subcategories individually. "[W]hile Appellants' expert opined that the IEPs should have had additional goals, she does not explain how the presence of such goals were necessary to ensure [Student] received a FAPE." (*Coleman v. Pottstown Sch. Dist., supra*, 581 Fed.Appx. at pp. 147-148.)

45. Ms. Garber's opinions about the additional goals Student needed were generally less than persuasive because she was Student's advocate and she had not seen Student in a classroom since the sixth grade. Dr. Pratt's opinions lacked persuasive value primarily because he saw Student as a failure in school, disregarded any role that Mother and the parent-child relationship may have had in his anxiety, and ignored the fact that Student had been uncooperative with many of the remedies Dr. Pratt proposed.

46. Student did not show that the September 2016 or May 2017 IEP goals were not measurable or did not address his educational needs, nor did he prove there was any educational consequence to the absence of the many additional goals his experts proposed. Student did not prove that Palo Alto did not provide him measurable annual goals in all areas of need.

#### SPEECH AND LANGUAGE AND SOCIAL SKILLS ISSUES

Issue 1(g): Did Palo Alto fail to timely provide an assessment plan in response to Parents requested referrals for assessments including . . . speech and language?

Issue 3(b): Did Palo Alto fail to assess Student in all areas of suspected disability by failing to conduct a speech and language assessment?

47. When Palo Alto's IEP team first decided upon Student's ninth grade program in September 2016, the history before them gave no reason to seek a speech and language assessment, nor any reason to offer Student direct speech and language support. The speech and language pathologist who had assessed him in sixth grade found him he was "generally able to generate socially appropriate responses" in social situations, though he did not always do so. At the end of his eighth grade, Ms. Tempesta, a speech and language pathologist, had examined him and reported that he had "age-appropriate social skills" individually and in groups. The Summit IEP team recommended consultation services only. At the September 2016 meeting Mother did not seek an assessment or direct services.

48. Only by isolating unrepresentative phrases from previous reports can Student now argue that the September 2016 IEP team should have given him direct speech and language support. Ms. Tempesta reported, for example, that Student sometimes misread nonverbal cues and that his use of nonverbal communication was inconsistent. Therefore, Student concludes, there should have been direct services. This argument is unpersuasive since Ms. Tempesta chose only to recommend consultation, which is what the Palo Alto IEP team also chose in September 2016.

49. Ms. Tempesta had also recommended a speech and language assessment in the fall. The evidence did not show why Summit did not send her report or any signed assessment plan in response to Palo Alto's records request. Neither party could find a signed assessment plan for speech and language. In addition, the Summit IEP summarized Ms. Tempesta's report but did not refer to a speech and language assessment, so Palo Alto had no particular reason to seek it out. Student identifies no

law in support of his argument that Palo Alto had an affirmative duty to seek out the report and signed plan from a different educational agency beyond its routine record request. Such a duty arguably exists, but only when a student transfers from one district to another within the same academic year. (20 U.S.C. § 1414(b)(3)(D); Ed. Code, § 56320, subd. (i).) That was not the case here.

50. Student did not prove that in September 2016, Palo Alto was at fault for not having Ms. Tempesta's report or any signed assessment plan. How they got lost was never proved. Palo Alto could probably tell from the Summit IEP that an ERMHS assessment was proposed, but it is not clear from the Summit IEP that a speech and language assessment had been proposed or authorized. Mother did not mention the signed assessment plan or seek the assessment; instead she told Palo Alto she did not want anything in the Summit IEP.

51. When Palo Alto obtained Ms. Tempesta's report sometime that fall, the report gave Palo Alto no reason to change Student's IEP or hurry an assessment. A speech and language assessment was scheduled for the spring triennial review, and the Tempesta report offered no reason to assess earlier.

52. No speech and language professional opined that Ms. Syvertson's assessment was inadequate. Student now argues that it was inadequate because the file she was given did not contain Ms. Tempesta's report or the May 2016 Summit IEP. But Student cannot identify any difference in what Ms. Syvertson might have concluded if she had possessed those documents. They were generally consistent with her report, allowing for Student's growth in the intervening year.

53. Student also argues that Ms. Syvertson, in using a single formal test instrument, violated the IDEA's requirements that she use a variety of assessment techniques and "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate

educational program for the child . . .” (20 U.S.C. § 1414(b)(2)(B).) The argument fails because Ms. Syvertson did not use the TOPS-2 as the sole criterion; she used that test, her informal observations during her conversations with Student, and a review of the files she was given.

