

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2018030762

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT,

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SAN DIEGO UNIFIED SCHOOL DISTRICT,

OAH Case No. 2018041298

v.

PARENT ON BEHALF OF STUDENT.

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DECISION

Student filed a second amended due process hearing request with the Office of Administrative Hearings, State of California, on June 29, 2018, naming San Diego Unified School District.<sup>1</sup>

Administrative Law Judge Ted Mann heard this matter in San Diego, California, on August 23, 28, 29, and 30, 2018.

Patricia Lewis, Attorney at Law, appeared on behalf of Student. Student's mother attended each day of the hearing. Student attended the first two days of the hearing.

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

Jonathan A. Read and Natalie Garnica, Attorneys at Law, represented San Diego. San Diego's Program Manager for Due Process, Jennifer Parks-Orozco attended each day of the hearing on behalf of San Diego.

At the request of the parties, OAH continued this matter for written closing arguments. The record was closed on September 21, 2018, upon receipt of written closing arguments.

## ISSUES<sup>2</sup>

### STUDENT'S ISSUES

1. Did San Diego deny Student a free appropriate public education from January 26, 2018, to June 29, 2018, by failing to implement a March 24, 2017 individualized educational program, Student's last agreed-upon IEP, by failing to:
  - a. Provide IEP accommodations;
  - b. Use assistive technology;
  - c. Follow Student's health plan regarding bathroom use?
2. Did San Diego deny Student a FAPE in the February 28, 2018 IEP by failing to:
  - a. Find Student eligible for special education on the basis of a specific learning disability;
  - b. Offer Student appropriate accommodations;
  - c. Offer Student appropriate goals;

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<sup>2</sup> At the hearing, the ALJ reviewed the hearing issues with the parties, re-identified the issues for hearing, and, finally, re-framed the issues for hearing based upon Student's second amended complaint. Student withdrew any issues stated in Student's complaint other than the issues stated in this Decision.

- d. Offer Student speech and language services;
- e. Offer Student occupational therapy services;
- f. Provide accommodations for bathroom use in his health plan; and
- g. Address bullying related to Student's participation in water polo?

3. Did San Diego deny Student a FAPE at the May 3, 2018 IEP team meeting by failing to review and consider Dr. Spencer Wetter's 2018 assessment report?

4. Did San Diego deny Student a FAPE at the May 3, 2018 IEP team meeting by failing to allow participation at the meeting by either Dr. Wetter or Student's friend?

### SAN DIEGO'S ISSUE

1. Did San Diego offer Student a FAPE in the IEP completed on February 28, 2018, such that San Diego may implement the IEP without parental consent?

### SUMMARY OF DECISION

Student contends that San Diego denied him a FAPE by failing to implement the accommodations, assistive technology, and health plan from the March 24, 2017 IEP. San Diego contends that the accommodations, assistive technology, and health plan from the March 24, 2017 IEP were implemented. This Decision finds that San Diego materially implemented the accommodations, assistive technology, and health plan at issue.

Student also contends that San Diego denied him a FAPE in multiple ways in the February 28, 2018 IEP. San Diego contends that the February 28, 2018 IEP provided Student with an offer of FAPE in the least restrictive environment, and that it should be allowed to implement the IEP. This Decision finds that Student did not meet his burden of proving that San Diego failed to offer a FAPE to Student, but rather, San Diego met its burden of establishing that its February 28, 2018 IEP offer met the legal procedural and substantive requirements and that San Diego may implement the February 28, 2018 IEP

without parental consent if Student attends a San Diego school during the 2018-2019 school year.

Lastly, Student contends that San Diego committed procedural FAPE violations by either not allowing attendance by Student's invitees at the May 3, 2018 IEP meeting, or by failing to consider or allow the presentation of an independent educational evaluation of Student at that meeting. San Diego contends that it did not bar the attendance of Student's invitees, nor did it prevent the presentation of the report. This Decision finds that Student did not meet his burden of proving San Diego committed the claimed procedural violations with regard to the May 3, 2018 IEP meeting.

## FACTUAL FINDINGS

1. At the time of the hearing, Student was a 15-year-old boy eligible for special education under the primary category of other health impairment arising from his attention deficit hyperactivity disorder and severe eczema. Student resided within San Diego's boundaries at all relevant times.

### EDUCATIONAL HISTORY

2. Student attended La Jolla Elementary from kindergarten through fifth grade. In second grade, San Diego identified Student eligible for the Gifted and Talented Education Cluster, as he scored in the 99th percentile on the February 22, 2011 GATE test administration. Student was also assessed for special education in February of 2011, and was initially placed in special education on April 23, 2012. Student attended Muirlands Middle School from sixth through eighth grade. Student attended general education classes at La Jolla High School for the 2017-2018 school year, and completed ninth grade. In ninth grade, he had a grade point average of 2.83, and a good attendance record.

## AUDITORY PROCESSING ASSESSMENT – NOVEMBER 5, 2014

3. An auditory processing assessment of Student was conducted at Scripps Audiology on November 5, 2014, and documented in a report by Kathleen Bulley, AuD. Student had been referred for assessment by Victor Lipp, M.D. The assessor found that Student had normal frequency discrimination, ordering, and patterning, with temporal resolution in the normal range. Overall, Student was broadly within the normal range with binaural integration tasks in the low normal to borderline normal range, and slightly below normal on the labeling portion of the frequency patterns test. The assessor indicated that the concerns might improve with time and maturation, and that Parent should consider a re-evaluation of Student's binaural integration in a year to monitor for improvement.

## WETTER 2016 ASSESSMENT

4. Dr. Spencer Wetter conducted an independent neuropsychological evaluation of Student and prepared a report of his findings. Dr. Wetter held a PhD in clinical psychology with a specialty in neuropsychology, and had been licensed by the State of California as a psychologist since 2003. He maintained a private clinical practice at the time he assessed and diagnosed Student in 2016. He assessed Student over two days in November of 2016, and documented his findings in the report. Dr. Wetter previously assessed Student in the second grade.

5. The assessment included neuropsychological testing of Student; interview and observations of Student; interview with Mother; Parent rating scales; and a review of records. Dr. Wetter did not interview any of Student's teachers, undertake any classroom observations of Student, nor review Student's IEPs. Neuropsychological testing instruments included: Comprehensive Test of Phonological Processing-2; Wide Range Assessment of Memory and Learning-2; Rey Complex Figure Test; Delis-Kaplan

Executive Function System; Test of Written Language-3; Test of Mathematical Abilities-2; and the Brown Attention Deficit Disorder Scales.

6. Dr. Wetter reported Student to have been previously diagnosed with attention deficit hyperactivity disorder and to have an IEP at school. He reported Student to have difficulty in reading, writing, and especially math, as well as performing below peers on standardized testing in math and English, despite previously qualifying as a GATE student. Dr. Wetter did not consult with any of Student's teachers, nor did he observe Student in a classroom environment.

7. On the test of phonological processing, Student scored above average in both phonological processing and phonological memory with standardized scores of 113 (with 100 being average or 50th percentile) in the 81st percentile. He scored a 98 in the 45th percentile in rapid naming. Overall, Student was average or above average on this assessment tool.

8. On the wide range assessment, Student scored in the 25th percentile in story memory and design memory. On the Rey complex figure, Student was below the 1st percentile in copy, but performed better on immediate recall (18th percentile), delayed recall (7th percentile), and recognition (79th percentile).

9. On the Delis-Kaplan test, Student scored in the 50th percentile in number-letter switching, 25th percentile in inhibition, 50th percentile in inhibition/switching, 16th percentile in letter fluency, 50th percentile in category fluency, and 50th percentile in design fluency. With the exception of letter fluency, Student's scores were all in the average range on this assessment tool.

10. On the test of written language, Student scored in the 9th percentile in contextual conventions, 84th percentile in contextual language, and 50th percentile in story construction. On the test of mathematical abilities, Student scored in the 16th percentile in computation, and the 37th percentile in story problems.

11. On the Attention Deficit Disorder scales completed by Mother, Student scored above the 99th percentile in attention, effort, and memory, the 98th percentile in activation, and the 70th percentile in affect. His overall score on the scales was in the above 99th percentile. Student's high scores on this assessment contributed to Dr. Wetter's ADHD diagnosis of Student.