54. Student also argues that Ms. Syvertson did not conduct classroom or campus observations on her own. Her duty, however, was to observe Student in “an appropriate setting.” (Ed. Code, § 56327, subd.(c).) Ms. Syvertson observed and tested Student in her office; Student does not claim that setting was not appropriate. Ms. Syvertson also had the benefit of observations made and reported by her co-assessors, Ms. Zawacki and Ms. Dias, in the integrated triennial assessment.

55. Even if Palo Alto had violated any law with respect to Ms. Tempesta’s report, the signed assessment plan, or Ms. Syvertson’s assessment, the violations did not deny Student a FAPE. (See 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) They did not impede Student’s right to a FAPE or deprive him of educational benefits. Nor did they deny Mother essential information; she had the Tempesta report, which was consistent with Ms. Syvertson’s assessment. Had Ms. Syvertson conducted her speech and language assessment in fall 2016, rather than spring 2017, it would have discouraged rather than encouraged an offer of speech and language services. There was no evidence that if Ms. Syvertson had used additional testing tools, her conclusions would have been different.

Issues 1(i) and 2(h): Did Palo Alto fail to provide Student adequate speech and language therapy services?

Issues 1(f) and 2(f): Did Palo Alto fail to provide Student an adequate structured social skills program?

56. No speech and language pathologist recommended direct speech and language services, such as pragmatic language support or social skills training. Instead,

Ms. Alberda and Ms. Syvertson testified that Student did not need them, and Student produced no persuasive evidence to the contrary.

57. As shown in the Factual Findings, evidence about Student's ability to make friends was mixed, but the weight of it showed he was reasonably successful in doing so.

58. Student concedes in his closing brief that he intellectually knows proper social skills, but claims that he cannot use them in real-life situations. That mischaracterizes the evidence, which showed that he sometimes can use those skills in real-life situations, but at other times cannot. The distinction is important, because it means that Student does not require further social skills training; his difficulty lies elsewhere. As established by several witnesses, the intermittent barriers to his more consistent use of social skills are emotional and need to be addressed from that perspective. The preponderance of evidence showed that Student did not need direct speech and language services during the complaint period, in the form of social skills training or any other form.

59. For the reasons above, Student did not prove that Palo Alto denied him a FAPE in either relevant school year by failing to assess him for speech and language difficulties, failing to provide him direct speech and language services, or failing to provide him additional social skills training.

#### ASSISTIVE TECHNOLOGY ISSUES

Issue 1(g): Did Palo Alto fail to timely provide an assistive technology assessment plan in response to Mother's request?

60. A proposed assessment plan must be developed and provided to a parent within 15 calendar days of "referral for assessment." (Ed. Code, §§ 56321, subd. (a); 56043, subd. (a).)

61. Student did not prove that there was ever a referral for an assistive technology assessment. Palo Alto instead chose a local procedure called AT referral,

which was different. Mother did not request an AT assessment at the September 29, 2016 IEP team meeting; she just inquired about available assistive technology. The evidence did not show whether, or how fully, the difference was explained to her at the meeting, but Mother was highly intelligent, well informed, and assisted for years by an advocate. She probably knew the difference, as she had just signed an assessment plan at Summit in May 2016. If she did not understand the difference at the meeting, she learned it quickly when she was involved in the AT referral process.

62. Palo Alto did not fail to timely provide an assistive technology assessment plan in response to a request or referral from Mother.

Issue 3(a): Did Palo Alto fail to assess Student in an area of suspected disability, namely assistive technology?

63. In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assess "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability, such as vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd. (c), (f).) Federal law also requires that the child "is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).)

64. Student did not prove that Student's IEP team should have known, during the complaint period, that assistive technology was an area related to Student's disabilities. The check mark in the September 2016 IEP was explained by Mr. Gadus as just an AT referral. Student does not identify anything in his earlier records that should have alerted the September 2016 IEP team to any need for assistive technology. Student had used a Chromebook successfully in the eighth grade at Summit. Mother requested information on available technology at the September 2016 meeting, but there was no

evidence that she claimed that it was related to his disabilities or essential for addressing them. In May 2017, the IEP team knew from Student's success with technology in the ninth grade, as observed by Mr. Gadus, that he did not need specific AT support, and stated that fact in the IEP Mother signed. Mr. Gadus proposed that Student use a Chromebook Plus pursuant to a new school policy, not in recognition of any disability-related need for it.

65. Even if Palo Alto had violated the IDEA by failing to formally assess Student for assistive technology needs, the alleged failing had no negative effect on Student's education or Mother's participatory rights. (See 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) In his gathering of information, Mr. Gadus learned everything an assessment would have learned, and put it to good use. Mother was involved in the referral process and in the development of Student's technology at every step. Student's assertion that with an assessment his needs, and the appropriate technology, would have been discovered earlier was unsupported by any evidence.

66. Palo Alto did not fail to assess Student in an area of suspected disability, namely, assistive technology.

Issues 1(j) and 2(i): Did Palo Alto fail to provide Student assistive technology services, equipment and software?

67. Through Mr. Gadus, Palo Alto provided Student ample and effective assistive technology services, equipment and software during the complaint period. Student was adept in the ninth grade at using the substantial technology embedded in the school's systems when he was not overly anxious. In his closing brief, the only criticism Student makes of his ninth grade technology experience is that he was given only an "off-the-shelf device." Why this made it inadequate is not explained. The two computers he subsequently used, one adequately and the other quite successfully, were also off-the-shelf.

68. Technology did not eliminate Student's executive functioning difficulties, but it was not a significant barrier to Student's executive functioning when he was not overly anxious. He became disorganized, confused, and unable to use some technology only when his anxiety was elevated. The barriers were emotional, not technological.

69. The decision of the May 2017 IEP team that Student did not need specific AT support was reasonable because it reflected that he was successful in the ninth grade with the embedded technology Palo Alto provided, except when overly anxious. Mr. Gadus' offer at that meeting of a trial period with a Chromebook Plus reflected a new district-wide policy and continued Palo Alto's voluntary extension of significant technology assistance to Student; it did not constitute a statement that Student needed special AT support to access the curriculum. Nothing in the notes of the meeting suggests that the team had decided he had such a need.

70. The technology and services Palo Alto supplied in the 10th grade adequately equipped and trained Student to access and turn in his assignments. Mother's insistence on use of a Windows Surface machine caused complications and delayed the eventually satisfactory solution found after the complaint period. But overall, as Mother's own statements demonstrated, Student was able to obtain his assignments from Schoology and submit them on Google Drive, except when overly anxious. His grades confirmed that ability.

71. The IDEA did not require that the Palo Alto satisfy all of Mother's and Student's additional demands for technological support. What the statute guarantees is an appropriate education, "not one that provides everything that might be thought desirable by loving parents." (*Tucker v. Bay Shore Union Free Sch. Dist.* (2d Cir. 1989) 873 F.2d 563, 567 [citation and internal quotation marks omitted].)

72. Student did not prove that Palo Alto denied him a FAPE by failing to timely provide an assistive technology assessment plan, by failing to assess his assistive

technology needs, or by failing to provide adequate assistive technology services, equipment or software.

## ACCOMMODATIONS ISSUES

Issues 1(b) and 2(b): Did Palo Alto provide Student adequate accommodations?

Issues 1(c) and 2(c): Did Palo Alto fail to implement the accommodations in Student's October 2016 and May 2017 IEP's, or fail to implement Student's May 2017 IEP?

## ADEQUACY OF ACCOMMODATIONS

73. An annual IEP must include a statement of the accommodations, modifications or supports, based on peer-reviewed research to the extent practicable, that will be provided to the student to allow him to advance appropriately toward attaining his annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

74. The sources and development of Student's ever-increasing list of accommodations, the use of justifications in the language of the accommodations, the similarity among some of them (for example, "provide breaks as necessary" and "student permitted to take breaks when feeling overwhelmed and/or anxiety increases"), and their sheer number all suggest that Palo Alto's acceptance of Mother's requests for accommodations was motivated more by a desire to mollify and cooperate with her than by concern that any particular accommodation was actually needed.

75. The only argument Student makes in his closing brief to show that his accommodations were inadequate is that some previous IEP contained accommodations that were omitted, or that someone asked for or recommended accommodations that were omitted. This argument confuses recommendation or acceptance of an

accommodation with a showing of actual need for it. Student makes no reference to any evidence that the omitted accommodations were required to fulfill the statutory purpose, and there was no such evidence. A need for a specific accommodation is not proved simply by evidence that Student had it in his IEP in seventh grade two years previously, or that it was recommended by a charter school in a very different environment the previous spring. Nor is such a need established by proving that Mother asked for the accommodation, or that a single individual on the school staff recommended it.

76. Student did not prove that Palo Alto failed to provide him adequate accommodations.

#### IMPLEMENTATION OF ACCOMMODATIONS

77. A district commits a substantive violation of the IDEA when it departs from a provision of an agreed-upon IEP only when the departure is material. In *Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 826, the Ninth Circuit held that a material failure to deliver related services promised in an IEP is a denial of FAPE when “there is more than a minor discrepancy between the services provided to a disabled child and those required by the child’s IEP.”