12. Based upon his testing, discussions with Mother and Student, and record review, Dr. Wetter diagnosed Student with ADHD, Predominately Inattentive Type and with a Specific Learning Disorder with Impairment in Written Expression, which he described as dysgraphia, based upon criteria in the Diagnostic and Statistical Manual, a handbook used by clinicians and psychiatrists to clinically diagnose mental disorders. He diagnosed dysgraphia in Student based upon Student's laborious, erratic, and inconsistent handwriting, and noted that legibility can often be an issue in dysgraphia. He also noted that Student had deficits in math computation that put him "at risk" for dyscalculia. Dr. Wetter relied on Student's very low initial score on the Rey complex figure and a low score on the Delis-Kaplan letter fluency sub-test to conclude that Student had an issue with approaching complex problems and organizing, but did not consider the issue of dyslexia at that time. Based upon his diagnoses, Dr. Wetter recommended a series of accommodations for Student, along with a program of educational therapy and critical thinking strategies.

#### MARCH 24, 2017 IEP

13. San Diego held Student's annual IEP team meeting on March 24, 2017. In addition to general education placement with related services, the IEP offer included a special factors analysis and accompanying accommodations and assistive technology requirements for Student.

14. The IEP offered 20 accommodations for Student, including:

- 1) Seating facing the teacher and next to a responsible peer;

- 2) If requested by Student, he could take math tests in a small group setting;
- 3) Student had increased physical response time up to 30 seconds to allow him to respond in class;
- 4) Student had increased verbal response time to allow time to organize and plan out thoughts before speaking, i.e. additional wait time, asking question and returning later for a response, or giving notice of question ahead of time;
- 5) If possible have Student's core academic classes before lunch;
- 6) Utilize language scaffolds, including recasting, graphic organizers, and comprehension checks;
- 7) Utilize visual/picture supports, including graphic organizers and models when appropriate;
- 8) Note-taking assistance to provide Student with class notes if Student was unable to copy down the notes in class, and provided he had made an attempt to take notes himself;
- 9) Study sheets would be provided in all academic areas when available, and if Student had an incomplete guide, he would be provided a complete copy before the test;
- 10) Access to digital texts for text to speech feature along with highlighting/extracting tool;
- 11) Assignment notebook verbal prompt given to Student to record assignments in his planner and option for Student to request initial from teacher to verify accurate assignment notes;
- 12) Student would have access to a calculator for science and math as long as it did not modify the standard being taught;
- 13) Student would have access to means to repeat, review, and drill, such as the "Learning Upgrade" online math program used to practice math skills'



- 14) Provide instructions in both visual and verbal formats whenever possible and when not possible use verbal checks for understanding by having Student paraphrase instructions to staff member or peer;
- 15) Student had extended time for completing tests, not to exceed 1.5 times the time provided to the general education class, and extended time could be provided in a separate environment, after school, or at lunch to minimize interruption to ongoing instruction;
- 16) Student had extended time for completing assignments provided Student requested extended time prior to actual due date, along with evidence he had attempted the assignment with amount of extended time based on consultation between Student and teacher;
- 17) Student would have access to a word processor with speech to text feature for longer writing assignments;
- 18) Praise and positive communication with home, including calls/emails as well as written notes in planner;
- 19) Teachers would allow Student movement breaks both inside and outside the classroom, and Student could stand in the back of the classroom as long as it did not disrupt other students;
- 20) When needed, visual checklists would be provided to assist Student in understanding what was expected of him for task initiation and completion.

15. The IEP also stated that Student required assistive technology devices and services to meet educational goals and objectives. The IEP indicated that: "[Student] benefits from having access to digital text for read aloud feature as well as access to highlighting tools. He also requires access to a word processor specifically for longer assignments with the speech to text feature." Parent did not consent to the IEP.

#### LINDAMOOD BELL ASSESSMENT – APRIL 7, 2017

16. Lindamood Bell, a private agency providing academic interventions, conducted a "Learning Ability Evaluation" of Student on April 7, 2017. The results and recommendations were reported by the Lindamood Bell Center Director, Katerina Violante. The report did not provide any explanation of the rationale or use of the assessment tools or an analysis or explanation of the results beyond raw and standard scores, percentiles, mental age equivalents and grade equivalents. The basis or validity for the age and grade equivalents was not provided. The vast majority of the reported results were between the 25th and 75th percentiles, which are the percentile range typically considered the average range. The report recommended that Student take the Lindamood Bell program entitled "Visualizing and Verbalizing for Language Comprehension and Thinking". No individualized recommendations were provided.

#### SETTLEMENT AGREEMENT - APRIL 13, 2017

17. Student and San Diego entered into a settlement agreement on April 13, 2017. As part of the settlement, Mother agreed that the March 24, 2017 IEP could be implemented, and that the March 24, 2017 IEP would constitute stay put in the event Parent did not agree with San Diego's offer for Student in his upcoming IEP.

#### REMEDIATION SUMMARY – SEPTEMBER 21, 2017

18. Bonnie Weiss, M.Ed., the director and owner of The Family & Learning Center drafted a remediation summary for Student, dated September 21, 2017. She reported that Student had undertaken a program over the summer at the Family & Learning Center to develop skills in math, writing, study skills, and executive functions. She referenced the 2016 report from Dr. Wetter as the basis for the remedial program.

## TRIENNIAL ASSESSMENTS

19. San Diego conducted triennial assessments ahead of Student's 2018 triennial IEP team meeting. The multi-disciplinary assessment team was led by school psychologist Letitia Henson, Phd. Dr. Henson received a Bachelor of Arts degree in psychology, a Master of Arts degree, and a PhD in school psychology. She held a pupil personnel services credential as a school psychologist and she has taught at the college level since approximately 2000.

20 Dr. Henson worked as a school psychologist for San Diego since 2001. She regularly conducted psychoeducational and triennial assessments of students. She also provides consultative support and interventions for students. She was assigned to La Jolla High School for the 2017-2018 school year, and was familiar with Student.

21. The assessment of Student utilized the following components: Review of available records, including previous special education assessments and all of Student's privately obtained assessments, including: Auditory Processing Assessment (11/05/14 – Kathleen Bulley, AuD - Scripps Audiology Department); Neuropsychological Evaluation (11/09/16 and 11/16/16 – Spencer Wetter, Phd – Applied Neuropsychology Institute); Learning Ability Evaluation Summary (4/07/17 – Katrina Violante – Lindamood Bell); Remediation Summary (9/21/17 – Bonnie Weiss, M.Ed. – The Family and Learning Center); standardized assessments in psychoeducation, academic achievement, speech/language, occupational therapy, health, and assistive technology; and Parent input.

## PSYCHOEDUCATIONAL ASSESSMENT

22. Dr. Henson reviewed San Diego's triennial evaluation of Student, dated January 14, 2015. Student was then a sixth grade student at Muirlands Middle School. On the Kaufmann Assessment Battery for Children, Second Edition, measuring cognitive

ability, Student obtained average scores ranging from standard scores of 103 to 112, which represented the 58th to 79th percentile. On the Woodcock-Johnson assessment of academic achievement, Student obtained average scores, including a total reading score of 102, a total math score of 101, a total written language score of 99, and an average oral language skill. On the Comprehensive Test of Phonological Processing, Student obtained a standard score of 85 in rapid symbolic naming which represented the 15th percentile.

23. Dr. Henson also observed Student. Student was polite and well-mannered during the standardized assessments. He was cooperative and able to build rapport with the assessor. Assessments were divided among several days on December 14, 2017, December 15, 2017, and January 5, 2018. Student's attention level varied throughout the assessments, and there were instances where Student appeared to be distracted.

24. The Wechsler Intelligence Scale is an individually administered, comprehensive clinical instrument for assessing the intelligence of children from six through 16 years of age. On the Wechsler, Student had a full-scale score of 104, which was the 61st percentile, and in the "average" range. He scored in the "high average" ranges in visual spatial (111) and working memory (115), and average scores in verbal comprehension (100) and fluid reasoning (109). In processing speed, he had a score of 92, which was the 30th percentile and the "average" range. Although still in the average range, Student's Processing Speed index score indicated that he had a relative weakness in this area as opposed to other areas of the test where he scored higher.

25. The Test of Auditory Processing Skills measured a child's functioning in various areas of auditory processing that might pertain to the cognitive and communicative aspects of language. Student's overall auditory processing skills were within the average range, with a standard score of 93 in the 32nd percentile. His phonologic skills were within the average range, with a standard score of 97, and his

auditory short-term memory skills were also in the average range with a standard score of 91. Student's auditory cohesion ability was in the average range, with a standard score of 90, and a percentile rank of 25.

26. The Beery Test of Visual Motor Integration required Student to look at and copy geometric designs of increasing difficulty. He obtained a standard score of 91, with a percentile rank of 27, placing him in the average range.

27. The Behavior Assessment System for Children, Second Edition, is an integrated system, based upon teacher and parent rating scales, designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders of children. The "at-risk" classification is used to indicate potential or developing problems that may need to be monitored carefully. Scores in the "clinically significant" range denote a high level of maladaptive behavior or absence of adaptive behavior. The test is based on rating scales completed by various people familiar with the subject. Dr. Henson received completed scales from teachers David James, James Essex, and Elnaz Khodaei, but did not receive a completed scale from Mother. Mr. James rated Student "at risk" for attention problems, social skills, and school problems, and Mr. Essex rated Student "at risk" for atypicality and social skills. Mr. Khodaei rated Student "clinically significant" in withdrawal and atypicality, and "at risk" in a majority of other areas.

28. Dr. Henson concluded that Student appeared to meet the criteria for eligibility under other health impairment based upon his diagnoses of ADHD and chronic eczema, but left the final decision to the IEP team. She also evaluated Student's eligibility for special education under the eligibility category of specific learning disability. She concluded that Student did not meet the criteria for specific learning disability, as he did not demonstrate a significant discrepancy between his ability and achievement. Similarly, she reported that Student did not meet the eligibility criteria for

a speech language impairment or require occupational therapy services to meet his educational needs.

#### ACADEMIC PERFORMANCE ASSESSMENT

29. Education specialist Janet Myles performed the academic assessment of Student. She was Student's special education case carrier for the 2017-2018 school year and was familiar with Student's academic performance. She administered the Woodcock-Johnson test of academic achievement. Student obtained scores in the average and high average range across the various subtests of the assessment, consistent with his previous scores from the 2015 triennial assessment, and also consistent with his cognitive abilities. Ms. Myles identified solving multi-step math problems involving polynomials, and organizing and prewriting to produce strong multi-paragraph essays as Student's areas of need.

#### SPEECH/LANGUAGE ASSESSMENT

30. Speech/language pathologist Andrea Richerson assessed Student for evidence of a speech/language impairment as part of the triennial assessment. She held a Bachelor of Arts degree in Speech-Language and Hearing Sciences, and a Master of Science in Communication Disorders and Sciences in 2016. She was licensed in California as a speech/language pathologist, and held a clear credential in speech/language pathology. She also had a Certificate of Clinical Competence from the American Speech-Language-Hearing Association.

31. Ms. Richerson utilized the following sources of information in performing her assessment: Student interview, teacher questionnaires, classroom observation of Student, and administration of two standardized assessments, the Comprehensive Assessment of Spoken Language and the Systematic Analysis of Language Transcript.

32. Ms. Richerson interviewed Student who professed a plan to attend college and become a civil engineer because he liked building and designing things. He stated that his favorite subject was English and his most difficult class was Spanish. He felt he had strengths in vocabulary and talking, and prior assistance in learning to speak clearly had helped.

33. Ms. Richerson also received completed teacher questionnaires. Mr. Essex, Student's English teacher, returned the questionnaire on September 26, 2017. Mr. Essex noted that Student was performing at grade level in reading decoding, written expression, large group participation, small group participation, asking for help in class, organizational skills in class. He stated that Student was also able to follow classroom instructions with an occasional reminder, and he benefited from ensuring engagement prior to beginning a task. Student also used appropriate grammar and vocabulary, and was able to participate in classroom discussions. Ms. Benito, Student's Spanish teacher, reported that Student was working at grade level in his ability to ask for help, and that he was able to follow classroom instructions, and was a visual and a verbal learner. She noted that Student took longer than average to complete assignments.

34. Ms. Richerson observed Student in his Spanish class on September 18, 2017. She observed him transitioning properly into class and participating appropriately in class, including asking and answering questions, and being easily redirected. She noted Student's strengths as being social, paying attention to the teacher, taking notes, and asking for clarification. When compared to two randomly chosen peers on his ability to ask and answer questions, as well as maintain attention to task in three-minute intervals over a 15-minute period, Ms. Richerson found Student functioned similarly to his peers.

35. Ms. Richerson administered the Comprehensive Assessment of Spoken Language in order to measure Student's oral language skills across three different areas:

lexical/semantic, measuring knowledge and use of words and word combinations; syntactic, measuring knowledge and use of grammar, and supralinguistic, measuring knowledge and use of language not directly available from surface level information. Student was tested over four different sessions. Student's performance fell within the average range with 12 standard subtest scores ranging from 92 to 113 and from the 30th percentile to the 81st percentile. The only below average subtest score was in idioms where Student had a standard score of 82 in the 12th percentile, indicating a relative weakness. Student's general language index, receptive language index, expressive language index, lexical/semantic index, syntactic index, and supralinguistic index were all in the average range from the 34th percentile to the 61st percentile.

36. Ms. Richerson also assessed Student using the Systematic Analysis of Language Transcript assessment. The assessment follows a structured program to have a student construct an oral argument, and the results are compared to 17 other student samples. Student was 100 percent intelligible and obtained a score of 22 out of 30, placing him 0.21 standard deviations below the mean, or within the average range.

37. Ms. Richerson concluded Student's use of communication in his educational setting did not require specialized support.

## OCCUPATIONAL THERAPY

38. Occupational therapist Brigitte Prud'homme assessed Student in the area of occupational therapy. She held a Bachelor of Arts degree and was licensed in California as an occupational therapist. She has an extensive and accomplished work history in her field.

39. Ms. Prud'homme utilized the following sources of information in performing her assessment: Record review; vision efficiency screening, Student interview; teacher interview; classroom observation of Student; and administration of assessments, including the Sensory Profile Adolescent/Adult Self-Questionnaire, the



Developmental Test of Visual Perception-A, portions of the Evaluation Tool of Children's Handwriting, and the Piaget Right Left Awareness Test.

40. Ms. Prud'homme administered the test of visual perception to Student in order to assess his overall visual perceptual and visual-motor abilities. The test is designed to assess visual perception with and without motor involvement, and is divided into three categories: motor-reduced visual perception, visual-motor integration, and general visual perception. Student was average or above average in five of six subtests, and below average in one, visual motor search, scoring in the 9th percentile on that subtest. On the tests index scores, Student scored average or above average. The Ms. Prud'homme concluded that Student had adequate visual perceptual skills with some minor concerns about executive functioning.

41. Ms. Prud'homme looked at three broad areas of Student's functioning in assessing Student's potential occupational therapy eligibility and needs: motor skills and sensory motor development, including physical education access, classroom and campus navigation, postural skills for educational activities, classroom tool use, technology accessibility, and written expression; social/emotional behavior skills, including social participation in school environments and emotional regulation for school participation; and adaptive skills and self -help, including school activities of daily living, instrumental activities of daily living, and task organization.

42. Ms. Prud'homme found that Student was polite, cooperative, motivated, and open to suggestions from adults. He was broadly average in perceptual skills, with good typing skills and legible writing. He demonstrated good overall fine motor skills, and was able to self-regulate throughout the school day, and to independently use school items as fidgets in an appropriate way to support his learning in class. Ms. Prud'homme found that Student would benefit from improving his skills and independence in the areas of organization/planning and self-advocacy, but that those

areas of need could be supported in the general education classroom without the intervention of an occupational therapist.

#### ASSISTIVE TECHNOLOGY

43. A San Diego district provider, Chesney Ballantyne, assessed Student for potential assistive technology needs. She held a Bachelor of Arts degree in Psychology and a Master of Arts in Communicative Disorders. She also obtained a certificate in Advanced Professional Development for Assistive Technology Applications. Since 2012, she has been licensed in California as a speech/language pathologist, and has held a Certificate of Clinical Competence from the American Speech-Language-Hearing Association. She had worked with San Diego since 2015 as an assistive technology provider.

44. In conducting her assistive technology evaluation of Student, Ms. Ballantyne reviewed Student's history of assistive technology use with San Diego, interviewed Student, identified Student's needs from his reported present levels of performance, and then undertook skills assessments and technology feature matching.

45. Student reported that he took notes in class and was able to listen to his teachers while writing down information. He also reported that his notes are useful to him and he could refer to them and understand them. Student also reported that he used a paper planner to keep track of his assignments and due dates. Student further reported using Bookshare, an online source for digital books, to access digital books and text to speech features at home. Student had access to Chromebooks in his classes at school, and was able to use Google Docs to complete assignments at home and school.

46. Ms. Ballantyne assessed Student's motor skills for handwriting by having him copy a short passage. His handwriting was legible, but he averaged 11.6 words per minute compared to the expected 24 words per minute expected of ninth graders,

placing him in the below average range. When composing material, as opposed to copying it, Student was able to achieve 23.6 words per minute, placing him right at the 24 words per minute expected. When copying on a computer word processor from dictation, Student typed 35.2 words per minute, with the eighth grade expectation being 13-18 words per minute, and adult expectation 35-50 words per minute, placing him well ahead of his peers. When composing on a computer word processor, Student typed 45 words per minute, with the eighth grade expectation of 13-18 words per minute, and adult expectation 35-50 words per minute, placing him well ahead of his peers. When attempting to use the word prediction software, Student found that it got in his way more than it helped him.

47. Ms. Ballantyne recommended assistive technology to support Student in producing his written language production objective. She recommended the following features: word processing, graphic organizers/digital writing templates, note extraction via digital highlighting, notes provided on a digital platform, a camera to capture classroom information, and a personal organization system. She also noted that Student had reported benefits from accessing texts with text to speech features.

48. San Diego assessed Student in all areas related to his suspected disability using a variety of assessment tools and measures. Tests and other assessment materials were administered by trained personnel in conformance with instructions. The assessors and other reporters were knowledgeable of Student's disability and competent to perform the assessment or provide input. Assessment materials were validated for the specific purpose for which they were used, and were selected and administered so as not to be racially, culturally, or sexually discriminatory. The assessments were provided and administered in Student's primary language, English.

49. Input was obtained from special education and general education teachers, Student's mother, outside providers, and trained San Diego personnel. Student

and his mother were interviewed by San Diego's assessors. Relevant functional, developmental, academic, and medical information was obtained for Student. Environmental factors were considered and eliminated as a basis for assessment bias. During assessment Student put forth an appropriate effort to complete the testing, and Student was not observed to be anxious or non-compliant. The data obtained accurately represented Student's abilities and capabilities. San Diego obtained sufficient, valid and reliable data, and did not rely on any single measure.

#### FEBRUARY 28, 2018 - TRIENNIAL IEP

50. San Diego held IEP team meetings for Student on January 10, 2018, January 31, 2018, February 14, 2018, and February 28, 2018, collectively comprising the triennial IEP for Student and resulting in an IEP offer to Student, dated February 28, 2018. The February 28, 2018 IEP meeting was attended by the following individuals: Mother; Chuck Podhorsky, La Jolla High School Principal; Elnaz Khodaei, San Diego general education teacher; Janet Myles, San Diego special education teacher; Letitia Henson, San Diego school psychologist; Kori King, San Diego school nurse; Xose Pascua, San Diego general education teacher; and Cindy Ueckert, La Jolla High School vice principal. The other IEP team meetings were attended by all necessary participants, many of whom attended the February 28, 2018 IEP team meeting, including the assessors who completed San Diego's multidisciplinary triennial report.

51. Mother was offered a copy of procedural safeguards and had no questions regarding parent rights. Mother was informed of Student's problems, attended the four IEP meetings, expressed disagreement regarding the IEP team's conclusions, and requested revisions in the IEP. The IEP team discussed Mother's concerns, including: the adequacy of Student's supports and the possible impact on his emotional well-being; Mother's disagreement with supporting remediation with current goals; Mother's request that Student's goals include a "C" or better on all tests, quizzes, homework, and

class assignments; Mother's request that Student be emailed all assignments; Mother's written request for accommodations for Student; and Mother's request that transition planning be skipped in the IEP.

52. The IEP team discussed Student's academic achievement, assessment results, present levels of performance, and health information leading to the creation of eight written proposed goals in English language arts, mathematics, and social/emotional/behavior. The proposed goals included baseline data, and measurable one-year goals. Each annual goal was to be completed by January 9, 2019, at the time of the next scheduled IEP, and Mother was to receive periodic progress reports every six weeks on Student's progress on the goals.

53. Student's first goal was in the area of English language arts, and was predicated on Student's need to identify evidence from a text that supports the author's ideas and thesis. The goal focused on Student's continued progress in written expression and writing an effective essay. The goal provided that Student would, given a grade level text, identify a main idea and provide strong supporting details as textual evidence with 95 percent accuracy in four of five trials as measured by Student's work samples.

54. Student's second goal was in the area of English language arts, and was predicated on Student's analysis of the development of complex characters over the course of a text and their interaction with other characters, along with their influence on the plot. The goal focused on Student's continued progress in written analysis and expression. The goal provided that Student, when given a grade level text and multiple stage drafting, would analyze the arguments/positions presented by the protagonist/author over four trials as measured by the production of writing and/or oral presentations at grade level proficiency by teacher created rubric.

55. Student's third goal was in the area of English language arts, and was predicated on Student's writing of appropriate to task paragraphs and multi-paragraph essays. The goal focused on Student's continued progress in written expression. The goal provided that Student, when given a grade level writing prompt, access to a word processor, and a graphic organizers/digital writing templates, would produce a clear and cohesive analysis essay by planning, revising, and editing with 95 percent accuracy in four of five trials as measured by teacher created rubric.

56. Student's fourth goal was in the area of English language arts, and was predicated on Student's drafting of a multi-paragraph essay with structure appropriate to task length and format, and inclusive of good textual evidence. The goal focused on Student's continued progress in written expression, and organization of writing and writing process. The goal provided that Student, when given a grade level assignment in any content area, would self-edit his work to correct spelling, punctuation, capitalization, and grammar errors with 90 percent accuracy over five trials as measured by Student's work sample and teacher scoring.

57. Student's fifth goal was in the area of mathematics, and was predicated on Student's continuing need for practice with arithmetic operations on polynomials. The goal focused on Student's continued progress in solving multi-step, polynomial equations and performing math operations, so as to improve on 80 percent accuracy. The goal provided that Student, when given an additional set of 10 grade level math problems, would use a variety of operations (e.g. addition, subtraction, multiplication, division) to solve them in three of four trials with 95 percent accuracy as measured by Student work samples.

58. Student's sixth goal was in the area of mathematics, and was predicated on Student's need to be able to address current content standards in his math class. The goal focused on Student's progress in interpreting expressions for functions in terms of

the situation they model. The goal provided that Student, when given staff instructions, topic, verbal/written prompt, worksheet/set of problems, guidance/staff support, would interpret and solve expressions for functions in a linear or exponential function with 90 percent accuracy over three trials as measured by Student's work samples.

59. Student's seventh goal was in the area of social/emotional/behavior skills, and was predicated on his need to improve accuracy and completeness of key details when writing assignments in his planner. The goal focused on Student's progress in documenting his assignments in his planner fully and completely. The goal provided that, when given organizational tools, Student would improve organizational skills for classroom work and homework through specific, repetitive instruction with 90 percent accuracy over two full, consecutive semesters as measured by teacher-kept data.

60. Student's eighth goal was in the area of social/emotional/behavior skills, and was predicated on his need to improve frequency of requesting assistance from teachers and staff. The goal focused on Student's progress in self-advocating and asking for help in class. The goal provided that Student, when unsure of the expectations in class, with checks for understanding from the teacher, would ask for help and/or clarification, either verbal or non-verbal, from staff during/after class on four of five opportunities as measured through observation and data collection from the IEP team.

61. The IEP team discussed placement, services, accommodations, and supports, and discussed a continuum of service options for Student, taking into account Student's unique needs. The IEP team proposed specialized academic instruction in a regular classroom utilizing a collaborative model for 15 hours per week, and specialized academic instruction in a separate classroom or other public school site for five hours per week. Student would have 1800 minutes of instructional time per week, with 300 minutes (or 17 percent) outside the general education classroom. The IEP also included a behavior intervention plan designed to assist Student with off-task behaviors and

difficulty with organization and planning. The IEP did not address bullying, nor was the topic raised by Parents at any of the four IEP meetings.

62. The IEP team proposed specific accommodations and supports tailored to Student's unique needs including: note-taking assistance; access to digital text for text to speech; assignment notebook prompt; access to a calculator; repeated review/drill; allowed to photograph board for assignments; signal for redirection; extended time on tests, up to one and a half times; access to study sheets; additional time to complete assignments; movement breaks; school planner to track assignments and due dates; additional time to organize and plan out thoughts; and appropriate use of fidgets.

63. Student's special factors included assistive technology to support Student in the classroom and to meet his educational goals and objectives. Based upon the assistive technology assessment undertaken by Chesney Ballantyne, San Diego offered assistive technology to support Student's written language objectives, including: word processing (with spelling and grammar check); graphic organizers and digital writing templates; note extraction via digital technology; notes provided on a digital platform for annotation; camera to capture classroom information (e.g. notes, assignments); and a personal organization system (e.g. digital calendar). It was also noted that although decoding and comprehension were not an area of stated need in the IEP, Student had reported that he benefited from accessing digital texts with text to speech features.

64. The February 28, 2018 IEP included an individualized school healthcare plan for Student. The plan provided physician contact information, emergency contact information, medical diagnoses/problems and descriptions, symptoms to watch out for, a health care action plan, and a list of designated staff. The health plan detailed Student's medications and possible side effects. The medications included cyclosporine. The possible side effects for cyclosporine were listed, including the possibility of increased volume and/or frequency of urination. The health plan was shared with and



explained to each of Student's teachers, including classroom teachers and physical education coaches. Mother raised the issue of Student's time in the bathroom at the February 28, 2018 IEP team meeting, seeking a clarification of the acceptable amount of time for Student to spend in the bathroom due to side effects of medication. San Diego sought release of medical information from Student's providers about the medication and its side effects. The team agreed that the school nurse would communicate with Student's teachers that Student could use the bathroom as needed with a maximum time of 10 minutes per visit, and that the nurse was available to the teachers if there was an issue.

65. The rationale for the program was to continue Student's progress in the general education setting with the necessary supports and accommodations to address Student's ADHD, and any issues arising from his medication. The team found Student eligible for special education under the other health impairment eligibility category as a result of his ADHD. The team did not find that Student was eligible under the category of specific learning disability as Student's academic performance was in line with his cognitive abilities, and there was no discrepancy between ability and performance. The team did develop an extensive series of accommodations designed to support Student in his goals, and assist Student with his needs associated with his ADHD and its effect on him in the classroom. The placement allowed Student to maximize his exposure to the general education classroom, continue his college preparation, and to continue on graduation track. At the IEP meeting, Student's parents did not consent to the IEP team's offer of placement and services for Student.

#### STUDENT'S GRADES AND PROJECTED CLASSES

66. On his January 10, 2018 progress report, Student had a grade point average of 2.83. He had a grade of C (70 percent) in Biology 1, a grade of B (87.6 percent) in World History 1; a grade of B (87 percent) in English 1, a grade of B (81

percent) in Integrated Math 1A, a grade of C (76 percent) in Spanish 5, and a grade of A (96 percent) in Physical Education. For the first semester of Student's ninth grade year, Student earned a B in English 1, a C in Spanish 5, a C in Integrated Math 1A, a C in Biology 1, an A in World History G1, and an A in Physical Education. For the second semester of Student's ninth grade year, Student earned a B in English 2, a B in Spanish 6, a C in Integrated Math 1B, a C in Biology 2, an A in World History G2, and an A in Physical Education. Each of the academic classes was a college prep course. Student intended to take an advanced placement European history class in the 2018-2019 school year, along with Chemistry, Advanced English, Integrated Math II, and Foundations in Technology.

#### 2017- 2018 SCHOOL YEAR – SECOND SEMESTER

67. The second semester of the 2017-2018 school year began on January 29, 2018. Student was enrolled in five college prep classes and in physical education. Student also was a member of the school swim team, and the school's club water polo team.

#### ACCESS TO ACCOMMODATIONS

68. Pursuant to the April 13, 2017 settlement agreement between the Student and San Diego, the accommodations from the March 24, 2017 IEP were agreed to be implemented for Student during the 2017-2018 school year. San Diego materially implemented the 20 accommodations from the March 24, 2017 IEP during the second semester of the 2017-2018 school year.

69. Student had extra time for both exams and assignments. He had access to a laptop in each classroom, although in some classes the laptops needed to be checked out to Student. Student used a planner to memorialize his class assignments, and he had access to other means of obtaining the assignments including teachers' use of

online posting of assignments and Student's use of a cellphone camera to copy assignments. Student also had access to teacher checks of his planner and planner initialing by the teacher or class paraprofessional (in Student's three specialized academic instruction classes). Student had access to technology inside and outside the classroom, in particular the Bookshare program that allowed him online access to books along with text to speech and other functions. Student had systems in place for extra time in answering questions, participation in class, and responding generally. Student also had access to appropriate fidgets, and the ability to take movement breaks, if needed. In addition, Student had access to a variety of teaching modalities (visual, verbal, etc.), and teaching aids, including study guides, study sheets, and graphic organizers. Student also had the opportunity to use open notes on tests in some classes.

#### IMPLEMENTATION OF HEALTH PLAN

70. Student's health plan was implemented without material failure during the second semester. Student had access to fans or cooling in class, although he did not need fans or cooling in class during the second semester because his eczema was well-controlled. Student had the opportunity to take bathroom breaks as needed when his medication caused urgency or frequency issues. There was a one-time incident with the Spanish teacher referring Student for excessive bathroom use, but that incident did not in itself constitute a material failure of implementation of the health plan.

#### BULLYING ALLEGATIONS

71. As a member of the water polo club team during the second semester, and prior to March 22, 2018, Student was involved in a series of instances where he was slapped on the neck ("neck slapping") and punched in the shoulder during practice or team activities at the school pool. The neck slapping and shoulder punching were not restricted to Student, but were widespread among the members of the team. Student

did not participate in the neck slapping and shoulder punching of others. On March 22, 2018, Mother, based upon Student's reports of the activity, filed a "Bullying and Intimidation Complaint" form with San Diego. The high school administration promptly investigated the allegations, including interviewing the team coaches, as well as the individuals identified by Student as perpetrators. The team coaches spoke to members of the water polo and swim teams, and the behavior ceased.

## TUTORING

72. Student received tutoring during the second semester from Mathnasium, a private tutoring company, and from an individual, Steven Dow, who had a tutoring business. Student believed that the tutoring and other support was helpful to him, and assisted him in earning the grades that he earned in the second semester, particularly in math and biology. During the summer of 2018, Student also attended La Jolla Learning Works, another private tutoring company, where he received an approximately 20-hour educational remediation course.

## DR. WETTER'S 2018 ASSESSMENT

73. Dr. Wetter conducted an independent educational evaluation of Student following the triennial IEP meeting. He examined Student on March 20, 2018, and March 22, 2018, discussed his findings with Mother on April 3, 2018, and thereafter drafted and issued a report of his findings. Student's and Mother's concerns centered on difficulties in math, science, English, and Spanish classes. Particular problems were noted with attention, organization, carelessness, difficulty following directions, time management, and fidgeting.

74. In conducting his assessment, Dr. Wetter interviewed Mother and Student; reviewed his previous assessments of Student from 2011 and 2016; and administered standardized assessments, including the Wechsler Intelligence Scale, Woodcock-

Johnson, Comprehensive Test of Phonological Processing, Test of Orthographic Competence, Wide Range Assessment of Memory and Learning, Delis-Kaplan Executive Function, Connors, Gray Oral Reading, Test of Written Language, Test of Mathematical Abilities, and Brown ADD Scales. Dr. Wetter did not observe Student in any classes, nor did he discuss Student with any of Student's teachers. He also did not consider Student's grades at La Jolla High School in forming his opinions for the assessment report. Parents did not provide Dr. Wetter with a copy of San Diego's triennial assessment prior to his assessment of Student.

75. On the Wechsler test, Student obtained a full-scale score of 109, in the average range at the 73rd percentile. Student's scores were very similar to those obtained on the same test by San Diego during its assessment of Student. The use of the Wechsler only three months after San Diego's previous administration of the test breached the test protocols, and called the results into question.

76. On the Comprehensive Test of Phonological Processing, Student scored in the 81st percentile in phonological awareness and phonological processing, obtaining standard scores of 113 in those areas. In the rapid naming portion of the test, Student obtained a standard score of 85 in the 16th percentile. All three scores were considered within the average range.

77. On the Woodcock-Johnson test, Student obtained scores in the average range, ranging from 94 in passage comprehensive to 113 in letter-word identification. Student's scores on the Woodcock test were commensurate with the scores he obtained on the Wechsler test.

78. On the Gray Oral Reading test, Student's oral reading index standard score was 86, placing him in the 18th percentile. On the test of Written Language, Student scored in the 9th percentile on contextual conventions, but in the 84th percentile in contextual language and the 95th percentile in story construction. On the test of

Mathematical Abilities, Student obtained scores in the 75th percentile in vocabulary and the 91st percentile in story problems. On the Brown ADD scales completed by Mother, Student was rated between the 68th percentile (affect) and the 95th percentile (effort, memory).

79. Based upon his testing, discussions with Mother and Student, and record review, Dr. Wetter diagnosed Student using DSM criteria. He found Student had a Specific Learning Disorder with Impairment in Reading/Dyslexia and with a Specific Learning Disorder with Impairment in Written Expression, which he described as dysgraphia. He continued to diagnose dysgraphia in Student based upon Student's laborious, erratic, and inconsistent handwriting, and noted that legibility could often be an issue in dysgraphia. Dr. Wetter added a diagnosis of dyslexia to the 2018 report, replacing concerns with executive functioning with the dyslexia diagnosis. Dr. Wetter based his dyslexia diagnosis on his findings that Student's phonological fluency was low, that Student had difficulty unscrambling words, Student's oral reading accuracy was low, and Student had poor writing mechanics. Dr. Wetter discounted the effect of Student's ADHD diagnosis on the 2018 assessment findings. Based upon his medical diagnoses, Dr. Wetter recommended a series of accommodations for Student, along with a program of educational therapy and critical thinking strategies.

#### MAY 3, 2018 IEP

80. San Diego held an IEP team meeting on May 3, 2018. The meeting was scheduled for 7:30 a.m. In addition to San Diego IEP team members, the IEP team also included Student's friend, JD<sup>3</sup>, Dr. Wetter, and Student's tutor, Steven Dow. The start of

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<sup>3</sup> This Decision uses the initials of Student's friend's name to protect the friend's privacy.. Student invited JD to attend to support Student during the meeting.

the meeting was delayed because San Diego had concerns about the legality and/or propriety of JD's attendance at the IEP meeting. The start of the meeting was delayed an hour or two while the San Diego administrators sought legal advice. The meeting eventually went forward. JD attended and spoke on behalf of Student. Mr. Dow also spoke on behalf of Student. Due to the late start, Dr. Wetter was unable to stay until the meeting got underway because he had a conflicting professional commitment. Dr. Wetter's 2018 assessment report was not presented at the meeting, although there was some discussion of the report, including the report being raised by Steven Dow. At the conclusion of this meeting, the IEP team agreed tentatively to schedule an additional meeting during the remainder of the 2017-2018 school year to allow for the presentation of Dr. Wetter's report.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.,<sup>5</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 employment and independent living, and (2) to ensure that the rights of children with disabilities and their

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>5</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

3. In 1982, the United States Supreme Court rendered the seminal and guiding decision in special education law. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034; 73 L.Ed.2d 690] (*Rowley*)). In the decision, the Supreme Court noted that the predecessor statute of the IDEA did not contain any substantive standard prescribing the level of education that a handicapped child must receive. (*Id.* at p. 189.) Instead, the Court determined that, in the Act, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Id.* at p. 192.) If a school district acts in



compliance with the procedures set forth in the IDEA, especially as regards the development of the child's IEP, then the assumption is that the child's program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that an educational agency must provide the disabled child with a "basic floor of opportunity." (*Id.* at p. 200.) The Court further noted that an appropriate education under the Act does not mean a "potential-maximizing education." (*Id.* at p. 197, fn. 21.) Stated otherwise, the educational agency must offer a program that "confers some educational benefit upon the handicapped child." (*Id.* at p. 200.)

4. The Supreme Court clarified its ruling in *Rowley* in the recent case of *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_ [137 S.Ct. 988, 996] (*Endrew F.*). The Court clarified that "[f]or a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" (*Id.* at 999 (citing *Rowley, supra*, 458 U.S. at pp. 203-04).) The Court went on to say that the *Rowley* opinion did not "need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level." (*Id.* at 1000.) For a case in which the student cannot be reasonably expected to "progress smoothly through the regular curriculum," the child's educational program must be "appropriately ambitious in light of [the child's] circumstances . . . ." (*Ibid.*) The IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at 1001.) Importantly, "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (*Ibid.*)

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.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, 56505, subd. (j).)

6. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student, as the complaining party for Student's issues, bears the burden of proof with regard to those issues. For San Diego's issue, San Diego is the complaining party, and thus bears the burden of proof with regard to that issue.

#### STUDENT'S ISSUE 1: FAILURE TO IMPLEMENT MARCH 24, 2017 IEP

7. Student contends that San Diego denied him a FAPE by failing to implement accommodations, assistive technology provisions, and Student's health plan as delineated by Student's March 24, 2017 IEP, and as agreed to by Student and San Diego in a settlement agreement, dated April 13, 2017. San Diego contends that it provided the accommodations and assistive technology, and implemented Student's health plan.

8. A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by

the child's IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 at p. 7.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn, supra*, 502 F.3d at p. 822.)

9. The methodology used to implement an IEP is left up to the district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149-1150 (*Adams*); *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Committee* (1st Cir. 2004) 361 F.3d 80, 84 (*citing Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley, supra*, 458 U.S. at pp. 207-208.) However, once a service, system, or device is included in a student's IEP, then the district is obligated to provide that component. (Ed. Code, § 56345, subd. (c).) Following the development of the IEP, the district must provide required services as soon as possible. (34 C.F.R. § 300.323(c)(2).)

10. Here, the Settlement Agreement, dated April 13, 2017, designated the March 24, 2017 IEP as the operative IEP going forward from that date, and as stay put in

the event of lack of consent to the next IEP. The relevant portions of the March 24, 2017 IEP called for Student to receive the listed accommodations, assistive technology, and a health plan.

#### IMPLEMENTATION OF ACCOMMODATIONS

11. The weight of the evidence did not demonstrate that Student failed to receive the accommodations called for in the March 24, 2017 IEP. Student pointed to instances where the accommodations may not have been adhered to perfectly, but Student did receive the benefits of the many accommodations provided to him, and Student did not prove that the provided accommodations fell materially short of those called for in the IEP. Further, Student's progress over the course of the second semester, including achieving success in passing all of his classes, and completing the semester with a B average demonstrates that the accommodations provided benefited Student. As Student progressed through his college preparatory program, there is no basis to find a material failure of San Diego to provide the called for accommodations.

#### IMPLEMENTATION OF ASSISTIVE TECHNOLOGY

12. The weight of the evidence did not demonstrate that Student failed to receive the assistive technology called for in the March 24, 2017 IEP. Student had access to laptops in the classroom. Student had access to Chromebooks in his classes at school, and was able to use Google Docs to complete assignments at home and school. Student also made good use of Bookshare to access digital books and text to speech features at home.

#### IMPLEMENTATION OF STUDENT'S HEALTH PLAN

13. Student failed to point to instances where the health plan was not implemented. Accordingly, weight of the evidence did not demonstrate that San Diego

failed to implement Student's health plan.

#### STUDENT'S ISSUE 2 AND SAN DIEGO'S ISSUE 1: FEBRUARY 28, 2018 FAPE OFFER

14. Student contends that San Diego denied him a FAPE by failing to make him an appropriate offer in the February 28, 2018 IEP because the offer failed to provide a FAPE in seven particular areas. San Diego contends that its offer provided Student with a FAPE, and San Diego should be allowed to implement the IEP.

15. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*See Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, supra*, 195 F.3d at p. 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.*, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

#### STUDENT'S ISSUE 2.A: FAILURE TO FIND STUDENT ELIGIBLE ON THE BASIS OF A SPECIFIC LEARNING DISABILITY

16. Student alleges that San Diego denied him a FAPE in the February 28, 2018 IEP offer by failing to make him eligible for special education under the category of specific learning disability. San Diego denies that Student is eligible for special education under the category of specific learning disability and that the IEP offer addresses Student's needs regardless of disability label.

17. As the United States Department of Education has advised, "a child's entitlement is not to a specific disability classification or label, but to a free appropriate public education." (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759; see also 20

U.S.C. § 1412(a)(3)(B); *Weissburg v. Lancaster Sch. Dist.* (9th Cir. 2010) 591 F.3d 1255, 1259; *Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055.) Recently, the *Timothy O.* court viewed autism eligibility more closely, but such enhanced scrutiny of autism is not at issue here. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*).)

18. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 U.S.C. § 1401(30)(A); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd.(a).) It also includes disability within the field of vision which results in visual perceptual or visual motor dysfunction. (Ed. Code, § 56337, subd.(a).)

19. A school district shall determine if a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method. (20 U.S.C. § 1414(b)(6); 34 C.F.R. §§ 300.307, 300.309(a)(1) & (2); Ed Code, 56337, subds. (b), (c).) The severe discrepancy method requires that a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); Ed. Code, § 56337, subd. (b)[authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10). The response to intervention method allows a district to assess if the pupil responds to scientific, research-based intervention. (Ed Code, § 56337, subd. (c).)

20. Here, Student failed to meet his burden of proof to show that San Diego should have found him eligible for special education under the eligibility category of specific learning disability. Rather than showing a severe discrepancy, standardized testing of Student, both by San Diego and by Dr. Wetter, showed that Student's

cognitive abilities were in the average range as was his academic performance as evidenced by Student's Woodcock-Johnson scores. Student also achieved a 2.83 grade point average in the first semester and a 3.00 grade point average in the second semester, indicating at least average academic performance. Dr. Wetter made a clinical diagnosis that Student had a learning disability pursuant to the DSM, but those findings do not rise to the level of eligibility under the standard applicable to educational circumstances. Additionally, and as noted above, there is no requirement that Student be found eligible on a particular basis, what is important is that Student's needs are met by his IEP, and the evidence indicates that that was the case here.

#### STUDENT'S ISSUE 2.B: FAILURE TO OFFER STUDENT APPROPRIATE ACCOMMODATIONS

21. Student alleges that San Diego failed to offer the appropriate accommodations to provide him with a FAPE. San Diego denies Student's allegations, and alleges that it offered Student the appropriate accommodations to provide him with a FAPE.

22. Here, Student failed to meet his burden of proof to show that San Diego failed to offer him appropriate accommodations. Student was offered a slate of 14 accommodations that were tailored to his unique needs as a Student with ADHD, and with the attendant issues in attention, focus, on task behavior, and organization. The accommodations placed the focus on Student to continue to develop his self-advocacy and organizational skills through accommodations that included: note-taking assistance; access to digital text for text to speech; assignment notebook prompt; access to a calculator; repeated review/drill; allowed to photograph board for assignments; signal for redirection; extended time on tests, up to one and a half times; access to study sheets; additional time to complete assignments; movement breaks; school planner to track assignments and due dates; additional time to organize and plan out thoughts;

and appropriate use of fidgets. In sum, the accommodations offered by San Diego provided Student ample opportunity to make progress in his education.

#### STUDENT'S ISSUE 2.C: FAILURE TO OFFER STUDENT APPROPRIATE GOALS

23. Student alleges that San Diego failed to offer the appropriate goals to provide him with a FAPE. San Diego denies Student's allegations, and alleges that it offered Student the appropriate goals to provide him with a FAPE.

24. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

25. The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial evaluation or most recent evaluation of the child; and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler*, 213 IDELR 118 (OSERS 1998).) There is no requirement that an IEP include baselines for the goals, other than addressing a student's present level of performance. (*Student v. San Diego Unified School Dist.* (2011) Cal.Offc.Admin.Hrngs Case No. 2011080459, at pp. 10-11.)



26. The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges v. Spartanburg County Sch. Dist. Two*, 57 IDELR 128 (D.S.C. 2011) (the use of percentages tied to the completion of discrete tasks is an appropriate way to measure student progress).)

27. A failure to offer an appropriate goal is a procedural violation of the IDEA. However, 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) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 [superseded in part by statute on other grounds by 20 U.S.C. § 1414(d)(1)(B)] (*Target Range*) [". . . procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892; *L.M. v. Capistrano Unified School District* (9th Cir. 2010) 556 F.3d 900, 910.)

28. Here, Student failed to meet his burden of proof to show that San Diego failed to offer him appropriate goals. Student's eight goals were designed to address his

unique needs and to allow him to make progress at school. The goals were tailored to assist Student with specific skills in English language arts, mathematics, and with social/emotional/behavioral needs, and were designed to assist Student in developing the next level of self-advocacy and task initiation to allow him to continue to progress on his path to success.

#### STUDENT'S ISSUE 2.D: FAILURE TO OFFER STUDENT SPEECH AND LANGUAGE SERVICES

29. Student alleges that San Diego failed to offer the appropriate speech and language services to provide him with a FAPE. San Diego denies Student's allegations, and alleges that it offered Student the appropriate speech and language services to provide him with a FAPE and make meaningful progress on his education.

30. Here, Student failed to meet his burden of proof that San Diego's failure to offer speech and language services denied him a FAPE. San Diego conducted a comprehensive speech/language assessment by a qualified assessor, and the assessment found that Student was not in need of speech/language services to make progress in his education, and that Student possessed adequate communication skills to make progress in the classroom without specialized services. Student provided no persuasive evidence that San Diego's determination was incorrect, or that Student required further speech and language services to access his education.

#### STUDENT'S ISSUE 2.E: FAILURE TO OFFER STUDENT OCCUPATIONAL THERAPY SERVICES

31. Student alleges that San Diego failed to offer the appropriate occupational therapy services to provide him with a FAPE. San Diego denies Student's allegations, and alleges that it offered Student the appropriate occupational therapy services to provide him with a FAPE and make meaningful progress on his education.

32. Here, Student failed to meet is burden of proof that San Diego's failure to offer occupational therapy services denied him a FAPE. San Diego conducted a comprehensive occupational therapy assessment by a qualified assessor, and the assessment found that Student was not in need of occupational therapy services to make progress in his education, and that Student possessed adequate skills to make progress in the classroom without specialized services. Student provided no persuasive evidence that contradicted San Diego's determination, or that Student required occupational therapy services to access his education.

#### STUDENT'S ISSUE 2.F: FAILURE TO PROVIDE ACCOMMODATIONS FOR BATHROOM USE IN HEALTH PLAN

33. Student alleges that San Diego failed to provide accommodations for bathroom use and as a result denied him a FAPE. San Diego denies Student's allegations, and alleges that specific provisions for bathroom usage in Student's health plan was unnecessary to provide him with a FAPE.

34. Here, Student failed to meet is burden of proof that San Diego's failure to specifically address bathroom usage in Student's health plan denied him a FAPE. In contrast, San Diego provided evidence that the health plan adequately addressed Student's health concerns, and that teachers and coaches had been familiarized with the health plan so as to respond appropriately to Student's health needs. During the four IEP meetings that culminated in the February 28, 2018 IEP offer, Mother specifically raised concerns about Student's potential need for bathroom usage because of his medication. San Diego addressed those concerns and formulated a plan to advise teachers of an appropriate amount of time for Student to be able to use the bathroom. However, specific mention of bathroom usage or time of use in the health plan was not necessary to provide Student with a FAPE.

## STUDENT'S ISSUE 2.G: FAILURE TO ADDRESS BULLYING RELATED TO STUDENT'S PARTICIPATION IN WATER POLO

35. Student alleges that San Diego failed to address alleged bullying of Student related to water polo in the IEP offer and as a result failed to provide him with a FAPE. San Diego denies Student's allegations, and alleges that it was not required to address alleged bullying of Student related to water polo in the IEP, and that it responded promptly and appropriately to instances of alleged inappropriate conduct by water polo players.

36. In a 2013 joint letter providing guidance on the IDEA, the U.S. Office of Special Education and Rehabilitative Services and the Office of Special Education Programs described bullying as follows<sup>6</sup>:

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (*e.g.*, excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors

(*Dear Colleague Letter*, (OSERS/OSEP August 20, 2013) 61 IDELR 263; 113 LRP 33753 (*Dear Colleague 2013*).)

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<sup>6</sup> These offices are a division of the United States Department of Education and charged with administering the IDEA and developing its regulations.

37. California has a more expansive definition of bullying than this federal guidance interpreting the IDEA. The California Education Code defines bullying as “a severe or pervasive physical or verbal act or conduct by a pupil or group of pupils ... directed toward one or more pupils” that causes or is “reasonably predicted” to cause a reasonable student to experience one or more of the following: (a) fear of harm to his or her person or property; (b) a substantially detrimental effect on his or her physical or mental health; (c) a substantial interference with his or her academic performance; or (d) a substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school. (Ed. Code, § 48900, subd. (r).) A “reasonable student” is a pupil, including an exceptional needs pupil, who exercises average care, skill, and judgement in conduct for a person of his or her age, and with his or her special needs. (Ed. Code, § 48900, subd. (r)(3).)

38. If the bullying of a student with a disability causes the student not to receive meaningful educational benefit, it can constitute a denial of a FAPE under the IDEA. (*Dear Colleague Letter*, Office of Special Education and Related Services (OSERS) (August 20, 2013) 61 IDELR 263.) It does not matter whether the bullying is related to the student’s disability. (*Id.*, at p. 2.) Therefore, a determination of whether bullying has denied a student a FAPE requires a two-step analysis: (i) whether bullying occurred, and (ii) whether the bullying resulted in the student not receiving educational benefit within the meaning of *Rowley*. There is a “strong likelihood” that bullying of a disabled student will result in the denial of a FAPE. (*Dear Colleague Letter*, OSERS (October 21, 2014) 464 IDELR 115 \*2.)

39. Bullying is not defined within the IDEA. Bullying is defined under the California Education Code for purposes of finding grounds for suspension or expulsion of a student as “any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils, and including one or more acts committed by a pupil or group of pupils

as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

- (a) fear of harm to her person or property;
- (b) a substantially detrimental effect on her physical or mental health;
- (c) a substantial interference with her academic performance; or
- (d) a substantial interference with her ability to participate in or benefit from the services, activities, or privileges provided by a school."

(Ed. Code, § 48900, subd. (r).)

40. "Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time." (*Dear Colleague Letter*, OSERS (August 20, 2013) 61 IDELR 263 \*1.) Confrontations between students that are not characterized by an imbalance in power generally do not constitute bullying. (*A.L. v. Jackson County Sch. Bd.*, 64 IDELR 173 (N.D. Fla. 2014) (an isolated instance of rough play between peers did not amount to bullying).) The Journal of the American Medical Association defines bullying as "a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one." (Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094, 2094 (2001).)

41. "Although there are no hard and fast rules regarding how much change in academic performance or behavior is necessary to trigger the school's obligation to convene the IEP team or Section 504 team, a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would

generally be sufficient." (*Dear Colleague Letter*, OSERS (October 21, 2014) 464 IDELR 115 \*3.)

42. In *M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634 (*M.L.*), the Ninth Circuit addressed whether a student who was subject to teasing was denied a FAPE. There, the fact that parents removed the student from school after only five days did not allow the district a reasonable opportunity to prevent or address the teasing. Further, the parents failed to demonstrate that the teasing affected the student, interfered with his education, or resulted in the loss of an educational benefit. "If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE." (*Id.*, 394 F.3d at pp. 650-651 citing *Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 633 [119 S.Ct. 1661, 143 L.Ed.2d 839]. [holding that to violate Title IX "harassment ... [must be] so severe, pervasive, and objectively offensive that it bars the victim's access to an educational opportunity or benefit."].)

43. Here, Student did not meet his burden of proof to demonstrate that there was any need for his IEP to raise the issue of bullying. The incidents of bullying alleged by Student consisted of an outbreak of neck slapping and shoulder punching among the members of the water polo club team. It is arguable that there were any power imbalances among the myriad team members involved in the outbreak. There was no evidence offered that Student was singled out, or that there was any ongoing pattern of the slapping/punching. The school responded promptly to Mother's complaint, the participants were identified, the coaches were made accountable, and in turn stopped the outbreak thereafter. Student also failed to provide competent evidence that the team-wide slapping/punching affected Student in any significant way, interfered with his education, or resulted in the loss of an educational benefit.

## SAN DIEGO'S ISSUE 1: ADEQUACY AND IMPLEMENTATION OF FEBRUARY 28, 2018 FAPE OFFER

44. San Diego contends that the February 28, 2018 IEP offer provided Student with a FAPE in the least restrictive environment, and that it had followed the appropriate procedures in seeking to implement the IEP. Student contends that the IEP offer failed to offer Student a FAPE.

45. If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164.

46. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit and make progress appropriate in light of the child's circumstances. (*Ibid.*)

47. A school district must ensure that a reevaluation of each child with a disability is conducted if the school district determines that the educational or related services needs of the child warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. (20 U.S.C. § 1414(a)(2)(A)(i),(ii); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1).) A reevaluation conducted under 34 Code of Federal Regulations part 300.303(a) may occur not more than once a year, unless the parent and the school district agree otherwise, and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, §§ 56043, subd. (k).)



48. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

49. The IEP team is required to include one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in the regular education environment; a special education teacher; and a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of

the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

50. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*) [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) School districts are legally required to take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents whose native language is other than English. (34 C.F.R. § 300.322 (e).)

51. An IEP should include: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, 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)(A); 34 C.F.R. §§ 300.320.) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent

practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

52. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

53. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup*

*School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].)

54. Here, San Diego conducted thorough and complete assessments of Student as a predicate to conducting the IEP process. San Diego's assessments met the applicable legal standards and provided reliable and complete information on Student's psychoeducational status. In resolving the conflict between Dr. Henson's opinion that Student did not meet the criteria for eligibility under the category of specific learning disability, and Dr. Wetter's 2016 diagnosis of a specific learning disability, it is found that Dr. Henson's was the more reliable and well-considered conclusion. Dr. Henson was a school psychologist, experienced in assessing students for educational purposes, while Dr. Wetter was not. Dr. Henson considered the eligibility criteria for specific learning disability in reaching her conclusion, while Dr. Wetter reported a clinical diagnosis without considering the applicable standards for eligibility under the IDEA.

55. San Diego's attendees fulfilled the statutory requirements in the breadth of personnel in attendance. Mother was afforded the opportunity to participate in each of the four IEP meetings, and she did, in fact, meaningfully participate in the IEP meetings by asking questions, raising concerns and issues, and challenging San Diego's analysis and assessment reports. The IEP team appropriately considered Student's strengths and weaknesses, parent's concerns, results of San Diego's most recent assessments, and Student's unique academic, developmental, and functional needs.

56. The IEP document itself consisted of the statutorily appropriate items including present levels of academic achievement and functional performance for Student; an analysis of how Student's disability affects his involvement and progress in the general education curriculum; a statement of eight measurable annual goals

designed to meet Student's unique needs arising from his disability and make progress in his education; a statement of how Student's performance on his goals will be measured and reported to Parent; a statement of special education and services to be provided to Student, along with projected start dates and duration, frequency, and location of services, supports, and accommodations.

57. San Diego's offer of placement, program, and services in Student's February 28, 2018 IEP met the applicable substantive requirements and constituted an offer of a free appropriate public education. Student's offered accommodations were tailored to Student's unique needs as they allowed for Student's proximity to instruction, extra time, careful prompting and redirection, and an emphasis on Student empowerment and self-advocacy designed to reduce his dependence on the system and to prepare him for his college plans. The terms of the accommodations did, in some instances, require Student to initiate or take responsibility for requesting an accommodation, but the team considered this to be a necessary step in Student progressing with his education, and developing his self-advocacy skills. The goals included in the IEP were tailored to Student's unique needs, and focused on the development of needed academic skills, combined with the attentional and organizational tools needed for Student to progress in his education.

58. The IEP offer was also calculated to constitute the least restrictive environment for Student by having him in a general education setting for 83 percent of the school day. The supports, services, and accommodations, with the exception of the five hours per week of study skills, were all designed to take place in the general education classroom with a minimum negative impact to Student's access to general education and his education generally.

59. Following Mother's rejection of the IEP offer of February 28, 2018, San Diego moved promptly to respond to Mother's demands, and then promptly filed for

due process.

60. In sum, San Diego established by a preponderance of the evidence that it met all the procedural and substantive requirements for establishing that the proffered special education program and services were necessary for Student to receive a FAPE. As San Diego has met the applicable legal requirements, and timely moved for a due process review of the appropriateness of the FAPE offer, San Diego may, over Parents' objection, implement the February 28, 2018 IEP if Student is enrolled in San Diego during the 2018-2019 school year.

### STUDENT'S ISSUE 3: FAILURE TO CONSIDER WETTER REPORT AT MAY 3, 2018 IEP MEETING

61. Student contends that San Diego denied him a FAPE at the May 3, 2018 team meeting by failing to review or consider Dr. Wetter's Spring 2018 Report. San Diego denies that it prevented Dr. Wetter from presenting his report or that the IEP team was required to consider his report at the May 3, 2018 IEP team meeting.

62. A district must consider the report of an independent assessor. (20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. § 300.502(c)(1); Ed. Code, §§ 56329, subds. (a)(1), (c).)

63. Here, San Diego established at hearing that Dr. Wetter left the May 3, 2018 IEP team meeting of his own accord because he had other professional obligations to attend. Other than the delay in starting the IEP, there was no action by San Diego to bar Dr. Wetter from presenting his report. Further, San Diego agreed to convene an additional follow-up IEP team meeting since the IEP team was unable to undertake its review of the report at the meeting on May 3, 2018. There is thus no evidentiary basis for Student's claim that San Diego failed to consider Dr. Wetter's report.

#### STUDENT'S ISSUE 4: FAILURE TO ALLOW PARTICIPATION AT MAY 3, 2018 IEP TEAM MEETING

64. Student contends that San Diego denied him a FAPE at the May 3, 2018 IEP team meeting by failing to allow either Dr. Wetter or Student's friend to attend and participate in meeting. San Diego contends that it did not exclude either individual from the May 3, 2018 IEP team meeting and that both had an opportunity and/or did participate in the meeting.

65. The law permits parents, at their discretion, to invite "other individuals who have knowledge or special expertise regarding the pupil, including related service personnel, as appropriate." (Ed. Code § 56341, subd. (b)(6).)

66. Here, the evidence showed that both Student's friend, JD, and Dr. Wetter were allowed to participate in the May 3, 2018 IEP. In Dr. Wetter's case, his own schedule necessitated his leaving the IEP meeting, not any action by San Diego. There was a substantial delay in starting the meeting, but there was no showing by Student that San Diego acted unreasonably in ascertaining its legal rights and obligations before proceeding with an IEP meeting that included Student's friend and supporter, JD.. Additionally, San Diego expected to promptly schedule an additional IEP meeting to allow Dr. Wetter's participation, and a review of his report. Student has failed to meet his burden of proof on this issue

#### ORDER

1. All Student's requests for relief are denied.
2. San Diego's requests for relief are granted.
3. The IEP offer of February 28, 2018 provided Student a FAPE in the least restrictive environment, and San Diego may implement that offer if Student attends a San Diego school in the 2018-2019 school year.

## 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. San Diego prevailed on all issues presented.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATE: October 9, 2018

/s/

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TED MANN

Administrative Law Judge

Office of Administrative Hearings