78. Of the 11 accommodations in dispute, Student proved that there was partial but not complete implementation of three in his sophomore year: the chunking of information with explicit directions, the five-minute warning of the end of class, and checking in for understanding. There was no evidence about the number of lengthy assignments that were not chunked; Student testified there were not many lengthy assignments, and that some of the lengthy ones were chunked. There was no evidence that absence of a five-minute warning had any effect on Student. He was highly intelligent, had a telephone that told time, and probably knew (as most students do) when a class would end. There was no evidence that there was any consequence of the

failure of any teacher to check in for understanding. Student's grades and teacher testimony showed that his understanding of academic material was excellent.

79. The evidence did not show that Palo Alto's partial failures to fully implement three accommodations were anything but minor and unimportant. Student's claim in his closing brief that inadequacies in implementing accommodations caused him greater anxiety and had a negative impact on his executive functioning skills was unsupported by evidence of any kind.

80. Student proved that some accommodations from his seventh grade and Summit IEP's and from Mother's lists of requests were omitted from his 2016 and 2017 IEP's. But he did not prove that any of the omitted accommodations was needed to allow him to advance appropriately toward attaining his annual goals, to be involved and make progress in the general education curriculum, or to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subd. (a)(4)(B).) Nor did Student prove that Palo Alto's deviations from three of his accommodations constituted a material failure of implementation of his IEP or denied him a FAPE.

#### PRIOR WRITTEN NOTICE ISSUES

Issue 1(l): Did Palo Alto fail in the school year 2016-2017 to provide Mother prior written note in response to her requests for more emotional support for Student and more Student supports in the area of executive functioning?

81. Whenever a district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, it must give parents prior written notice of that decision. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.102(a)(3)(iii); Ed. Code, § 56500.4.) The notice must include (1) a description of the action proposed or refused by the agency; (2) an explanation of why

the agency made the decision; (3) a description of each evaluation procedure, assessment, record, or report on which the decision was based; (4) a reminder of parents' procedural safeguards; (5) sources for assistance; (6) the options considered and the reasons for rejecting the others; and (7) a description of other factors relevant to the decision. (34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b). The notice must be given "a reasonable time before" the district actually changes the student's placement or the provision of a FAPE to the student. (34 C.F.R. § 300.503(a).) This is to ensure that "parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect." (*Letter to Chandler* (OSEP 2012) 59 IDELR 110.)

82. In his closing brief, Student does not identify any particular request Mother made for "more emotional support for Student" in the ninth grade and does not further address that issue. The only "Student supports in the area of executive functioning" he identifies concerns Mother's request for one-on-one assistance. Student argues that Palo Alto should have provided prior written notice with respect to her request for one-to-one teacher assistance for executive functioning, but cannot identify any final decision Palo Alto made or action it took with respect to that request, and therefore cannot identify anything that would have triggered the prior written notice requirement. The request was the principal subject of three lengthy but inconclusive IEP team meetings in September 2017, and was still under consideration at the end of the complaint period. Palo Alto did not fail to provide Mother prior written notice of its decisions in the 2016-2017 school year.

Issue 2(k): Did Palo Alto fail to provide prior written notice in response to Parent's August 29, 2017 letter?

83. Student argues that the Palo Alto violated the IDEA by failing to send Mother a prior written notice concerning the demands in her August 29, 2017 letter. The

argument fails because Student cannot identify any final decision that Palo Alto made with respect to those demands. The agreement by Dr. Sheridan and Mr. Dakopolos to the removal of the words “as arranged with teachers” from one accommodation was tentative and not made on behalf of the entire team; Dr. Sheridan prefaced her agreement by stating that she was not speaking for the entire team. The tentative agreement was never memorialized in a document, which could have served as prior written notice. (*G.D. v. Westmoreland Sch. Dist.* (1st Cir. 1991) 930 F.2d 942, 949.) Prior written notice must be given a reasonable time before the district actually makes the proposed change, and that time had not been determined by October 31, 2017. In any event, no conceivable injury to Mother’s participatory rights could occur because she was the prime mover in the making of the alleged decision and witnessed its acceptance. She did not need a letter describing it.

84. As noted above, Palo Alto held three IEP team meetings in September 2017, and tried to hold another in October, but nothing was finally decided in those meetings. There was no proof Palo Alto ever took or proposed to take any action on the many items in the August 29, 2017 letter, or that it advanced any “propos[al] to initiate or change, or refus[al] to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil.” (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) Student did not prove that Mother was entitled to prior written notice concerning the contents of the August 29, 2017 letter.

#### PREDETERMINATION ISSUES

Issue 1(h): Did Palo Alto predetermine Student’s May 9, 2017 IEP placement and services?

85. 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.)

86. “[T]he informed involvement of parents” is central to the IEP process. (*Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 524 [167 L.Ed.2d 904]). Protection of parental participation is “[a]mong the most important procedural safeguards” in the Act. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

87. Predetermination of an IEP offer violates the above requirements. It occurs when a district has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified Sch. Dist. (I)* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) However, school officials need not come to an IEP meeting with a blank mind; they “can, and should, have given some thought” to placement before the meeting. (*Doyle v. Arlington County School Bd.* (E.D.Va. 1992) 806 F.Supp. 1253, 1262.) They do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693, fn. 3.) District staff may bring a draft of the IEP to the meeting as long as parents are provided an opportunity to discuss their questions, concerns, and recommendations before the IEP is finalized. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

88. In his closing brief, Student conflates the prohibition of predetermination with the legal requirement of parental participation. He argues that since various issues were not, in his view, adequately discussed at the May 2017 IEP team meetings,

“procedural error” occurred, citing *M.S. v. Los Angeles Unified Sch. Dist.* (C.D. Cal., Sept. 12, 2016, No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910. That decision addressed a district’s failure to discuss a residential placement at an IEP team meeting; it had nothing to do with predetermination.

89. In addition, Student again confuses a single aspect of an IEP with a “placement,” arguing that Mother’s suggestion at the triennial review of one-to-one executive functioning assistance constituted a placement that the team did not discuss. It was not a placement (see 5 C.C.R. § 3043, subd. (a)); it was a single idea among hundreds discussed over approximately six hours of meetings. The notes of the meetings do not purport to capture all that was discussed during those meetings, and the fact that the notes do not reflect a discussion of Mother’s one-to-one executive functioning proposal does not establish that it was not discussed or considered. (5 C.C.R. § 3043, subd. (a).)

90. A predetermination claim – which is the claim Student makes – instead requires proof that a district decided upon its offer before the meeting and arrived with a “take it or leave it” attitude. (*JG v. Douglas County Sch. Dist. supra*, 552 F.3d at p. 801, fn. 10.) There was no proof Palo Alto did so. The authors of the triennial assessment reports made recommendations, but that is required by law. (Ed. Code, § 56327.) Palo Alto arrived at the meeting with a draft IEP, but that does not indicate predetermination. (*Fuhrmann v. East Hanover Bd. of Educ., supra*, 993 F.2d at p. 1036.) The only other preparation done before the triennial review that appears in the record was a meeting in Ms. Zawacki’s office among Ms. Bricca, Ms. Zawacki and Mother in which they reviewed Mother’s emailed requests for accommodations and other matters, and decided which they agreed with. The evidence did not make clear whether Ms. Zawacki’s starred list of acceptable accommodations represented Palo Alto’s official view, nor did it indicate why some of the starred accommodations were not included in the final document. In any

event, nothing about that meeting suggests predetermination; the discussion was carried on into the official May 30, 2017 IEP team meeting.

91. In addition, over three long meetings the May 2017 IEP team made several changes in the proposed IEP as the result of Mother's participation. It adopted several accommodations Mother wanted. The team at first proposed that Student attend two Cognitive Planning classes, but on Mother's insistence reduced the offer to one Cognitive Planning class. The evidence showed that the offer evolved at the meeting and was not fixed in advance. Student did not show that Palo Alto's offer of May 9, 2017 was predetermined.

Issue 2(g): Did Palo Alto predetermine Student's September 11, 14 and 26, 2017 IEP's?

92. Nor was anything predetermined in advance of the three IEP team meetings in September 2017. Some of the issues raised in Mother's August 29, 2017 letter requesting changes in Student's IEP were discussed at length in the three IEP team meetings in September 2017, but no written IEP offer resulted from those meetings. Student's contention that "his September 11, 14, and 26, 2017 IEP's" were predetermined has no factual basis because there were no such IEP's. The evidence showed that nothing was finally decided at those meetings; instead, the many issues raised by Mother's letter were postponed until after the receipt of Dr. Pratt's assessment report, well past the complaint period. Since nothing was determined at those meetings, nothing could have been predetermined.

## ORDER

Student's requests 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. Palo Alto prevailed on all issues heard.

## 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: May 14, 2018

\_\_\_\_\_/s/\_\_\_\_\_  
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CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings